IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2023 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 22-0123

LAWYER DISCIPLINARY BOARD,
Petitioner,

v.

J. STEVEN HUNTER, a member of
The West Virginia State Bar,
Respondent.

Lawyer Disciplinary Proceeding
No. 20-06-037

LAW LICENSE SUSPENDED AND OTHER SANCTIONS IMPOSED

Submitted: September 6, 2023
Filed: October 18, 2023

Rachael L. Fletcher Cipoletti, Esq.
Chief Lawyer Disciplinary Counsel
Kristin P. Halkias, Esq.
Lawyer Disciplinary Counsel
Office of Lawyer Disciplinary Counsel
Charleston, West Virginia
Counsel for the Petitioner

J. Steven Hunter, Esq.
Steve Hunter Associates, L.C.
Lewisburg, West Virginia
Self-Represented Litigant

JUSTICE HUTCHISON delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "A *de novo* standard applies to a review of the adjudicatory record made before the [Hearing Panel Subcommittee of the Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the [Hearing Panel Subcommittee's] recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the [Hearing Panel Subcommittee's] findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record." Syl. Pt. 3, *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994).

2. "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." Syl. Pt. 3, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987).

3. "Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates factors to be considered in imposing sanctions and provides as follows: "In imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court [West Virginia Supreme Court of Appeals] or Board [Lawyer

Disciplinary Board] shall consider the following factors: (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." Syl. Pt. 4, *Office of Lawyer Disciplinary Counsel v. Jordan*, 204 W. Va. 495, 513 S.E.2d 722 (1998).

4. "Mitigating factors in a lawyer disciplinary proceeding are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Syl. Pt. 2, *Lawyer Disciplinary Board v. Scott*, 213 W. Va. 209, 579 S.E.2d 550 (2003).

5. "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." Syl. Pt. 3, *Lawyer Disciplinary Board v. Scott*, 213 W. Va. 209, 579 S.E.2d 550 (2003).

6. “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.” Syl. Pt. 4, *Lawyer Disciplinary Board v. Scott*, 213 W. Va. 209, 579 S.E.2d 550 (2003).

HUTCHISON, Justice:

This lawyer disciplinary proceeding against respondent J. Steven Hunter, a member of the West Virginia State Bar, originated in a Statement of Charges issued against him by the Investigative Panel of the Lawyer Disciplinary Board ("the Board") and filed with this Court by the Office of Disciplinary Counsel ("ODC"). Following an evidentiary hearing, the Board's Hearing Panel Subcommittee ("HPS") found that the charges were supported by the evidence and that respondent committed multiple violations of the West Virginia Rules of Professional Conduct relating to his representation of an elderly client. The HPS concluded that respondent: (1) failed to execute a written engagement letter or fee agreement and to communicate the scope of the representation as well as any written changes in the basis or rate of the fee when the fee was later increased; (2) failed to deposit the retainer fee into his client trust account and provide an accounting as to when the fees were earned or expenses incurred; (3) represented both his elderly client and the client's wife, whose interests were directly adverse, and then, after a court expressly determined that a conflict of interest existed, continued to represent both interests without obtaining the client's written informed consent; (4) failed to comply with a court order directing that he immediately reimburse his client for the retainer fee; (5) failed to make reasonable efforts to ensure that his office manager comport her conduct to the Rules of Professional Conduct; and (6) failed to refrain from contacting his elderly client, who had been declared

to be a "protected person,"[1] without first obtaining consent from his designated legal representative.

The HPS recommended that respondent's law license be suspended for a period of one year, in addition to other sanctions.[2]

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[1] A "protected person" is defined in West Virginia Code § 44A-1-4(13) (2000), in relevant part, as

> an adult individual, eighteen years of age or older, who has been found by a court, because of mental impairment, to be unable to receive and evaluate information effectively or to respond to people, events, and environments to such an extent that the individual lacks the capacity: (A) To meet the essential requirements for his or her health, care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian; or (B) to manage property or financial affairs or to provide for his or her support or for the support of legal dependents without the assistance or protection of a conservator. A finding that the individual displays poor judgment, alone, is not sufficient evidence that the individual is a protected person within the meaning of this subsection.

[2] The HPS also recommended that the Court require that (1) respondent complete an additional nine hours of continuing legal education prior to reinstatement, during the current reporting period, three hours of which should be in IOLTA accounts, and the other six hours in the area of ethics and law office management; (2) respondent comply with the mandates of Rule 3.28 of the West Virginia Rules of Lawyer Disciplinary Procedure; (3) respondent be permitted to petition the court for reinstatement following a one-year suspension pursuant to Rule 3.2 provided the above sanctions are satisfied; (4) following reinstatement, if any, respondent be placed on one-year supervised probation; and (5) respondent be ordered to pay the costs of the lawyer disciplinary proceedings pursuant to Rule 3.15.

Upon our review of the briefs, the record, oral argument, and the pertinent legal authorities, and for the reasons set forth below, we adopt the HPS's report and recommended sanctions.

