

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 19-0879



LAWYER DISCIPLINARY BOARD,

Petitioner,

v.

E. LAVOYD MORGAN, JR.,

Respondent.

RESPONDENT'S APPEAL BRIEF

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RESPONDENT'S APPEAL BRIEF

I was a high school dropout. I went from that to having a law degree. I worked for the Department of Corrections midnight to eight and I would go to school from 4:30 to 9:30. I did that for two years, and then I went to Concord and finished my undergraduate degree. I see what I do, I take it as a calling. I take it very seriously. I genuinely care about my clients and I have always tried to give the best service I can, and I've been fairly successful. I've got a really good reputation with the judges and with the magistrates that I work with and prosecuting attorneys and other attorneys. I took on too much. I went through the divorce. I was depressed. I had the physical pain. I had the surgeries and the downtime. Frankly, I just-- I gave up hope for a period of time. I was in a dark place. I have since taken -- I'm climbing back up out of this hole. I love the practice of law and I do a lot of good for a lot of people, I think. And I would like the opportunity to continue to do that. I do genuinely care about my clients and their outcomes. That's pretty much all. Testimony from Respondent E. Lavoyd, Jr., (January 28, 2020, Tr. 439-40)

I. Introduction

To the Honorable Justices of the

West Virginia Supreme Court of Appeals:

Respondent E. Lavoyd Morgan, Jr., has lived the American dream, where through hard work and perserverance, he went from being a high school dropout to becoming a member of the West Virginia State Bar on October 2, 1995. (January 28, 2020 Tr. 180-81). Once he was admitted to the

Bar, Mr. Morgan set out to being the best lawyer he could be and to place himself in a position to help as many people in his community as he could. To that end, after starting out by working with other lawyers, Mr. Morgan decided to hang out his own shingle and open up his law office in Lewisburg, West Virginia.

Mr. Morgan now appears before this Court at the lowest point in his professional career. On April 1, 2020, the Office of Disciplinary Counsel (ODC) submitted a proposed 158-page order, including 485 proposed findings of fact and 26 pages of proposed conclusions of law. On this same date, counsel for Mr. Morgan submitted a proposed 51-page order, including 112 proposed findings of fact and 13 pages of proposed conclusions of law. The Hearing Panel in this ethics matter, which involved 15 notebooks, 9,417 Bates numbered pages, and the testimony of 21 witnesses on day one and 12 witnesses on day two, adopted **verbatim** the ODC's proposed order, in which the ODC recommended the annulment of Mr. Morgan's hard earned law license. The Hearing Panel agreed to the same simply by signing the Word document presented by the ODC. Apparently, none of the objections or arguments presented by Mr. Morgan's counsel, including issues never before addressed by this Court, merited any mention or consideration whatsoever in the final order.

In an effort to be completely open and honest, the Court should be made aware of the fact that on April 3, 2020, Mr. Morgan was involved in a tragic accident that resulted in the death of his fiancée, Amelia Braden "Molly" Winsby. Mr. Morgan was arrested for driving under the influence of alcohol causing death and presently remains on home confinement pending the final resolution of these criminal charges. Thus, Mr. Morgan presently is dealing with the lowest point in his professional and personal life.

Because Mr. Morgan wants to continue practicing law in this State and to prove that he is worthy of the public's and the Court's trust, he objected to the recommendation of annulment and

seeks to persuade the Court to devise a more appropriate suspension with conditions designed to give him the hope that he once again will be able to practice as a lawyer. It would be very easy for the Court to be overwhelmed by the 158-page order, the ODC's 110-page "brief," and to conclude that Mr. Morgan must have really committed a multitude of ethical sins worthy of annulment. However, despite the thousands of documents and reams of paper generated in this ethics proceeding, Mr. Morgan respectfully submits the recommendation of annulment is completely unjustified under these facts.

II. Assignment of Error

Whether the Hearing Panel's verbatim adoption of the ODC's proposed 158-page order recommending annulment should be rejected by the Court because:

- 1. Respondent's actions were the result of negligence, rather than intentional acts;**
- 2. The Hearing Panel failed to give any mitigation consideration to the fact that an employee of Respondent stole money from several of Respondent's potential clients; and**
- 3. The Hearing Panel failed to give any mitigation consideration to the impact Respondent's health problems had on running his law office?**

III. Statement of the case

A. Procedural history

The disciplinary actions against Mr. Morgan proceeded on two separate tracks. First, on or about September 27, 2019, the ODC filed in this Court a petition seeking the immediate suspension of Mr. Morgan's law license. After the matter was fully briefed and argued, on March 20, 2020, the Court issued its decision granting the ODC's petition for immediate suspension, suspending Mr.

Morgan immediately until the pending **STATEMENT OF CHARGES** is resolved by the Court, ordering the Chief Judge in Greenbrier County to appoint a lawyer to serve as the trustee for Mr. Morgan's law practice during the pendency of this suspension, and requiring the Hearing Panel to expedite the issuance of its final ruling within sixty days.

The second track was the usual procedure followed in lawyer ethics cases. On or about September 30, 2019, the ODC filed with the Court the **STATEMENT OF CHARGES** against Mr. Morgan. On or about November 4, 2019, Mr. Morgan filed **RESPONDENT'S ANSWER** in response to the **STATEMENT OF CHARGES**. Two days of hearing were held on January 27 and 28, 2020. At the end of the hearings, the Hearing Panel asked counsel to provide proposed findings of fact and conclusions of law, which were filed on April 1, 2020.

B. The charges asserted against Mr. Morgan

1. Poor communications, over reliance on his office staff to handle finances and client contact, negligence in training and supervising his staff, and overall negligence in running his office

The complaints filed against Mr. Morgan fall into several different general categories. The number of complaints reflects not only the fact that Mr. Morgan is a hard worker who tried to help as many clients as he could, but also is yet another example of how social media in a small community can generate a lot of controversy about a lawyer, resulting in the filing of so many different complaints.

Negligence: In this ethics proceedings, Mr. Morgan freely acknowledged his shortcomings and negligence in running his office. As a solo practitioner, Mr. Morgan necessarily placed a lot of reliance on his staff to take care of the day to day issues in the office while he attended proceedings in magistrate, family, and circuit courts in Greenbrier, Pocahontas, Monroe, Summers, Raleigh, Nicholas, and Fayette counties. (January 28, 2020 Tr. 181). He left the handling of his finances

initially to his then wife Tina O'Neil. Clearly, Mr. Morgan was negligent in failing to review his bank statements on a regular basis and in failing to train Ms. O'Neil in the ethics rules governing the handling of client money in a law firm.

The ODC recommended and the Hearing Panel adopted multiple findings and conclusions that Mr. Morgan's actions were intentional, rather than negligent. Thus, the Court's characterization of Mr. Morgan's actions will be critical to the resolution in this matter.

Mitchell Coles: Mr. Morgan gave a person named Mitchell Coles a chance to be his main paralegal.¹ This decision turned out later to be a huge mistake because Mr. Coles used his position in Mr. Morgan's office to take money directly from clients, to keep the money himself, and to give the client the impression that Mr. Morgan represented them. During this proceeding, Mr. Morgan had the experience of meeting some of these "clients" for the first time because he had never met them and did not have any file on them. Of course, Mr. Morgan recognizes he has a legal liability owed to these clients with respect to the money they paid to Mr. Coles, but Mr. Morgan continues to deny he committed any ethical violation in connection with these clients, other than his negligence in supervising Mr. Coles.

The ODC failed to recommend and the Hearing Panel similarly failed to acknowledge how the actions of Mr. Coles must be considered as a mitigating factor for Mr. Morgan. The issue of how to consider the actions of a law firm employee, who commits crimes against the lawyer as well as the clients, has never before been addressed by this Court.

