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

LAWYER DISCIPLINARY BOARD,

Petitioner,

FILE COPY

vs.

No. 19-0636

SCOTT A. CURNUTTE,

Respondent.

REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD

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

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I. REPLY TO RESPONDENT'S BRIEF

This matter is before this Honorable Court pursuant to the "Report of the Hearing Panel Subcommittee" filed on February 13, 2020, wherein a Hearing Panel Subcommittee of the Lawyer Disciplinary Board [hereinafter "HPS"] found that the clear and convincing evidence established that Respondent had violated Rule 8.4(c) of the Rules of Professional Conduct. Based upon the evidence and in consideration of the factors outlined in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure, the HPS recommended that Respondent be suspended for one hundred (100) days among other sanctions.¹ The Office of Lawyer Disciplinary Counsel [hereinafter "ODC"] consented to the Report of the HPS on or about March 10, 2020. Respondent filed an objection on or about March 16, 2020.

In his brief, Respondent concedes that he violated 8.4(c) when, for three years, he falsely reported to The West Virginia State Bar on his Financial Responsibility Disclosure Form [hereinafter "FRD"] that he had professional liability insurance when he did not have any such policy in place. However, Respondent asserts that the recommended sanction is too severe. Respondent argues that the HPS' recommendation did not account for his character and reputation, that no actual injury occurred and that a substantial population of West Virginia would suffer from lack of legal services should he be suspended.

¹ The recommendation of the HPS is as follows: (1) that Respondent's law license be suspended for one hundred (100) days; (2) that prior to filing a petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, Respondent must complete an additional six (6) hours of CLE in ethics; (3) that Respondent must comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure; (4) that prior to filing a petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, Respondent must pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure; and (5) that at the time of filing a petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, Respondent shall fully and accurately disclose to the Lawyer Disciplinary Board what efforts, if any, he has made to procure professional liability insurance.

II. ARGUMENT

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

The HPS properly found that Respondent violated duties owed to his clients, to the public and to the legal profession and furthermore, Respondent has admitted that his conduct violated Rule 8.4(c) and the parties entered into stipulations to that effect. However, Respondent argues that the HPS failed to acknowledge and properly balance his additional mitigating factor. Specifically, Respondent argues that the HPS did not consider the testimony of Respondent’s only witness, Diane Young, Pro-Bono Coordinator, West Virginia Legal Aid, or the information in his curriculum vitae when reaching its decision. [Respondent’s Exhibit 1, Tr. pp. 22-38] The HPS had no questions related to Respondent’s reputation when he presented and discussed his curriculum vitae at the hearing. [Tr. p. 22-32] In regard to Ms. Young’s testimony, when asked by Senior

Lawyer Disciplinary Counsel whether Respondent had spoken to her about why he asked her to appear at his disciplinary hearing and whether he had discussed the Statement of Charges with her, Ms. Young replied “No. He just asked me if I would be a character witness.” [Tr. p. 37] Then later, the Chair of the HPS asked “Ms. Young, could you give me your opinion of [Respondent’s] reputation for honesty?” [Tr. 38] Ms. Young replied “It’s impeccable. I’ve never known anybody to question anything he’s ever done.” [Id.] The Chair then asked “Okay. And if truthfulness were an issue involved in this case, would that surprise you?” [Id.] Ms. Young replied “Yes, it would greatly.” [Id.] Unlike in Lawyer Disciplinary Board v. Blyler, 237 W.Va. 325, 343, 787 S.E2d 596, 614 (2016), where the Court found character and reputation to be a mitigating factor, Respondent’s sole witness in the instant case could not offer testimony that “the conduct at issue was aberrant,” that the misconduct “would have occurred but for challenges in meeting the needs of [family members]” or that the witness had a belief that should Respondent be permitted to continue to practicing law with supervision that he would comply with all that was required of him. Testimony about Respondent’s reputation for truthfulness from a witness who did not have knowledge that Respondent’s trustworthiness and honesty were the character traits at issue has little value.

Respondent also argues that the HPS failed to consider his work with CLE programs and *pro bono* efforts as a mitigating factor. Respondent further argues that a suspension would harm a large group of people in an area of the State underserved by legal services² and that the appropriate discipline is a reprimand. Participation in Continuing Legal Education (hereinafter “CLE”) is mandatory for members of the West Virginia State Bar and members can earn the required hours in a number of ways, including teaching CLE courses. Furthermore, Respondent’s service on bar

² In his reply brief, Respondent stated that he had a caseload of approximately 125 cases in civil, family law and federal criminal cases, and also serves as a guardian *ad litem* for children in multiple family court circuits. He also cited to the fact that he mediates approximately 100 family and civil cases a year. However, Respondent did not introduce this information during the hearing in this matter.

committees and service on the court appointed list is to be commended but again these are obligations that members of the West Virginia State Bar are already encouraged to undertake and the same should not be considered in mitigation of sanction. [See, Rules of Professional Conduct, Rule 6.1. Voluntary Pro Bono Publico Service; Rule 6.2. Accepting Appointments; Rule 6.3 Membership in Legal Organizations; and Rule 6.5 Nonprofit and Court-Annexed Limited Legal Services Programs].