I. Facts and Procedural History

Respondent was admitted to the practice of law in West Virginia in 1973. Therefore, he is subject to the disciplinary jurisdiction of this Court and its properly constituted Board. He maintains a practice in Lewisburg, Greenbrier County.

On February 10, 2022, the Board's Investigative Panel issued a formal Statement of Charges against respondent consisting of a single count that alleged multiple violations of the Rules. An evidentiary hearing was conducted before the HPS on August 9, 2022, at which testimony and documentary evidence were presented by both parties.

Following the evidentiary hearing, on January 6, 2023, the HPS issued its report. The HPS made extensive findings of fact, none of which are specifically challenged in this appeal. They are summarized below.

Count I – Complaint of Stephen L. Peters

At all times relevant, Raymond Peters, an elderly person, now deceased,[3] lived alone on property he owned in Alderson, West Virginia. Complainant Stephen L.

[3] Mr. Peters died on November 23, 2020, during the pendency of the underlying lawyer disciplinary proceedings.

Peters is Mr. Peters's son. Karen Bordonaro was Mr. Peters's friend and caregiver who lived on Mr. Peters's property in a house that he built for her use. She is a convicted felon. Ms. Bordonaro regularly corresponded by e-mail with complainant concerning his father.[4] In late 2017, she informed complainant that Mr. Peters was experiencing memory lapses and confusion.

On January 26, 2018, Mr. Peters granted complainant medical power of attorney, with Ms. Bordonaro listed as successor representative. Also on that date, Mr. Peters signed a Living Will and General Durable Power of Attorney listing complainant as his agent.

In July of 2018, communication between complainant and Ms. Bordonaro, which, up to that point, had been friendly, became strained. Further, Mr. Peters informed complainant that he intended to sell his property in Alderson and move to Rhode Island with Ms. Bordonaro. Complainant advised Ms. Bordonaro that he would be traveling to Alderson on August 17, 2018, to discuss the situation. Prior to complainant's arrival, on August 16, 2018, Mr. Peters and Ms. Bordonaro were married in the Circuit Court of Greenbrier County.

Mr. Peters was subsequently diagnosed with active vascular dementia, moderately severe, resulting in a permanent and progressive cognitive impairment. When it became clear that he was no longer able to handle his own affairs, complainant, on

[4] Neither complainant nor his two siblings lived in West Virginia.

September 17, 2018, filed an emergency petition for the temporary appointment of a guardian and conservator for his father.[5] On October 5, 2018, a hearing on the emergency petition was conducted in the Circuit Court of Summers County. Following the hearing, the circuit court declared that Mr. Peters met the statutory definition of a "protected person"[6] and appointed complainant as Mr. Peters's temporary guardian and temporary conservator.

Mr. Peters and Ms. Bordonaro subsequently retained respondent to represent them concerning the outcome of the emergency hearing. Respondent charged the couple a flat fee of $2,500.00, and Mr. Peters wrote respondent a check for the full amount. For reasons that are unclear from the record, that check was never cashed, and Ms. Bordonaro subsequently wrote respondent two separate checks totaling $2,500.00 as payment for respondent's legal services. Respondent's wife and office manager, De'Etta Hunter, deposited the funds into respondent's law office checking account rather than his client trust (IOLTA) account. Respondent failed to execute a written agreement confirming the

[5] *See* W. Va. Code § 44A-2-14(a) (2009) (providing for the appointment of a temporary guardian and/or temporary conservator "upon a finding that an immediate need exists, that adherence to the procedures otherwise set forth in this chapter for the appointment of a guardian or conservator may result in significant harm to a person or the estate, and that no other individual or entity appears to have authority to act on behalf of the person, or that the individual or entity with authority to act is unwilling, or has ineffectively or improperly exercised the authority").

[6] *See* n.1, *supra.*

scope of his representation or the basis or rate of the fee and expenses for which Mr. Peters and Ms. Bordonaro would be responsible.

On November 16, 2018, respondent, on behalf of Mr. Peters and Ms. Bodonaro, filed a motion to terminate complainant's (temporary) appointment as guardian and conservator of his father.

A subsequent forensic psychological evaluation of Mr. Peters on December 17, 2018, determined Mr. Peters to have Possible Major Neurocognitive Disorder due to Alzheimer's disease, without behavioral disturbance. It was further determined that Mr. Peters met the statutory requirements of a "protected person" as that term is defined in West Virginia Code § 44A-1-4(13), and, accordingly, it was recommended that Mr. Peters be appointed a (full) guardian and conservator[7] and, further, that the circuit court examine the validity of Mr. Peters's recent marriage to Ms. Bordonaro given his significant cognitive impairment.

In her report filed on March 18, 2019, Leigh Lefler, Esquire, Mr. Peters's guardian ad litem, similarly recommended that the circuit court find Mr. Peters to be a protected person pursuant to West Virginia Code § 44A-1-4(13) and that a (full) guardian and conservator be appointed. Ms. Lefler also recommended that complainant remain guardian and conservator; she specifically recommended that Ms. Bordonaro not be

[7] As previously noted, complainant was appointed Mr. Peters's *temporary* guardian and *temporary* conservator in the earlier proceeding.

appointed, in part, based upon the "limitations placed upon an individual with a felony conviction record to serve as guardian and conservator."