¹This Court has issued two decisions involving Mr. Coles: *State v. Coles*, ___ W.Va. ___, ___ S.E.2d ___, 2013 WL 5476375 (No. 13-0149, 10/01/13), and *State v. Coles*, 234 W.Va. 132, 763 S.E.2d 843 (2014). Mr. Morgan testified that when he hired Mr. Coles, he did not know about his criminal record. Even after learning about his criminal record, Mr. Morgan was so impressed with Mr. Coles that he kept him as an employee. (January 28, 2020 Tr. 274-80).

Health issues: Between September, 2017, and May, 2018, Mr. Morgan began suffering from serious medical issues that made it difficult for him to make it into his office. Eventually, as will be discussed below, Mr. Morgan was forced to undergo several surgeries, which caused him to be out of his office for several months. During this time, Mr. Coles was in charge of the office and that is when he stole money from clients. Mr. Coles actually was arrested for other crimes he committed around the time Mr. Morgan was hospitalized, which effectively left the office empty. During this time, many of the complainants alleged they could not reach Mr. Morgan by telephone. Also, the mail during this time piled up and played a factor in many of the complaints filed.

The ODC recommended and the Hearing Panel adopted findings and conclusions failing to give Mr. Morgan's health issues the mitigation consideration they deserved.

ODC responses: Mr. Morgan and his counsel made a sincere effort to respond to every request for a response from the ODC regarding all of the complaints filed. The record reflects that there is not one single complaint filed against Mr. Morgan to which he never responded at all. In this case, one response was never enough. The ODC requested response after response after response to the same complaint. According to the record, there were several ODC requests to which no response was filed. Mr. Morgan was able to find one ODC request that was mailed to the wrong address. Also, to the extent an ODC request was sent to Mr. Morgan's counsel and no response was filed, Mr. Morgan should not be disciplined for his counsel's own incompetence.²

²As a point of person privilege, counsel for Mr. Morgan has a routine habit of first having all mail scanned into the office system and then calendaring any ODC requests. Counsel has never found in his office the ODC requests that allegedly were ignored by counsel. The fact that there were multiple ODC requests sent to Mr. Morgan's counsel that never generated a response came as a surprise to his counsel. Regardless of how this occurred, counsel respectfully assures the Court that he did not intentionally ignore an ODC request for information in this case. In any event, Mr. Morgan is not responsible for these alleged violations.

The ODC recommended and the Hearing Panel adopted findings and conclusions that somehow Mr. Morgan intentionally and deliberately refused to file responses to some of the ODC's requests for information when, in fact, such failures were the result of negligence.

Financial issues: Finally, although Mr. Morgan had a successful law practice, there were times when the money became real tight and he was unable to pay all of his obligations, including the payment of employees. As a result, two former employees filed ethics complaints against him based upon the failure to be paid money they were owed. Mr. Morgan respectfully submits these issues were financial in nature, rather than being a violation of any of his ethical duties as a lawyer.

With this general understanding of the charges, Mr. Morgan now will address each count separately.

2. Count I PUBLIC DEFENDER SERVICES (Negligence)

In Count I, the ODC alleges Mr. Morgan violated Rules 3.3(a)(1), 1.5(a), 8.4(c) &(d), 5.3, and 8.1(a) of the West Virginia Rules of Professional Conduct in connection with the billing he submitted to the West Virginia Public Defender Services (PDS) for appointed work he had performed. Specifically, the ODC alleges Mr. Morgan misrepresented his actual and necessary time expended for services performed in PDS cases, he engaged in improper and unsubstantiated PDS billing, he failed to ensure his staff's conduct was compatible with his professional obligations, and he made false statements about the work performed in PDS cases.

In responding to the multiple inquiries about his PDS billing, Mr. Morgan and his counsel conducted in depth research to identify any errors made in the billing, which would explain what appeared to be an excessive number of hours billed. Through this process, Mr. Morgan discovered some basic math errors, incorrect dates, billings attributed to another lawyer in his firm, and some

errors for which Mr. Morgan could not find any explanation. All of these accounting issues are discussed in some detail in the responses filed, which are included in the Exhibit Notebooks.

Tina O'Neil, who previously was married to Mr. Morgan and was employed as his office manager from about 2008 through August 1, 2017, explained the procedure followed in submitting bills to PDS. (January 28, 2020 Tr. 227, 235). Ms. O'Neil explained she had never received any training on the ethics rules governing the maintenance of bank accounts in a law firm. (January 28, 2020 Tr. 227-28). With respect to process PDS bills, Ms. O'Neil explained that Mr. Morgan and the other lawyers in the office kept their own timeslips, which were used to create the bill for PDS. Either Ms. O'Neil or some of the other employees in the office processed these PDS bills. (January 28, 2020 Tr. 228-29). Mr. Morgan never gave instructions to the employees in the office to inflate the numbers submitted to PDS. (January 28, 2020 Tr. 230). Denney Bostic, who was employed by Mr. Morgan as a paralegal, testified that Respondent had never asked him to pad his time in PDS cases. (January 27, 2020 Tr. 128).

Mr. Morgan testified that he reviewed the PDS bills before signing and having them submitted. (January 28, 2020 Tr. 193). Although he had never prepared a voucher for billing PDS, Mr. Morgan agreed that he had the ultimate responsibility for the accuracy of his PDS bills. (January 28, 2020 Tr. 195). Mr. Morgan made every effort to keep accurate time on his timeslips and when he traveled for more than one client on the same day, he billed one client for the trip to the court and the other client for the return trip. (January 28, 2020 Tr. 199). Since March of 2018, Mr. Morgan has been appointed to at least 93 criminal cases, but Respondent has chosen not to bill for all of the work he has performed in an effort to mitigate any possible overbilling from his office. (January 28, 2020 Tr. 200).

The ODC represents that after having this accounting performed on the PDS vouchers identified, Mr. Morgan owes PDS approximately \$1,732.50. (¶27 STATEMENT OF CHARGES). Working on 93 appointed criminal cases without submitting any invoices for that work to PDS more than covers the amount of money the ODC claims Mr. Morgan owes to PDS.

Unlike the ODC's proposed conclusions which were adopted verbatim by the Hearing Panel, the record supports a finding that Mr. Morgan was **negligent** in explaining the ethics rules governing law firm bank accounts, **negligent** in supervising the employees in his office, **negligent** in supervising how the PDS billing was conducted, and **negligent** in reviewing the PDS invoices closely to make sure they accurately reflected the time noted on the timeslips. There is no factual basis supporting the ODC's allegation and the Hearing Panel's conclusion that Mr. Morgan deliberately made false statements in connection with his PDS cases.³

3. Count II TRAVIS NORWOOD (Negligence)

In Count II, the ODC alleges Respondent violated Rules 1.5(b), 1.15(a) & (c), 1.16(d), 8.4(c) & (d), and 8.1(a) & (b) of the West Virginia Rules of Professional Conduct in connection with his representation of Travis Norwood, who had retained Mr. Morgan with an \$8,000 check from Mr. Norwood's mother in connection with his criminal appeal. Specifically, the ODC alleges Mr. Morgan failed to obtain a written fee agreement, he failed to have the retainer deposited in his trust account, he failed to keep complete records of the funds paid, he failed to place unearned fees

³The ODC and the Hearing Panel adopted findings and conclusions that Mr. Morgan engaged in criminal conduct by submitting erroneous bills to PDS and also asserted he was blaming his staff. (Hearing Panel Order, pp. 138-39). This conclusion is completely rebutted by the detailed analysis of the PDS bills questions, where common every day mathematical errors were committed and acknowledged. Furthermore, the record demonstrates all of the PDS billing was processed by Mr. Morgan's staff, based upon the time slips Mr. Morgan created. He was not blaming his staff for any errors committed, but rather simply was explaining how the PDS billing was processed.

deposited in his trust account, he failed to provide a client his file and refund for unearned fees, he misrepresented the state of the case and misappropriated and converted funds belonging to the client, he provided false information regarding his accounting, and he failed to timely respond to the ODC's lawful request for information.