Contrary to Respondent's assertion that no injury occurred, there is no requirement that actual injury occur to find that discipline is warranted. Rule 3.16 of the Rules of Lawyer Disciplinary Procedure provides that when imposing a sanction after a finding of lawyer misconduct, the Court shall consider: (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. [Emphasis Added]. Respondent's admitted conduct clearly created a situation wherein he, his law firm, his former attorney employee, and his clients were exposed to potential harm by reporting that he was covered by professional liability insurance when in fact, he was not. [Exhibit 6, 000062] Furthermore, Respondent's noncompliance with the administrative rules of The West Virginia State Bar and the Rules of Professional Conduct was also clearly detrimental to his former attorney employee, the public, the legal system and the legal profession.

While Respondent may be disappointed in the outcome, in reaching its recommendation as to sanctions, the HPS clearly considered the evidence as a whole and evaluated the evidence Respondent submitted in mitigation. The HPS found that the aggravating factors, including Respondent's dishonest or selfish motive; misconduct spanning three (3) reporting years; and his

substantial experience in the practice of law as Respondent has been admitted to practice law since September 23, 1991, outweighed the mitigating factors presented, including Respondent's reputation and character. Moreover, mitigating factors were not envisioned to insulate a violating lawyer from discipline.

This Court has also "repeatedly advised that '[i]n disciplinary proceedings, this Court, rather than endeavoring to establish a uniform standard of disciplinary action, will consider the facts and circumstances [in each case], . . . in determining what disciplinary action, if any, is appropriate.'" Lawyer Disciplinary Board v. Brown, 223 W.Va. 554, 678 S.E.2d 60, 66 (2009); *quoting* Syl. pt. 2, [in part] Committee on Legal Ethics v. Mullins, 159 W.Va. 647, 226 S.E.2d 427 (1976); Syl. Pt. 2, [in part], Committee on Legal Ethics v. Higginbotham, 176 W.Va. 186, 342 S.E.2d 152 (1986); Syl. Pt. 4, [in part], Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989).

A review of the record clearly indicates that the HPS properly considered the evidence, including aggravating and mitigating factors, and made an appropriate recommendation to this Court. Respondent has failed to show that the factual findings of the HPS are not supported by the reliable, probative, and substantial evidence or that the one hundred (100) days suspension is not a proper sanction given consideration of the whole record. This is a matter of first impression and for the public to have confidence in our disciplinary and legal system, lawyers, like Respondent, who engage in conduct involving dishonesty, fraud, deceit or misrepresentation over the course of three (3) years, must be removed from the practice of law for a period of time. Such a sanction is also necessary to deter other lawyers from engaging in similar conduct and to restore the faith of the public in the integrity of the legal profession. The public must be able to rely on the information disseminated by The West Virginia State Bar on The West Virginia State Bar's website. Therefore,

it is of the utmost importance that the information reported to and maintained by The West Virginia State Bar be true and accurate. Moreover, the public, legal professionals and the Courts of this State expect that the State's lawyers will abide by the rules and regulations that govern the practice of law. Respondent's conduct demonstrates a disregard for personal integrity and the honor of the profession. As this Court so aptly stated in In re Brown, 166 W.Va. 226, 232-3, 273 S.E.2d 567, 570 (1980), albeit in a reinstatement matter, but which is certainly applicable to this case:

Woven through out disciplinary cases involving attorneys is the thought that they occupy a special position because they are actively involved in administering the legal system whose ultimate goal is the evenhanded administration of justice. [footnote omitted] Integrity and honor are crucial components of a lawyer's character as are a sense of duty and fairness. Because the legal system embraces the whole of society, the public has a vital expectation that it will be properly administered. From this expectancy arises the concept of preserving public confidence in the administration of justice by disciplining those lawyers who fail to conform to professional standards.

III. CONCLUSION

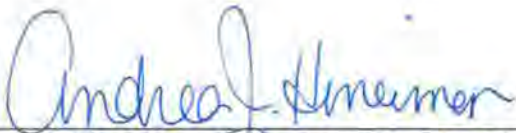
In reaching its recommendation as to sanctions, the Hearing Panel Subcommittee considered the evidence, the facts and recommended sanction, the aggravating factors and mitigating factors. For the reasons set forth above, the Hearing Panel Subcommittee recommended the following sanctions:

1. That Respondent's law license be suspended for one hundred (100) days;
2. That prior to filing a petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, Respondent must complete an additional six (6) hours of CLE in ethics;
3. That Respondent must comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure;

4. That prior to filing a petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, Respondent must pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure; and
5. That at the time of filing a petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, Respondent shall fully and accurately disclose to the Lawyer Disciplinary Board what efforts, if any, he has made to procure professional liability insurance.

Accordingly, the Office of Lawyer Disciplinary Counsel urges that this Honorable Court uphold the sanctions recommended by the Hearing Panel Subcommittee.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel



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