During a March 25, 2019, hearing, at which both respondent and Ms. Bordonaro were present, the circuit court declared Mr. Peters to be a "protected person," complainant was named full guardian and conservator, and Ms. Lefler was appointed as Mr. Peters's full guardian ad litem.[8] It was agreed during this hearing that Mr. Peters would receive a cash allowance of $300.00 per month[9] and that any amount above that must be approved by complainant prior to withdrawal or purchase.[10]

Notwithstanding the foregoing, in June of 2019, while Mr. Peters and Ms. Bordonaro were at respondent's law office, Mrs. Hunter assisted Mr. Peters in contacting Discover Bank and requesting $5,000.00 for the purpose of paying additional legal fees to respondent. A check for that amount was subsequently remitted to respondent,[11] and Mrs. Hunter deposited the funds into respondent's law office account rather than his client trust account. Complainant, as Mr. Peters's conservator, did not authorize, or otherwise have any prior knowledge of, the withdrawal and payment of funds to respondent. Furthermore,

[8] *See* W. Va. Code § 44A-2-9 (1998) ("Hearing on petition to appoint").

[9] Complainant paid Mr. Peters's bills electronically.

[10] The order memorializing the circuit court's ruling was entered on July 11, 2019.

[11] Respondent testified, "Well, I know – I knew taking the money was wrong. . . . Saying I represented Mr. Peters at some point, obviously became wrong."

respondent failed to communicate, in writing, the changes in the basis or rate of the fee or expenses when the previously paid $2,500.00 flat fee increased by $5,000.00 to $7,500.00. Indeed, during the disciplinary proceedings, the ODC twice requested proof from respondent of an engagement letter or written fee agreement with Mr. Peters and Ms. Bordonaro. Ultimately, respondent conceded that he "did not do an engagement letter" with Mr. Peters and Ms. Bordonaro.[12]

Respondent, on behalf of Mr. Peters and Ms. Bordonaro, subsequently filed a Restated Motion to Terminate Conservatorship and Guardianship and Notice of Intent to Appeal. A hearing on the motion was held on September 6, 2019, but neither respondent, Mr. Peters, nor Ms. Bordonaro appeared. By order entered September 27, 2019, the circuit court denied the motion as untimely filed, and also concluded that there was a direct conflict in respondent's representation of both Mr. Peters and Ms. Bordonaro, pursuant to Rule 1.7 of the Rule of Professional Conduct, "as their interests are directly adverse." The circuit court further ordered respondent to return the $5,000.00 fee Mr. Peters paid to him, noting that, "[Mr.] Peters was a protected person without the capacity to contract and retain

[12] Respondent testified that, "[g]enerally, I do flat fees," indicating that he does not routinely execute written fee agreements with his clients, as required by Rule 1.5 of the Rules of Professional Conduct. When asked whether he routinely complies with the Rules, respondent testified, "I'm just trying to do my own stuff and doing it the way I've been doing for 50 years." When reminded that the "[R]ules have changed[,]" respondent stated, "I understand that. I have finally been able to sit down and read them. I printed them off [but] never in the last 20 years have I been to a seminar where anybody went through those rules."

legal counsel" and that respondent "was aware of that ruling and Mr. Peters['s] incapacity[.]" The court also ordered Ms. Bordonaro to have no contact with Mr. Peters.[13]

Thereafter, respondent, on behalf of Ms. Bordonaro, filed a Motion for Emergency Stay of Judgment. Among other things, the motion averred that the order entered following the September 6, 2019, hearing – at which hearing neither respondent, Mr. Peters, nor Ms. Bordonaro appeared – "was done on an *ex parte* basis as [respondent] had thought the hearing of September 6[,] 2019 was in fact scheduled for September 9, 2019[.]"[14] The circuit court denied the motion by order entered October 17, 2019.

On October 29, 2019, Mr. Peters's guardian ad litem filed a Petition for Show Cause Order and/or Protective Order Preventing Financial Exploitation, alleging, inter alia, that Mrs. Hunter had visited Mr. Peters at his home and denied entry to Mr. Peters's neighbor, Darrell McCallister, who was also complainant's lawful West Virginia proxy, because Mr. Peters was not dressed; that Mrs. Hunter, as respondent's wife, is an agent and/or proxy of Ms. Bordonaro, and, as such, her contact with Mr. Peters violated the circuit court's prior order prohibiting the same; that respondent had failed to return the

[13] Additionally, the circuit court gave complainant leave to file for divorce on behalf of Mr. Peters pursuant to West Virginia Code § 48-5-202 (2001); enjoined Ms. Bordonaro from dissipating, damaging, disposing, or encumbering any part of Mr. Peters's estate or financial accounts; and ordered Ms. Bordonaro to reimburse Mr. Peters a sum certain for a purchase she made using Mr. Peters's credit card without prior permission from complainant, Mr. Peters's conservator.

[14] In a subsequent proceeding, respondent acknowledged that, in fact, he had received proper electronic notice of the September 6, 2019, hearing.