Ms. McNeil testified that money received from clients in a retained criminal or divorce case would be deposited in the operating account. When she was employed in the office, she never sat down with Mr. Morgan to review the bank statements, which were collected and provided to their outside bookkeeper. (January 28, 2020 Tr. 232). Mr. Morgan was the only person in the office who could make a withdrawal from the trust account. Mr. Morgan, Ms. O'Neil, and the bookkeeper could sign withdrawals from the operating account. Everyone in the office had the authority to make deposits into both accounts. (January 28, 2020 Tr. 233). Ms. O'Neil explained that sometimes money was withdrawn from the trust account and deposited into the operating account so the law firm could meet expenses. She would make notations of these withdrawals in the trust account. (January 28, 2020 Tr. 233-34).

Mr. Morgan explained he understood Mr. Norwood was retaining him to do an appeal. (January 28, 2020 Tr. 297). Mr. Morgan acknowledges that he owes a refund to Mr. Norwood's mother. In fact, in verified supplemental responses from Mr. Morgan (Exhibit 69 and 113), he readily agreed that he owed Mr. Norwood's mother \$6,000, and he sent a \$500 check to Mr. Norwood's mother as part of this repayment. Valerie Norwood Grow, Mr. Norwood's mother, testified that she had received a check for \$500 from Mr. Morgan. (January 27, 2020 Tr. 81).

The record supports a finding that Mr. Morgan was **negligent** in the supervision of his employees, **negligent** in instructing his employees on depositing retainer checks from clients into

the trust account until the fee was earned, and **negligent** in communicating with Mr. Norwood and the ODC. Mr. Morgan's office consistently deposited retainer fees in his operating account, rather than in his trust account. Because the retainer fee was placed in the operating account and spent, the unused portion of the fee paid was not available to Mr. Morgan to pay Mr. Norwood's mother. The record does not support the allegation that Mr. Morgan provided false information regarding his accounting. While throughout the process of the ODC seeking multiple responses from Mr. Morgan the numerous complaints filed against him, he may have failed to file a response to each and every request, there is no evidence Mr. Morgan intentionally failed to file such a response. The record reflects that many of the complaints or requests for factual information were sent during the time when Mr. Morgan was unable to go into his office because he was dealing with medical issues. Mr. Morgan agrees he owes Mr. Norwood's mother a total of **\$5,500**.⁴

4. Count III LORI ANN MCKINNEY (Negligence)

In Count III, the ODC alleges Mr. Morgan violated Rules 1.3, 3.2, 8.4(c) & (d), 1.4(b), 1.15(a), and 1.16(d) of the West Virginia Rules of Professional Conduct in connection with his representation of Richard and Lori Ann McKinney in their criminal cases as well as their possible medical malpractice case. Specifically, the ODC alleges Mr. Morgan failed to act diligently and expeditiously in addressing the McKinneys' possible medical malpractice action allowing the one-year statute of limitations to expire, he failed to communicate with the McKinneys regarding the plea

⁴The ODC proposed and the Hearing Panel adopted a conclusion that Mr. Morgan owes \$7,500 by failing to give Mr. Morgan any credit for the work he had performed, asserting, without any factual basis, that Mr. Morgan's accounting was fraudulent. (Hearing Panel Order, p. 156). Mr. Morgan will not quibble with the additional \$2,000, but does affirmatively deny submitting any fraudulent accounting. This specific finding was denied by Mr. Morgan and was based upon a witness allegedly overhearing a conversation between Mr. Morgan and Mr. Coles. (January 28, 2020, Tr. 427)

agreement and possible medical malpractice case, he failed to keep complete records of the funds paid to him, and he failed to provide his client file to the McKinneys.⁵

Mr. Morgan explained that he was able to obtain a plea agreement where all of the criminal charges asserted against Lori Ann McKinney would be dismissed upon her husband Richard McKinney entering a guilty plea to one of the four counts returned against him. (January 28, 2020 Tr. 318-19). Mr. Bostic and Mr. Morgan met with the McKinneys to go over the plea agreement. (January 27, 2020 Tr. 118-20). Mr. Bostic testified that Mr. Morgan had earned the money he was paid in this criminal case because the McKinneys were facing potentially very long sentences, which were avoided through the plea agreement negotiated by Mr. Morgan. (January 27, 2020, Tr. 132-33).⁶

The McKinneys did speak with Mr. Morgan about a possible medical malpractice case Mr. McKinney thought he had, that would have to be filed in Kentucky. Mr. Morgan told the McKinneys that he was not licensed to practice law in Kentucky, but that he would check around to see if he could find a lawyer for them. (January 28, 2020 Tr. 319). Mr. Morgan also acknowledged he never sent the McKinneys any letter discussing the possible medical malpractice case. (January 28, 2020 Tr. 321). Mr. Morgan also explained he did not know that the statute of limitations for a medical malpractice case in Kentucky was one year. (January 28, 2020 Tr. 320-21). In connection with taking a sworn statement from Mr. Morgan, the ODC required him to produce his client files for

⁵Amazingly, even though it is undisputed that Mr. Morgan eventually found the McKinneys' file and did provide it to the ODC prior to the hearing, the ODC recommended and the Hearing Panel accepted a finding that Mr. Morgan failed to provide a copy of their file. (Hearing Panel Order, ¶116).

⁶Despite the testimony from Mr. Morgan and Mr. Bostic to the contrary, the ODC recommended and the Hearing Panel adopted a finding that Mr. Morgan had failed to communicate the plea agreement to the McKinneys. (Hearing Panel Order, ¶114).

these various complainants. At that time, he was unable to locate the McKinneys' file. However, a few weeks before the hearings, he was able to find their file and it was produced to the ODC. (January 28, 2020 Tr. 291-92). Mr. Morgan explained he did not deliberately hold back the production of their file; he simply did not find it prior to giving his sworn statement.

Lori Ann McKinney testified that she and her husband retained Mr. Morgan to represent them in their criminal cases on or about December 6, 2016. (January 27, 2020 Tr. 337). After Mr. McKinney entered the guilty plea, but before the sentencing, the McKinneys terminated his representation of them in their criminal cases. (January 27, 2020 Tr. 352). The alleged malpractice occurred on August 4, 2016. (January 27, 2020 Tr. 343). The McKinneys mentioned this possible medical malpractice case to him some time in February, 2017, after another law firm had rejected the case due to the fact that Mr. McKinney was incarcerated. (January 27, 2020 Tr. 338).

Richard McKinney testified that his main complaint against Mr. Morgan was that he was hoping to receive an alternative sentence and was disappointed when he did not. (January 28, 2020 Tr. 43). Mr. McKinney did agree that he fired Mr. Morgan after he entered the guilty plea, but before the sentencing hearing. (January 28, 2020 Tr. 49-50). Although Mr. Morgan had requested a \$10,000 for the retainer in these criminal cases, the McKinneys only paid him \$5,900. (January 28, 2020 Tr. 67). The plea agreement did not have any language binding the trial court to impose any alternative sentencing. (January 28, 2020 Tr. 68-69).

Mr. Morgan did not violate any of his ethical obligations in connection with the representation of the McKinneys in their criminal cases. He was able to negotiate a favorable plea agreement, but was fired by the McKinneys prior to the sentencing hearing. The plea agreement did not bind the trial court to impose any alternative sentence, which is the main complaint from Mr.

McKinney. There is no evidence to support the allegation that Mr. Morgan deliberately refused to produce the McKinneys' files prior to giving his sworn statement. In fact, as soon as he located their file, it was produced to the ODC.

With respect to the possible medical malpractice action, Mr. Morgan was **negligent** in failing to communicate with the McKinneys about the one-year statute of limitations, **negligent** in advising the McKinneys of his failure to find another lawyer to take the case, and **negligent** in his lack of diligence to provide the McKinneys with any written explanation about their possible medical malpractice claim.