$5,000.00 fee paid to him by Mr. Peters, in violation of the circuit court's September 27, 2019, order; and that Mrs. Hunter had continued to accompany Mr. Peters to financial institutions to withdraw funds. The petition averred that respondent and Ms. Bordonaro engaged in the financial exploitation of Mr. Peters, and requested a financial exploitation protective order as well as a show cause order as to why these parties should not be held in contempt of the circuit court's prior order.

A hearing on the petition for a show cause order, subsequently amended, was conducted on November 8, 2019. At that hearing, respondent testified that he had been retained to represent both Mr. Peters and Ms. Bordonaro, for which he was paid $5,000.00,[15] and, when asked if the funds were deposited into his client trust account, respondent stated, "I don't know where [they] went to. It's not typically a check that I would have deposited into a trust account, but what my wife did with [the check], I don't know." Furthermore, without acknowledging that the circuit court had previously ordered him to reimburse Mr. Peters for the $5,000.00 retainer fee, respondent testified, "If I'm required to [return the check] after a proper hearing, yes, I will pay Mr. Peters." Respondent testified that Mrs. Hunter had visited Mr. Peters at his home on several occasions for the purpose of checking on his welfare, as she had developed a close personal relationship with

[15] Respondent requested that he be permitted to testify at the show cause hearing. Before granting his request, the circuit court advised respondent of his constitutional right to remain silent, cautioning him that his testimony "could potentially be used against [him] in a criminal proceeding arising out of" the $5,000.00 fee. Respondent indicated that he understood his Fifth Amendment rights and proceeded to testify.

him and Ms. Bordonaro and conceded that she had accompanied him to financial institutions for the purpose of withdrawing cash.[16]

The circuit court entered an order on November 18, 2019, following the November 8th hearing. The court determined that complainant, Mr. Peters's guardian and conservator, had not authorized the $5,000.00 payment to respondent, Mrs. Hunter's visits to Mr. Peters's home, Mrs. Hunter's "withdrawal of any funds from [Mr.] Peters['s] account," or Ms. Bordonaro's use of Mr. Peters's credit cards for her personal use; that respondent's representation of Mr. Peters occurred after Mr. Peters had been declared to be a "protected person;" that respondent denied "awareness as to whether this would constitute a conflict of interest;" and that respondent and Ms. Bordonaro engaged in the financial exploitation of Mr. Peters within the meaning of West Virginia Code § 55-7J-1 (2021).[17] The circuit court held respondent and Ms. Bordonaro in contempt and ordered

[16] When asked whether, under the Rules, respondent is responsible for the conduct of his employees, respondent answered,

> If you could show me that in the Rule, I'll read it and I may agree with you. . . . I've tried to be responsible for her [i.e., Mrs. Hunter], but she's 65 years old and has a Masters degree in Public Administration and has been working in and around the law office for all the time we've been married, and she's my wife, and I try to take care of her. Like I said [sic], "Don't go down there to the Peters house, it's going to create a damn mess."

[17] "Financial exploitation" is "the intentional misappropriation or misuse of funds or assets or the diminishment of assets due to undue influence of [a] . . . protected person[.]" W. Va. Code § 55-7J-1(b)(3) (2021).

respondent to immediately reimburse Mr. Peters for the $5,000.00 retainer fee paid to respondent, and Ms. Bordonaro to reimburse him for the unauthorized purchase she made with his credit card. Respondent, Mrs. Hunter, and Ms. Bordonaro were also enjoined from having any contact with Mr. Peters.

Following the filing of the instant ethics complaint, ODC's investigation of respondent's law office bank accounts for a specified period, including operating, trust, and IOLTA accounts, revealed that no deposits of $5,000.00 were made on or around the date the retainer fee for that amount paid to respondent by Mr. Peters was cashed. After the ODC twice inquired if respondent had refunded the $5,000.00 retainer fee as previously ordered by the circuit court, respondent ultimately submitted a receipt from complainant's counsel, Lusk & Bradford, PLLC, indicating that the refund had been paid on November 25, 2020 (i.e., fourteen months after the circuit court first ordered respondent to refund the money).

The subsequently filed Statement of Charges against respondent on February 10, 2022, alleged multiple violations of the West Virginia Rules of Professional Conduct. Following the August 9, 2022, evidentiary hearing, the HPS issued its report, finding that

ODC proved, by clear and convincing evidence, that respondent violated the Rules of Professional Conduct[18] as follows:

Respondent's representation of both Mr. Peters and Ms. Bordonaro (whose interests were directly adverse to one another), violated Rule 1.7(a)(1), entitled "[c]onflict of [i]nterest; current clients" and which provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client[.]

Respondent's continued representation of Ms. Bordonaro in the same or a substantially related matter in which her interests were determined by the circuit court to be adverse to the interests of Mr. Peters, and for which representation Mr. Peters, through his legal representative, did not provide written informed consent, violated Rule 1.9(a), entitled "[d]uties to former clients" and which provides:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

[18] *See* Syl. Pt. 1, *Lawyer Disciplinary Bd. v. McGraw*, 194 W. Va. 788, 461 S.E.2d 850 (1995) (stating that Rule 3.7 requires ODC "to prove the allegations of the formal charge by clear and convincing evidence").