5. Count IV WANDA TALLMAN (Negligence)

In Count IV, the ODC alleges Mr. Morgan violated Rules 1.5(b), 1.15(a) & (c), 1.16(d), 8.1(b), and 8.4(c) & d) of the West Virginia Rules of Professional Conduct in connection with his representation of Stephanie Parkin, who is the granddaughter of Wanda Tallman, who paid the retainer on her behalf. Specifically, the ODC alleges Mr. Morgan failed to obtain a written agreement with Ms. Parkin, he failed to deposit the retainer fee in his trust account until that money was earned, he failed to provide the client file and to refund any unearned fees, he failed to timely respond to ODC's requests for information on numerous occasions, and he wrongfully misappropriated and converted funds belonging to his client.

Ms. Tallman admitted that while Mr. Morgan was representing Ms. Parkin, Ms. Tallman and her granddaughter had some kind of disagreement, which prompted her request for a refund. (January 27, 2020 Tr. 244). Ms. Tallman was not Mr. Morgan's client; Ms. Parkin was. (January 27, 2020 Tr. 245).

Mr. Morgan did not have a written fee agreement with Ms. Parkin. (January 28, 2020 Tr. 323). Based upon the bank records presented, he agreed that the retainer fee had not been deposited into his trust account. (January 28, 2020 Tr. 323-24). Mr. Morgan testified that he provided all of the legal services necessary on behalf of Ms. Parkin and denied owing her any money. (January 28, 2020 Tr. 407). During questioning from the Panel, Mr. Morgan acknowledged that for certain criminal and domestic relations cases, he charged a standard flat fee. However, he acknowledged that those flat fees should have been deposited in his trust account until the fees were earned, at which time the earned fees should have been deposited in his operating account. He also agreed that even in flat fee cases, he needed to keep records of his time to help establish when the fees were earned. (January 28, 2020 Tr. 436-38). In his sworn statement, he explained that he was unable to provide an accounting because it should have been included in the Quickbooks program, but he is unable to access that data. (Tab 53, at 2218).

Mr. Morgan was **negligent** in failing to obtain a written agreement with Mr. Parkin. He was **negligent** in failing to have the retainer fees deposited into his trust account. While throughout the process of the ODC seeking multiple responses from Mr. Morgan the numerous complaints filed against him, he may have failed to file a response to each and every request, there is no evidence Mr. Morgan intentionally failed to file such a response. The record reflects that many of the complaints or requests for factual information were sent during the time when Mr. Morgan was unable to go into his office because he was dealing with medical issues. There is no evidence proving that Mr. Morgan deliberately failed to produce his file. (Tab 157).

6. Count V DENNY W. BOSTIC (Financial issues)

In Count V, the ODC alleges Mr. Morgan violated Rules 1.15(a) & (c), 7.5, 8.1(b), and 8.4(b) & (d) of the West Virginia Rules of Professional Conduct. Specifically, the ODC alleges Mr.

Morgan failed to hold and deposit client retainer fees in his trust account until such fees were earned, he continued to use "& Associates" when he no longer had any other lawyers employed in his office, he failed to timely respond to some ODC requests, he failed to pay state and federal income taxes and workers' compensation premiums, and he provided a worthless check to an employee.

Mr. Bostic testified that on more than one occasion, the pay check he received would not be honored by the bank on the date of the check. However, the checks would clear a few days later. (January 27, 2020 Tr. 113). One of the last pay checks he received was not honored, which prompted Mr. Bostic to obtain a worthless check warrant against Mr. Morgan. (January 27, 2020 Tr. 101). Mr. Bostic agreed that Mr. Morgan paid him the money about a year and a half later. (January 27, 2020 Tr. 102). Additionally, Mr. Bostic's health insurance premiums were not paid for several months and Mr. Morgan had failed to pay certain taxes. (January 27, 2020 Tr. 103-04). Although Mr. Bostic raised some issue with respect to the Charleston office maintained by Mr. Morgan, he did testify to meeting with a client in the Union Building, where this empty office was located. (January 27, 2020 Tr. 111-12).

Mr. Morgan testified that there did come a time when his law firm did not pay Mr. Bostic's health insurance. He thought the premiums were paid automatically, but he discovered the premium had not been paid for himself when he was in the process of making medical appointments. (January 28, 2020 Tr. 326). As for the alleged worthless check given to Mr. Bostic, he testified he understood from the bank that the check cleared subsequently, but he discovered at the worthless check hearing he learned that was not true. Mr. Morgan went ahead and paid the check to Mr. Bostic and the charges were dismissed. (January 28, 2020 Tr. 327-28). The bank records establish through multiple examples that retainer checks received from clients, particularly in flat fee cases, were deposited in his operating account, rather than in his trust account. (January 28, 2020 Tr. 334-37).

Mr. Morgan testified that he had a repayment agreement for the payment of taxes and workers' compensation premiums. (January 28, 2020 Tr. 395-96).⁷ For a time, Mr. Morgan did maintain an empty office in Charleston that could be used, as needed, to meet with clients in that area. (January 28, 2020 Tr. 405).

Mr. Morgan was negligent in regularly depositing client retainer fees in his operating account, rather than in his trust account. He was **negligent** in keeping the words "& Associates" in the name of his law firm after he no longer employed any associates. While throughout the process of the ODC seeking multiple responses from Mr. Morgan the numerous complaints filed against him, he may have failed to file a response to each and every request, there is no evidence Mr. Morgan intentionally failed to file such a response. The record reflects that many of the complaints or requests for factual information were sent during the time when Mr. Morgan was unable to go into his office because he was dealing with medical issues. While Mr. Morgan struggled with his finances and sometimes gave paychecks to employees that did not clear the bank on the date of the check, failed to pay health insurance and workers compensation premiums, and taxes, he ultimately made sure all paychecks cleared and were paid and he has an agreement to pay back taxes and workers compensation premiums. These issues are more financial in nature as opposed to being an issue of legal ethics.

7. Count VI EVELYN G. LEWIS (Mitchell Coles and negligence)

In Count VI, the ODC alleges Mr. Morgan violated Rules 1.4(a), 1.15(a) & (d), 1.16(d), and 8.1(b) of the West Virginia Rules of Professional Conduct. Specifically, the ODC alleges Mr.

⁷The ODC recommended and the Hearing Panel adopted findings and conclusions that Mr. Morgan had violated his ethical obligations in connection with his taxes and workers' compensation premiums while ignoring Mr. Morgan's undisputed testimony that he had payment plans in place for both. (Hearing Panel, ¶171).

Morgan failed to keep the client reasonably informed about the status of the case, he failed to promptly comply to reasonable requests for information, he failed to hold client funds in his trust account until the fees were earned, he failed to provide his client with a full accounting of the work performed, he failed to provide the client file, he failed to provide a refund of unearned fees, and he failed to timely respond to ODC requests.

Ms. Lewis retained Mr. Morgan to represent her in a divorce action through a meeting with Mitchell Coles, who was a paralegal employed by Mr. Morgan. (January 27, 2020 Tr. 374). She made the retainer check out to “Mitchell Coles” in the amount of \$3,500. (January 27, 2020 Tr. 376). Mr. Morgan did appear on her behalf at temporary hearing. (January 27, 2020 Tr. 377).

Mr. Morgan was not aware of any fee agreement being obtained from Ms. Lewis. (January 28, 2020 Tr. 343). To the extent Mr. Morgan failed to file a response to the ODC’s request dated July 20, 2018, Mr. Morgan explained he did not deliberately fail to respond. This letter was received at a time when Mr. Morgan was unable to get into his office due to the medical issues he had during that time period. (January 28, 2020 Tr. 340). While Ms. Lewis may have asked Mr. Coles multiple times for copies of her file, Mr. Morgan had no knowledge of such requests. In fact, Mr. Morgan has been unable to locate her file. (January 28, 2020 Tr. 341-42).