Respondent's failure to timely comply with two court orders directing him to return the $5,000.00 retainer fee to Mr. Peters – returning the funds only after the filing of the instant ethics complaint more than one year later –violated Rule 3.4(c), entitled "[f]airness to opposing party and counsel" and which provides:[19]

> A lawyer shall not:
> . . .
> (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists[.]

Respondent's failure to execute an engagement letter or fee agreement, and to communicate, in writing, the scope of the representation, including how expenses and fees would be handled, or any changes in the basis or rate of the fee when the fee was increased from $2,500.00 to $7,500.00, violated Rule 1.5(b), entitled "[f]ees" and which provides:

> (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the

[19] Although not challenged by respondent in this appeal, the HPS made only a conclusory finding that this conduct violated Rule 8.4(c), which provides that "[i]t is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]" The circuit court previously ruled that respondent's conduct constituted the financial exploitation of Mr. Peters, which we have no trouble concluding constituted a violation of Rule 8.4(c).

> fee or expenses shall also be communicated to the client in writing.

Respondent's failure to deposit the $5,000.00 retainer fee into his client trust account and provide billing statements to support when the fees were earned or expenses incurred, violated Rule 1.15(c), entitled "[s]afekeeping property" and which provides:

> (c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

Respondent's failure to make reasonable efforts to ensure that the conduct of Mrs. Hunter, his office manager over whom he had direct supervisory authority, was compatible with respondent's professional obligations as a lawyer, violated Rule 5.3(b), entitled "[r]esponsibilities regarding nonlawyer assistance" and which provides:

> With respect to a nonlawyer employed or retained by or associated with a 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.[20]

[20] The HPS also concluded that respondent violated Rule 5.3(c)(1) and (2) (providing that, with respect to a nonlawyer who is employed by a lawyer, "(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the [Rules] 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

Continued . . .

Respondent's failure to obtain the consent of Mr. Peters's guardian ad litem before communicating with Mr. Peters, violated Rule 4.2, entitled "[c]ommunication with persons represented by counsel" and which provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Finally, Respondent's violation of lawful court orders and his continued course of conduct creating the need for ongoing litigation, violated Rule 8.4(d), entitled "[m]isconduct" and which provides:

> It is professional misconduct for a lawyer to:
> . . . .

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be avoided or mitigated but fails to take reasonable remedial action"). Although neither raised by respondent nor acknowledged by ODC, we note that respondent was not specifically charged with violating Rule 5.3(c)(1) and (2). However, we recognize that a lawyer may be disciplined for an uncharged violation of the Rules "if the uncharged violation is within the scope of the misconduct alleged in the formal charge, and if the lawyer is given: (1) clear and specific notice of the alleged misconduct supporting the uncharged rule violation; and (2) an opportunity to respond." Syl., in part, *Lawyer Disciplinary Bd. v. Stanton*, 233 W. Va. 639, 760 S.E.2d 453 (2014). The evidence showed, and the HPS found, that Mrs. Hunter played an integral role in respondent's law practice, but that she refused to abide by respondent's direction, had a lack of understanding of the Rules, and disregarded court orders. The evidence further showed that respondent was aware of Mrs. Hunter's conduct but failed to mitigate or remediate the consequences thereof. It is clear that the uncharged violation of Rule 5.3(c)(1) and (2) is within the scope of the misconduct alleged in the formal charge relating to Mrs. Hunter's conduct and, further, given that the evidence supporting the uncharged violation was elicited largely from the testimony of respondent and Mrs. Hunter, we find that respondent was given clear and specific notice of the alleged misconduct supporting the violation, as required by *Stanton*.

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

The HPS recommended the following sanctions:

(1) That respondent's law license be suspended for a period of one year;

(2) That, prior to reinstatement, respondent complete an additional nine hours of continuing legal education during the current reporting period, three hours of which should be in IOLTA accounts and the other six hours in the area of ethics and law office management;

(3) That respondent comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure;

(4) That respondent be permitted to petition the Court for reinstatement following a one-year suspension pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, provided the above sanctions are satisfied;

(5) That, following reinstatement, if any, respondent be placed on one-year supervised probation; and

(6) That respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

The ODC agrees with the findings of fact and conclusions of law set forth in the HPS's report and with the recommended sanctions. For his part, respondent does not specifically challenge any of the HPS's factual findings. He admits that he "made mistakes in handling" the underlying matter and to violating the Rules of Professional Conduct. Respondent challenges the HPS's conclusions of law only insofar as the HPS determined that he acted "intentionally and knowingly." Rather, respondent concedes only that his "negligent and overzealous acts may have caused potential injury" and offers that he and his wife "allowed our moral obligations [to an elderly client] to interfere with my ethical

obligations." He emphasizes that he ultimately returned Mr. Peters's $5,000.00 retainer fee but recognizes that the reimbursement was untimely. Finally, respondent objects to the proposed sanction of a one-year suspension of his law license, arguing that it would put an "end[] [to] a long career that has served thousands of clients without harm." Respondent proposes that some period of probation with a supervised practice would be more appropriate under the circumstances.[21]

II. Standard of Review

This Court considers the report and recommendation of the HPS under the following standard:

> A *de novo* standard applies to a review of the adjudicatory record made before the [HPS] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the [HPS's] recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the [HPS's] findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record."

Syl. Pt. 3, *Committee on Legal Ethics v. McCorkle,* 192 W.Va. 286, 452 S.E.2d 377 (1994).

We give respectful consideration to the recommendations of the HPS regarding sanctions to be imposed upon an attorney for ethical violations; however, we

[21] Respondent represents that it is his intention to retire from the practice of law and contends that a lesser sanction "would allow [him to] wind down [his] practice and sell [his] office[.]"

have held that "'[t]his Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law.' Syllabus point 3, *Committee on Legal Ethics of the West Virginia State Bar v. Blair,* 174 W.Va. 494, 327 S.E.2d 671 (1984)." Syl. Pt. 1, *Lawyer Disciplinary Bd. v. Scott,* 213 W. Va. 209, 579 S.E.2d 550 (2003).

We are further mindful of the multiple considerations in these cases:

> 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.

Syl. Pt. 3, *Committee on Legal Ethics v. Walker,* 178 W. Va. 150, 358 S.E.2d 234 (1987). With these standards to guide us, we now consider the case before us.

III. Discussion

As previously noted, respondent does not challenge the HPS's findings of fact in this appeal. This Court gives substantial deference to such findings and, having determined that they are "supported by reliable, probative, and substantial evidence on the whole record[,]" syl. pt. 3, in part, *McCorkle*, 192 W. Va. at 287, 452 S.E.2d at 378, we adopt them. Similarly, upon our *de novo* review of the record below, we further adopt the HPS's conclusions of law. *See id.*

The present dispute lies with the propriety of the HPS's recommended sanction of a one-year suspension of respondent's law license. Therefore, we focus our discussion on the proven misconduct that the parties and HPS agree constitute violations of the Rules to determine whether such sanction is warranted.

Our consideration of the appropriate sanction in a lawyer disciplinary proceeding is guided by syllabus point four of *Office of Lawyer Disciplinary Counsel v. Jordan*, 204 W. Va. 495, 513 S.E.2d 722 (1998), which held:

> Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates factors to be considered in imposing sanctions and provides as follows: "In imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court [West Virginia Supreme Court of Appeals] or Board [Lawyer Disciplinary Board] shall consider the following factors: (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."

We evaluate these factors with the understanding that "attorney disciplinary proceedings are primarily designed to protect the public, to reassure it as to the reliability and integrity of attorneys and to safeguard its interest in the administration of justice[.]" *Committee on Legal Ethics v. Keenan*, 192 W. Va. 90, 94, 450 S.E.2d 787, 791 (1994).

We first consider the *Jordan* factor that evaluates whether respondent violated duties owed to his client, the public, the legal system, or the legal profession. 204

W. Va. at 497, 513 S.E.2d at 724, Syl. Pt. 4. By his own admission, respondent (1) disobeyed court orders that required him to promptly reimburse Mr. Peters for the $5,000.00 retainer fee; (2) failed to deposit the retainer fee into his client trust account and provide billing records regarding fees paid; (3) failed to execute a fee agreement, communicate the scope of the representation and expenses and fees, as well as any changes in the basis or rate of the fee, in writing, to Mr. Peters and Ms. Bordonaro; (4) continued to represent Ms. Bordonaro without obtaining from Mr. Peters (through his legal representative) his written informed consent after a court determined that respondent had a conflict of interest; and (5) failed to properly supervise his nonlawyer employee, Mrs. Hunter, to make reasonable efforts to ensure that her conduct comported with respondent's professional obligations as a lawyer, and to take reasonable remedial action to avoid or mitigate the consequences of her conduct.

The HPS concluded that respondent violated his duties to Mr. Peters, the public, the legal system, and the legal profession, and we agree. We have observed,

> [a] lawyer owes an ethical duty to clients including the duty of candor, loyalty, diligence, and competence. Lawyers also owe duties to the public who rely on lawyers to protect their interests. The general public deserves lawyers with the highest standards of honesty and integrity. As officers of the court, lawyers owe duties to the legal system whereby they must conduct themselves within the bounds of the law and abide by the rules of substance and procedure which afford the administration of justice. As to the legal profession, lawyers owe an ethical duty to maintain the integrity of the profession.

Lawyer Disciplinary Bd. v. Blyler, 237 W. Va. 325, 341, 787 S.E.2d 596, 612 (2016). That respondent, through his proven misconduct, violated these duties is obvious and so we need not disturb the HPS's conclusion in this regard.

The second *Jordan* factor is whether respondent "acted knowingly, intentionally, or negligently." 204 W. Va. at 497, 513 S.E.2d at 724, Syl. Pt. 4. The HPS concluded that the record demonstrates that respondent acted intentionally in his failure to comply with court orders and knowingly (1) in his failure to execute written fee agreements and to generally stay abreast of the Rules; (2) in continuing to represent Ms. Bordonaro after the circuit court determined that respondent had a conflict of interest; and (3) in delegating financial duties to Mrs. Hunter, a nonlawyer, without properly supervising or educating her. The HPS found there to be "no evidence to the contrary, and the Respondent presented none." We agree.