Mr. Morgan was **negligent** in relying on Mitchell Coles, who was the exclusive contact with Ms. Lewis. To the extent that Ms. Lewis made various requests of Mr. Cole for her file or for an update in her case, Mr. Morgan ultimately bears responsibility of Mr. Coles’ actions and inactions. It is not clear from the record that the check Ms. Coles wrote to “Mitchell Coles” was ever deposited in Mr. Morgan’s law firm accounts. However, once again, Mr. Morgan was **negligent** in supervising Mr. Coles and making sure that any money paid by a client to retain Mr. Morgan was deposited in Mr. Morgan’s trust account. Mr. Morgan’s **negligence** also caused Ms. Lewis not to receive a

complete accounting of the money paid, the money earned, and the work performed. Although Mr. Morgan has not been able to find her file, he is still responsible for making sure such a file exists. While throughout the process of the ODC seeking multiple responses from Mr. Morgan the numerous complaints filed against him, Mr. Morgan may have failed to file a response to each and every request, there is no evidence Mr. Morgan intentionally failed to file such a response. The record reflects that many of the complaints or requests for factual information were sent during the time when Mr. Morgan was unable to go into his office because he was dealing with medical issues.

8. Count VII TODD W. CLUTTER (Negligence and health issues)

In Count VII, the ODC alleges Mr. Morgan violated Rules 1.4(a) & (b), 1.15(a) & (c), 1.16(d), and 8.1(b) of the West Virginia Rules of Professional Conduct. Specifically, the ODC alleges Mr. Morgan failed to keep his client reasonably informed about the status of his cases, he failed to comply with reasonable requests for information, he failed to communicate with clients, he failed to hold funds paid by clients in his trust account, he failed to provide the client file and pay refund for unearned fees, and he failed to respond timely to ODC's requests for information.

Mr. Clutter testified that he retained Mr. Morgan to represent him and his wife in several different cases, but sometimes Mr. Morgan did not show up for scheduled hearings. (January 27, 2020 Tr. 201-02). Mr. Clutter eventually received some of his files from Mr. Morgan, but some critical documents provided to Mr. Morgan were not found or returned to him. (January 27, 2020 Tr. 205-06). Mr. Clutter acknowledged that Mr. Morgan continued to represent the Clutters in various ongoing matters, even after they filed the ethics complaint against him. (January 27, 2020 Tr. 210). Jacqueline Clutter testified in great detail about all of the various actions where Mr. Morgan represented them. (January 27, 2020 Tr. 220-28).

Mr. Morgan testified that he represented the Clutters in several different cases and did not believe he owed them any money. (January 28, 2020 Tr. 406). During the time when he was dealing with his medical issues, Mr. Morgan acknowledges he did not do a good job having a process in place to communicate with his clients. The Clutters are the clients who posted a note on the door of his home. Mr. Morgan's reliance on Mitchell Coles during this time period was misplaced. (January 28, 2020 Tr. 406-07).

Particularly during the time when Mr. Morgan could not go into his office, he was negligent in communicating regularly and promptly with his clients. Mr. Morgan had a practice of having retainers paid by clients deposited in his operating account, rather than his trust account. Mr. Morgan did provide the client files he located to the Clutters, but some documents in those files were missing. While throughout the process of the ODC seeking multiple responses from Mr. Morgan the numerous complaints filed against him, Mr. Morgan may have failed to file a response to each and every request, there is no evidence Mr. Morgan intentionally failed to file such a response. The record reflects that many of the complaints or requests for factual information were sent during the time when Mr. Morgan was unable to go into his office because he was dealing with medical issues.⁸

9. Count VIII LONNIE DENNIS LILLY (Negligence and health issues)

In Count VIII, the ODC alleges Mr. Morgan violated Rules 1.1, 1.3, 1.4(a) & (b), 1.5(b), 1.15(a) & (c), and 8.1(b). Specifically, the ODC alleges Mr. Morgan failed to act competently and diligently in handling the client's case, he failed to keep his client reasonably informed about the

⁸Mr. Morgan disputes and denies that he owes the Clutters any money, in light of all of the professional services he provided to them in their many different matters. Mr. Morgan testified in some detail about the various cases involving the Clutters. The ODC proposed and the Hearing Panel adopted a recommendation that somehow Mr. Morgan owes the Clutters \$9,000. (Hearing Panel Order, p. 156).

status of the case, he failed to promptly comply with reasonable requests for information and he failed to communicate with the client, he represented a client without a written fee agreement, he failed to deposit the client's retainer in his trust account, and he failed to timely respond to OCD's lawful requests for information.

Mr. Lilly testified that he hired Mr. Morgan in connection with an automobile accident. (January 27, 2020 Tr. 260). Mr. Lilly had filed an uninsured claim against his insurance company in Kanawha County and he retained Mr. Morgan, who had the case transferred to Raleigh County. (January 27, 2020 Tr. 267). At some point, Mr. Lilly went to Mr. Morgan's office and saw the door locked and lots of papers stuck inside the front door. (January 27, 2020 Tr. 261). Mr. Lilly paid Mr. Morgan a total of \$1,250. (January 27, 2020 Tr. 262). Mr. Lilly did have a fee agreement with Mr. Morgan, but when he asked for his file, Mr. Morgan did not provide it to him. (January 27, 2020 Tr. 263-64). Mr. Lilly acknowledged that Mr. Morgan did discuss the possibility of pursuing a bad faith action against his insurance company. (January 27, 2020 Tr. 270).

Mr. Morgan testified Mr. Lilly paid him a retainer to have the case Mr. Lilly filed in Kanawha County transferred to Raleigh County, which he did. (January 28, 2020 Tr. 346). Mr. Morgan admitted the retainer was not deposited in his trust account because it was a flat fee case and also admitted he did not have a written fee agreement. (January 28, 2020 Tr. 347).

Mr. Lilly did not appear to fully understand the nature of the representation provided by Mr. Morgan, which would have been much clearer if Mr. Morgan had provided Mr. Lilly with a written fee agreement explaining what services would be provided. Mr. Morgan deposited Mr. Lilly's retainer in his operating account, rather than his trust account. While throughout the process of the ODC seeking multiple responses from Mr. Morgan the numerous complaints filed against him, Mr.

Morgan may have failed to file a response to each and every request, there is no evidence Mr. Morgan intentionally failed to file such a response. The record reflects that many of the complaints or requests for factual information were sent during the time when Mr. Morgan was unable to go into his office because he was dealing with medical issues. To the extent a request from ODC was sent to Mr. Morgan's counsel rather than to Mr. Morgan, any failure of Mr. Morgan's counsel to file a timely response to such request is a reflection of Mr. Morgan's counsel and should not be considered in evaluating the charges against Mr. Morgan.

10. Count IX DANI JONES & ANDREW ARRICK (Michell Coles and negligence)

In Count IX, the ODC alleges Mr. Morgan violated Rules 1.1, 1.3, 1.4(a) & (b), 5.3, and 8.1(b) of the West Virginia Rules of Professional Conduct. Specifically, the ODC alleges Mr. Morgan failed to act competently and diligently in handling the client's case, he failed to keep the client reasonably informed about the status of the case, he failed to promptly comply with reasonable requests for information, he failed to communicate with the client, he failed to ensure his staff's conduct was compatible with his professional obligations, and he failed to timely response to ODC requests.

Ms. Jones testified that she had never met Mr. Morgan in person, but did meet with Mitchell Coles at a wedding and Mr. Coles explained he worked for Mr. Morgan. Ms. Jones and her son Mr. Arrick wanted to file a civil lawsuit relating to injuries they claimed to have suffered due to mold at their mobile home. (January 27, 2020 Tr. 294-95). No fee agreement was ever signed. After some nasty text messages, Mr. Coles returned her file to her. (January 27, 2020 Tr. 300-01).

Mr. Morgan testified that he had never met Ms. Jones or Mr. Arrick and was unaware of any messages they may have left with his office. The first time he saw these two individuals was when

they appeared at this hearing. He understands Ms. Jones and Mr. Arrick has sued Jeff Rodgers and Mr. Morgan for 11 million dollars, but at the time of the hearing, the complaint had not been served on Mr. Morgan. (January 28, 2020 Tr. 350, 408).

Mr. Morgan is responsible for the actions of his employees, including Mitchell Coles, even where Mr. Morgan did not know anything about this particular case. Mr. Morgan was **negligent** in supervising Mr. Coles, which resulted in these two clients not having their possible lawsuit litigated promptly, diligently, and competently. Mr. Morgan could not communicate with these clients about their case because he knew nothing about them, but his **negligence** in supervising Mr. Coles ultimately resulted in these clients not filing their case in time. While throughout the process of the ODC seeking multiple responses from Mr. Morgan the numerous complaints filed against him, Mr. Morgan may have failed to file a response to each and every request, there is no evidence Mr. Morgan intentionally failed to file such a response. The record reflects that many of the complaints or requests for factual information were sent during the time when Mr. Morgan was unable to go into his office because he was dealing with medical issues.⁹

11. Count X REBECCA DOSS (HELMICK)(Negligence and health issues)

In Count X, the ODC alleges Mr. Morgan violated Rules 1.1, 1.3, 1.4(a) & (b), 1.15(a) & (c), and 8.1(a) & (b). Specifically, the ODC alleges Mr. Morgan failed to act competently and diligently in handling the client's case, he failed to keep the client reasonably informed about the status of the

⁹The ODC proposed and the Hearing Panel recommended a wide variety of ethical sanctions against Mr. Morgan in connection with these clients Mr. Morgan had never met in his life. (Hearing Panel Order, pp. 74-75). How can Mr. Morgan have mishandled the case of clients he did not know? This is one of the several examples of how Mr. Morgan was damaged by the actions of Mr. Coles and why the actions of Mr. Coles should be treated as a mitigating, rather than as an aggravating factor. Fundamentally, a lawyer should not be sanctioned for ethics violations in connection with a client the lawyer has never met and did not know even existed.

case, he failed to promptly comply with reasonable requests for information, he failed to communicate with the client, he failed to hold client funds in his trust account, he made a false statement during the investigation of this ethics complaint, and he failed to timely respond to an ODC request for information on numerous occasions.

Ms. Helmick testified that she hired Mr. Morgan to represent her in a divorce. (January 28, 2020 Tr. 116). Mr. Morgan did appear with her at a hearing in the divorce action. She retained Mr. Morgan with an initial \$2,500 check and later a \$500 check. (January 28, 2020 Tr. 117-19, 135-36). Thereafter, around March, April, and May of 2018, she was unsuccessful in reaching anyone at Mr. Morgan's office by telephone. (January 28, 2020 Tr. 121). Later in her testimony, Ms. Helmick stated she paid Mr. Morgan \$3,500 and she never signed a retainer agreement with him. (January 28, 2020 Tr. 134).

Based upon the records presented to him, Mr. Morgan admitted that the two retainer checks provided by Ms. Doss were deposited in the operating account, rather than his trust account. (January 28, 2020 Tr. 337). Mr. Morgan could not recall if he had produced Ms. Doss's file to the ODC, but he thought her file may have been one of the files taken by Mr. Coles, but not returned. (January 28, 2020 Tr. 352). Mr. Morgan stated he had explained to Ms. Doss that under West Virginia law, the fact that her daughter was of age and wanted to stay with her father would be very difficult to overcome. In this bitter divorce, Ms. Doss was very unhappy with the custody issue. (January 28, 2020 Tr. 413).

The main complaint asserted by Ms. Doss is she was not satisfied with the custody ruling, where the trial court went with the wishes of her daughter, who was of age. Mr. Morgan had no control over that custody issue. There were communication problems, particularly during the time

when Mr. Morgan was unable to get into his office due to his medical issues. Although Mr. Morgan did not provide a copy of Ms. Doss's file to the ODC, he explained he could not find it. Mr. Morgan did not deliberately fail to comply with this request from the ODC. Mr. Morgan consistently deposited retainer checks into his operating account, rather than his trust account. There is no evidence in this record of Mr. Morgan deliberately making any false statement to the ODC. While throughout the process of the ODC seeking multiple responses from Mr. Morgan the numerous complaints filed against him, Mr. Morgan may have failed to file a response to each and every request, there is no evidence Mr. Morgan intentionally failed to file such a response. The record reflects that many of the complaints or requests for factual information were sent during the time when Mr. Morgan was unable to go into his office because he was dealing with medical issues.

12. Count XI TAMMY S. REED (Negligence)

In Count XI, the ODC alleges Mr. Morgan violated Rules 1.1, 1.3, 1.15(a) & (c), 1.16(d), 5.3, and 8.1(a) & (b). Specifically, the ODC alleges Mr. Morgan failed to act competently and diligently in handling a client's case, he failed to deposit a retainer from the client in his trust account, he failed to provide the file to the client, he failed to refund any unearned fees, he failed to ensure his staff's conduct was compatible with his professional obligations, he made a false statement during the investigation of this ethics complaint, and he failed to timely respond to ODC requests for lawful information.

Ms. Reed testified that she retained Mr. Morgan to represent her in a divorce. She retained Mr. Morgan with a check for \$2,500 and continued to make \$200 monthly payments thereafter. She thought a total of \$4,800 had been paid to Mr. Morgan. (January 27, 2020 Tr. 393-94). Eventually, Ms. Reed was unable to speak with Mr. Morgan, which prompted her to fire him and obtain new

counsel. Mr. Morgan never provided her with an accounting of the money she paid to him. (January 27, 2020 Tr. 395-96). Despite her request and the request of her new lawyer, Mr. Morgan never provided her file to her and did not pay her a refund. (January 27, 2020 Tr. 397). Mr. Morgan did provide her file in response to the ODC's request. (Tab 261).

Mr. Morgan agreed that he needs to go through Ms. Reed's file to determine what refund is owed to her. (January 27, 2020 Tr. 402). Mr. Morgan was **negligent** in communicating with Ms. Reed as well as in competently and diligently handling her case. Mr. Morgan placed retainer fees in his operating account, rather than in his trust account until such fees had been earned. Mr. Morgan has not provided Ms. Reed an accounting for the work he performed, which would be necessary to determine the amount of refund she is owed. Mr. Morgan admits she is owed a refund, but he has not make the calculation at this time nor has he paid her any refund. Mr. Morgan was **negligent** in supervising his staff to make sure retainer fees were deposited in his trust account until the fees were earned. There is no evidence in this record of Mr. Morgan deliberately making any false statement to the ODC. While throughout the process of the ODC seeking multiple responses from Mr. Morgan the numerous complaints filed against him, Mr. Morgan may have failed to file a response to each and every request, there is no evidence Mr. Morgan intentionally failed to file such a response. The record reflects that many of the complaints or requests for factual information were sent during the time when Mr. Morgan was unable to go into his office because he was dealing with medical issues.

13. Count XII DEBORAH J. KYLE (Negligence)

In Count XII, the ODC alleges Mr. Morgan violated Rules 1.1, 1.3, 1.4(a) & (b), 1.15(a) & (c), 5.3, and 8.1(a) & (b). Specifically, the ODC alleges Mr. Morgan failed to act competently and

diligently in handling the client's case, he failed to keep the client reasonably informed about the status of the case, he failed to promptly comply with reasonable requests for information, he failed to communicate with the client, he failed to hold client funds in his trust account, he failed to ensure his staff's conduct was compatible with his professional obligations, he made a false statement during the investigation of this ethics complaint, and he failed to timely respond to ODC's lawful requests for information

Ms. Kyle testified she retained Mr. Morgan for \$3,050 to represent her in a divorce. (January 27, 2020 Tr. 325, 327). Mr. Morgan did represent her at a hearing, but thereafter, Ms. Kyle had problems getting in contact with Mr. Morgan. (January 27, 2020 Tr. 325-27). Ms. Kyle eventually fired Mr. Morgan and retained a new lawyer. (January 27, 2020 Tr. 327-29).