Respondent's claim that his violations of the Rules were neither intentionally nor knowingly made but, rather, were negligent and a result of acting overzealously on behalf of a client to whom he and Mrs. Hunter felt a moral obligation to help is not persuasive. We fail to see how any lawyer – let alone one with respondent's vast experience – could unknowingly or unintentionally ignore multiple court orders that directed reimbursement of a significant fee and that concluded, as a matter of law, that it was a conflict of interest for respondent to represent two parties whose interests were directly adverse. Additionally, the evidence showed that respondent was previously admonished

for violating Rule 1.5[22] and, further, he admitted to attending West Virginia State Bar regional meetings where ODC "talked about the fee agreements."[23] "Lawyers who engage in the practice of law in West Virginia have a duty to know the Rules of Professional Conduct and to act in conformity therewith. Consequently, a claim of lack of knowledge of any prohibition or duty imposed under the Rules is no defense in a lawyer disciplinary proceeding." Syl. Pt. 2, *Lawyer Disciplinary Bd. v. Ball*, 219 W. Va. 296, 633 S.E.2d 241 (2006). We, thus, conclude that respondent acted intentionally and knowingly in violating the Rules in this case.

Finally, we examine the amount of the actual or potential injury caused by respondent's misconduct, as required by the third *Jordan* factor. 204 W. Va. at 497, 513 S.E.2d at 724, Syl. Pt. 4. The HPS concluded, and we agree, that "[r]espondent demonstrated a pattern and practice of placing his own opinions and interests above the directives of the [c]ourt" by refusing to comply with court orders directing him to have no contact with Mr. Peters and to return the retainer fee. Respondent's misconduct caused complainant considerable frustration and expense at a time when his father was

[22] In the case of Lawyer Disciplinary Board Investigative Panel Closing in Thomas E. Withrow's complaint, I.D. No. 14-05-001 (January 31, 2015), the Investigative Panel advised respondent that Rule 1.5, which became effective January 1, 2015, requires all fee agreements to be in writing. Respondent was specifically warned that, in light of that Rule, "any future failure to put fee agreements in writing will result in the filing of formal charges[.]"

[23] Respondent made this concession when questioned about his claim that ODC has failed to educate practitioners about the Rules.

deteriorating. We further agree with the HPS's conclusion that respondent's failure "to stay current and abreast of changes in the law particularly with respect to client contracts/agreements and the handling of client funds," and to prevent Mrs. Hunter from engaging in improper conduct and to mitigate any damage caused by such conduct not only harmed Mr. Peters and complainant, but also poses potential harm to the public, the legal system, the legal profession, and other vulnerable clients.

In determining the appropriate sanctions to be imposed upon respondent, we examine his conduct in light of both mitigating and aggravating factors. "Mitigating factors in a lawyer disciplinary proceeding are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." *Scott*, 213 W. Va. at 209, 579 S.E.2d at 550, Syl. Pt. 2. As we explained more fully in syllabus point three of *Scott*,

> [m]itigating 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.

Id. at 210, 579 S.E.2d at 551, Syl. Pt. 3.

For mitigation purposes, the HPS identified respondent's "full and free disclosure to [the] disciplinary board or cooperative attitude toward [the] proceedings," respondent's "character or reputation," and his remorse for his misconduct.[24] The HPS concluded that respondent admitted to his transgressions during the proceedings below and respectfully participated in the process. It further concluded that character evidence presented at the evidentiary hearing showed that respondent has maintained "a small-town practice that has benefitted the local community and its citizens for many years; has been active on boards and participated in numerous fund-raising activities for those in need; and currently serves Greenbrier County as its Fiduciary Commissioner." Finally, respondent demonstrated remorse for his "professional actions and/or inactions" relating to his representation of Mr. Peters. From our review of the record, we agree with the HPS that these mitigating factors exist in this case.

By contrast, "[a]ggravating factors in a lawyer disciplinary proceeding are any considerations or factors that may justify an increase in the degree of discipline to be imposed." *Id.,* Syl. Pt. 4. The HPS found numerous aggravating factors to exist in this case including that respondent (1) has substantial experience in the practice of law, having practiced for forty-nine years, (2) failed to respond to ODC's initial requests for information, (3) engaged in the financial exploitation of a "protected person," and (4)

[24] Respondent does not argue, nor do we find, that the fact that he finally made restitution to Mr. Peters after refusing to comply with court orders directing reimbursement should be considered a mitigating factor in this case.

knowingly accepted an additional $5,000.00 in fees after he was already fully paid the flat rate fee of $2,500.00, causing him to be unjustly enriched.