Mr. Morgan agreed that he does owe a refund to Ms. Kyle, but he has not been able to locate her file. (January 27, 2020 Tr. 402; Tab 51).

Mr. Morgan was **negligent** in communicating with Ms. Kyle, handling her case, keeping her informed, and delaying the resolution of her case. Mr. Morgan was **negligent** in failing to have a good system in place to communicate with his clients during the time when he was dealing with his medical issues. Mr. Morgan consistently deposited retainer fees from clients into his operating account, rather than his trust account until such fees were earned. There is no evidence in this record of Mr. Morgan deliberately making any false statement to the ODC. While throughout the process of the ODC seeking multiple responses from Mr. Morgan the numerous complaints filed against him, Mr. Morgan may have failed to file a response to each and every request, there is no evidence Mr. Morgan intentionally failed to file such a response. The record reflects that many of the complaints or requests for factual information were sent during the time when Mr. Morgan was unable to go into his office because he was dealing with medical issues.

14. Counts XIII, XIV & XV HUNTER P. CHELLIS, SARA E. REYNOLDS & THERESA L. REYNOLDS (Negligence and health issues)

In Counts XIII, XIV, and XV, the ODC alleges Mr. Morgan violated Rules 1.3, 1.4(a) & (b), 1.5(b), 1.15(a), 8.1(b), and 8.4(c) & (d) of the West Virginia Rules of Professional Conduct. Specifically, the ODC alleges Mr. Morgan failed to act diligently in handling the client's cases, he failed to keep the clients reasonably informed about the status of the cases, he failed to promptly comply with reasonable requests for information, he failed to communicate with the clients, he failed to obtain a written fee agreement, he failed to hold third party funds in his trust account, he failed to timely respond to ODC's requests for lawful information, and he wrongfully misappropriated and converted funds belonging to his client or third party.

Ms. Chellis testified that she retained Mr. Morgan to recover damages for personal injuries suffered in an automobile accident. Her mother Theresa Reynolds and sister Sara Reynolds were injured in the same accident and all three of them were represented Mr. Morgan. (January 28, 2020 Tr. 102-05). In the summer of 2018, Ms. Chellis had trouble reaching any person in Mr. Morgan's office. (January 28, 2020 Tr. 105). At some point, Mr. Morgan gave her his cell phone number and her case was settled. (January 28, 2020 Tr. 109).

Theresa Reynolds testified that she had trouble communicating with Mr. Morgan after he agreed to represent her and both of her daughters in a tort action. (January 28, 2020 Tr. 138-39). Her case was settled in 2018. (January 28, 2020 Tr. 142).

Sara Reynolds testified that she had trouble communicating with Mr. Morgan. (January 28, 2020 Tr. 151). Her case was settled in 2018. (January 28, 2020 Tr. 152).

Mr. Morgan testified that for much of the time when Ms. Chellis, Ms. Reynolds, and Ms. Reynolds attempted to reach him at his office, Mr. Morgan was not in the office dealing with his

medical issues. (January 28, 2020 Tr. 412). Mr. Morgan was **negligent** in failing to act diligently in resolving these combined cases. Mr. Morgan also failed to have a good system in place to communicate with his clients during the time when he was dealing with his medical issues. Mr. Morgan was **negligent** in failing to have written fee agreements with his clients. Mr. Morgan was **negligent** in the way his clients' funds were deposited in his accounts. While throughout the process of the ODC seeking multiple responses from Mr. Morgan the numerous complaints filed against him, Mr. Morgan may have failed to file a response to each and every request, there is no evidence Mr. Morgan intentionally failed to file such a response. The record reflects that many of the complaints or requests for factual information were sent during the time when Mr. Morgan was unable to go into his office because he was dealing with medical issues.

15. Count XVI CRYSTAL M. SHEPPARD (Negligence)

In Count XVI, the ODC alleges Mr. Morgan violated Rules 1.3, 1.4(a) & (b), a.16(d), and 8.1(d) of the West Virginia Rules of Professional Conduct. Specifically the ODC alleges Mr. Morgan failed to act diligently in handling the client's case, he failed to keep his client reasonably informed about the status of the case, he failed to promptly comply with reasonable requests for information, he failed to communicate with the client, he failed to provide the client file as requested, and he failed to timely respond to ODC's lawful requests for information.

Ms. Sheppard testified that she hired Mr. Morgan to represent her in a personal injury action arising out of an automobile accident. (January 27, 2020 Tr. 368). There came a time when Ms. Sheppard had trouble communicating with Mr. Morgan at this office. (January 27, 2020 Tr. 369). She sent Mr. Morgan a certified letter firing him, obtained a new counsel, and her case was settled in about three weeks. (January 27, 2020 Tr. 369-70).

Mr. Morgan was **negligent** in failing to act diligently in handling this case. Mr. Morgan also failed to have a good system in place to communicate with his clients during the time when he was dealing with his medical issues. While throughout the process of the ODC seeking multiple responses from Mr. Morgan the numerous complaints filed against him, Mr. Morgan may have failed to file a response to each and every request, there is no evidence Mr. Morgan intentionally failed to file such a response. The record reflects that many of the complaints or requests for factual information were sent during the time when Mr. Morgan was unable to go into his office because he was dealing with medical issues.

16. Count XVII JONATHAN M. HAYNES (Mitchell Coles)

In Count XVII, the ODC alleges Mr. Morgan violated Rules 1.1, 1.3, 1.4(a) & (b), 1.15(a) & (c), and 8.4(c) of the West Virginia Rules of Professional Conduct. Specifically, the ODC alleges Mr. Morgan failed to act competently and diligently in handling the client's case, he failed to keep his client reasonably informed about the status of the case, he failed to promptly comply with reasonable requests for information, he failed to communicate with the client, he failed to hold his client's funds in his trust account, he failed to keep complete records of funds paid to him, and he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation.

Mr. Haynes testified that he retained Mr. Morgan to represent him in a divorce. (January 28, 2020 Tr. 405). Mr. Haynes believes he paid Mr. Morgan a total of \$4,000. (January 28, 2020 Tr. 406). Mr. Haynes asked Mr. Coles for his file, but Mr. Coles said he had the file in Beckley. Because Mr. Coles never returned the file, Mr. Haynes spent \$300 to obtain his file from the clerk's office. (January 28, 2020 Tr. 412). Mr. Morgan never paid Mr. Haynes any refund. Mr. Haynes had problems trying to speak with Mr. Morgan. (January 28, 2020 Tr. 413-14).

Mr. Morgan was not aware that Mr. Haynes had requested to receive a copy of his file. It is possible this request was made to Mr. Coles. (January 28, 2020 Tr. 368). Mr. Morgan did not recall receiving any letter from Mr. Haynes' new counsel seeking a copy of the file. (January 28, 2020 Tr. 369).

Mr. Morgan was **negligent** in communicating with Mr. Haynes during his representation. Mr. Morgan deposited the funds paid by Mr. Haynes in his operating account, rather than in his trust account until those fees were earned. Mr. Morgan was **negligent** in his supervision of Mr. Coles and in relying on Mr. Coles to have so much contact with Mr. Morgan's clients. There is no evidence to support the allegation that Mr. Morgan engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation.

17. Count XVIII ELIZABETH ANN GOOD (Financial issues)

In Count XIX, the ODC alleges Mr. Morgan violated Rules 8.1(b) and 8.4(b) of the West Virginia Rules of Professional Conduct. Specifically, the ODC alleges Mr. Morgan failed to timely respond to ODC's lawful requests for information and Mr. Morgan failed to timely pay wages in violation of the law.