The HPS also fully considered respondent's prior disciplinary offenses, having received two admonishments in 2002, one admonishment in 2015, and another in 2019. As previously noted, in the 2015 matter, respondent failed to execute a written contingent fee agreement and was "warned that any future failure to put fee agreements in writing will result in the filing of formal charges[.]" Despite this prior admonishment, respondent, in the instant proceeding, claimed that he was unaware of Rule 1.5, blaming ODC for failing to educate practitioners on the Rule's requirement. In 2019, in Lawyer Disciplinary Board Investigative Panel Closing in Ronald K. Cook's complaint, I.D. No. 18-02-288 (December 3, 2019), respondent was admonished for failing "to locate Complainant's file and . . . to provide any information regarding the accounting and allocation of the fee paid to his firm by Complainant, or any billing statements in respect thereof." He was ordered to repay the complainant the full $10,000.00 retainer fee because he failed to "properly account[] for the matter for which his firm was retained[.]" We agree with the HPS that the foregoing aggravating factors justify an increase in the degree of discipline to be imposed. *See Scott*, 213 W. Va. at 210, 579 S.E.2d at 551, Syl. Pt. 3.

Turning to the appropriate sanction in this case, we are mindful that "there is no 'magic formula' for this Court to determine how to weigh the host of mitigating and aggravating circumstances to arrive at an appropriate sanction; each case presents different circumstances that must be weighed against the nature and gravity of the lawyer's

misconduct." *Lawyer Disciplinary Bd. v. Sirk*, 240 W. Va. 274, 282, 810 S.E.2d 276, 284 (2018). Here, the aggravating factors weigh heavily in favor of removing respondent from the practice of law for some period of time. That respondent's violation of a host of ethical rules occurred in connection with his representation of a client who he knew to be a "protected person" is particularly egregious and cannot be overstated. As the circuit court found in its September 27, 2019, order directing respondent, among other things, to return the $5,000.00 retainer fee, "[Mr.] Peters was a protected person without the capacity to contract and retain legal counsel" and respondent "was aware of that ruling and Mr. Peters['s] incapacity[.]" The HPS emphasized that the purpose of guardian and conservator proceedings is to protect vulnerable persons like Mr. Peters "from exploitation and manipulation and to safeguard against such abuse by requiring permission from his court-appointed guardian/conservator before decisions or purchases were made on his behalf. . . . 'the whole thing was to stop people from taking Mr. Peters'[s] money' – yet Respondent and [Mrs.] Hunter engaged in the very activity that the Guardian/Conservator proceedings were meant to safeguard against."

Further, respondent, who has been practicing law for five decades, knowingly ignored two lawful court orders directing him to return the retainer fee to his client. He failed to execute a written fee agreement despite having been previously admonished for the same offense; although respondent also attempted to blame ODC for failing to educate practitioners on this requirement, he ultimately admitted that he had attended presentations at which ODC "talked about the fee agreements." Respondent has

also demonstrated a willful disregard of the Rules, at first claiming to be unaware that he is responsible for the conduct of his employee wife but then admitting that he knew that she had ignored court orders prohibiting contact with the client. Respondent admitted that he failed to take any effective action to remediate her conduct.[25]

It is incumbent upon this Court to impose discipline that will appropriately punish respondent, sufficiently deter "other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession." *Walker*, 178 W. Va. at 150, 358 S.E.2d at 234, Syl. Pt. 3. *See also Lawyer Disciplinary Bd. v. Grafton*, 227 W. Va. 579, 588, 712 S.E.2d 488, 497 (2011) (recognizing that it is "the multi-faceted responsibility [of] this Court . . . to devise a proper sanction for the advancement of the legal system and protection of the public").[26] Based upon the facts and circumstances of this case, we agree with the HPS that the public, the legal system, and the profession of this State will be better served by the imposition of a one-year suspension of respondent's law license. We also adopt the other recommended sanctions of the HPS.

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[25] *See* n.16, *supra.*

[26] *See e.g., Lawyer Disciplinary Bd. v. Atkins*, 243 W. Va. 246, 842 S.E.2d 799 (2020) (imposing nine-month suspension where lawyer failed to supervise nonlawyer assistants to ensure their conduct was compatible with his professional obligations, in violation of Rule 5.3, and where lawyer also violated Rules 1.3, 1.4(a)(3) and (4), 1.15(a) and (d), 8.4(c) and (d), and 8.1(a)); *Lawyer Disciplinary Bd. v. Blyler*, 237 W. Va. 325, 787 S.E.2d 325 (2016) (imposing sixty-day suspension, where lawyer acted negligently, rather than intentionally or knowingly, for violating Rule 1.15(a), as well as Rules 8.4(c) and (d), 1.3, 1.4(a) and (b), and 3.2).

IV. Conclusion

For the reasons stated above, we order the following sanctions:

(1) That respondent's law license be suspended for one year;

(2) That, prior to reinstatement, respondent complete an additional nine hours of continuing legal education during the current reporting period, three hours of which should be in IOLTA accounts and the other six hours in the area of ethics and law office management;

(3) That respondent comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure;

(4) That respondent be permitted to petition the Court for reinstatement following a one-year suspension pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, provided the above sanctions are satisfied;

(5) That, following reinstatement, if any, respondent be placed on one-year supervised probation; and

(6) That respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Law License Suspended and Other Sanctions.