Ms. Good was employed as a legal assistant by Mr. Morgan for about two and one-half months. (January 27, 2020 Tr. 90, 92). Mr. Morgan was supposed to pay Ms. Good in cash. When Mr. Morgan failed to pay her wages, Ms. Good filed an ethics charge against him. (January 27, 2020 Tr. 91). Ms. Good sued Mr. Morgan in Magistrate Court and obtained a judgment against him for the wages owed. (January 27, 2020 Tr. 94-95).

Mr. Morgan testified that he does not dispute Ms. Good's assertion that he owes her for the wages she earned and he does have a judgment against him for about \$2,342, which has not yet been paid. (January 28, 2020 Tr. 370-71).

While throughout the process of the ODC seeking multiple responses from Mr. Morgan the numerous complaints filed against him, Mr. Morgan may have failed to file a response to each and every request, there is no evidence Mr. Morgan intentionally failed to file such a response. The record reflects that many of the complaints or requests for factual information were sent during the time when Mr. Morgan was unable to go into his office because he was dealing with medical issues. While Mr. Morgan does owe wages to Ms. Good, this issue has to do with Mr. Morgan's financial issues, rather than any professional ethics violation.

**18. Count XIX KELSEA HOWER & LISA STANSEL
(GALITZ)(Negligence)**

In Count XIX, the ODC alleges Mr. Morgan violated Rules 1.1, 1.3, 1.4(a) & (b), 1.15(a), 5.3, 8.1(a), and 8.4(c) & (d) of the West Virginia Rules of Professional Conduct. Specifically, the ODC alleges Mr. Morgan failed to act competently and diligently in handling the client's case, he failed to keep his client reasonably informed about the status of the case, he failed to promptly comply with reasonable requests for information, he failed to communicate with the client, he failed to hold his client's funds in his trust account, he failed to keep complete records of funds paid to him, he failed to ensure his staff's conduct was compatible with his professional obligations, he made a false statement during the investigation of this ethics issue, and he wrongfully misappropriated and converted funds belonging to his client or third party.

Ms. Hower testified that she hired Mr. Morgan to represent her to recover personal injury damages she suffered in an automobile accident. (January 28, 2020 Tr. 71). Mr. Morgan settled her case in April, 2017. (January 28, 2020 Tr. 73). After the case was settled, Mr. Morgan told Ms. Hower that she would receive a partial payment while the medical subrogation was being negotiated. (January 28, 2020 Tr. 74). At the time she filed her ethics complaint against Mr. Morgan in

September, 2018, Ms. Hower still had not received any money from the settlement. In September of 2019, she received a check for \$7,000. (January 28, 2020 Tr. 75). Mr. Morgan did not provide Ms. Hower with a settlement sheet showing how the settlement money was distributed. (January 28, 2020 Tr. 75-76). Ms. Hower was not aware of the fact that the settlement check was not deposited in Mr. Morgan's trust account and that Mr. Morgan's trust account had a negative balance. (January 28, 2020 Tr. 77). Ms. Galitz, who is the mother of Ms. Hower, testified that Mr. Morgan never provided a settlement sheet to Ms. Hower. (January 28, 2020 Tr. 84).

Mr. Morgan did not create a settlement sheet in connection with Ms. Hower's settlement. (January 28, 2020 Tr. 374). Mr. Morgan admitted this case and the way the money was deposited was handled poorly. (January 28, 2020 Tr. 376-77). Mr. Morgan accepted full responsibility for the way this particular settlement was handled. (January 28, 2020 Tr. 411-12).

Mr. Morgan was **negligent** in the way he handled this case, from the delay in getting it resolved to the lack of communication with the client to the failure to deposit the insurance proceeds in the trust account until the settlement ultimately was paid to Ms. Hower. Mr. Morgan was **negligent** in creating a settlement sheet, which would have provided Ms. Hower with a breakdown of the settlement proceeds. Mr. Morgan was **negligent** in ensuring that his staff's conduct was compatible with his professional obligations. There is no evidence supporting the allegation that Mr. Morgan made a false statement during the investigation of this complaint.

19. Count XX PIYUSH BARERIA (Mitchell Coles and negligence)

In Count XX, the ODC alleges Mr. Morgan violated Rules 1.3, 3.2, 1.5(b), 1.15(a) & (c), 1.16(d), and 5.3 of the West Virginia Rules of Professional Conduct. Specifically, the ODC alleges that Mr. Morgan failed to act diligently and failed to expedite litigation, he failed to obtain a written agreement with the client, he failed to hold his client's funds in his trust account, he failed to keep

complete records of funds paid to him, he failed to provide any refund to the client for unearned fees, and he failed to ensure his staff's conduct was compatible with his professional obligations.

Mr. Bareria testified that he hired Mr. Morgan to represent him in a divorce. (January 27, 2020 Tr. 278). Mr. Morgan did perform some work for him and appeared at hearings. (January 27, 2020 Tr. 280). Eventually, Mr. Bareria had the experience of having several meetings scheduled with Mr. Morgan, which were cancelled. (January 27, 2020 Tr. 279-80). Mr. Bareria sent multiple texts, made several telephone calls, and sent emails to Mr. Morgan seeking a refund of money, but he did not receive any responses, which prompted Mr. Bareria to fire Mr. Morgan. (January 27, 2020 Tr. 282-83). Mr. Bareria was seeking a refund of \$3,500 from Mr. Morgan, who verbally agreed to pay him back, but the payment was never received. (January 27, 2020 Tr. 285). Mr. Bareria made some of his payments to Mr. Morgan by speaking to Mr. Coles and providing his credit card. (January 27, 2020 Tr. 287).

Mr. Morgan testified that he fully intends to pay money back to Mr. Bareria when he is able to do so. Mr. Morgan also explained that the payments Mr. Bareria made were never deposited into any of Mr. Morgan's bank accounts, but rather were received by a Square account apparently maintained by Mr. Coles. These payments are reflected on Mr. Bareria's credit card statements where payments were made to "SQ*E. LAVOYD MORGAN, JR." (January 28, 2020 Tr. 378-80; Tab 326, at 8737-40). The file Mr. Morgan produced does include retainer agreements written to Mr. Bareria, but the copies in the file are not signed. (Tab 328, at 9011-12).

Mr. Morgan was **negligent** in his supervision of Mr. Coles and entrusting him with so much authority to deal with clients. Mr. Morgan was **negligent** in reviewing and maintaining his law firm's bank accounts. Mr. Morgan was **negligent** in not obtaining a signed fee agreement with Mr. Bareria. Although the evidence demonstrates the retainer fees paid by Mr. Bareria were not

deposited into Mr. Morgan's trust account, the facts show actually the money was stolen by Mr. Coles and Mr. Morgan never received any payments from Mr. Bareria. Mr. Morgan agrees he owes a refund to Mr. Bareria, once he has the means to do so.

20. Count XXI BRANDON E. PERDUE (Negligence)

In Count XXI, the ODC alleges Mr. Morgan violated Rules 1.1, 1.3, 1.4(a) & (b), and 3.2 of the West Virginia Rules of Professional Conduct. Specifically, the ODC alleges Mr. Morgan failed to act competently and diligently in handling the client's case, he failed to keep his client reasonably informed about the status of the case, he failed to promptly comply with reasonable requests for information, he failed to communicate with the client, and he failed to expedite litigation in handling the client's case.

Mr. Perdue testified that Mr. Morgan was appointed to represent him in a criminal case and Mr. Morgan met with Mr. Perdue twice. (January 28, 2020 Tr. 158). Mr. Perdue and his family made multiple attempts to communicate with Mr. Morgan, but most of these attempts were unsuccessful until Mr. Morgan had some communication in January, 2019. (January 28, 2020 Tr. 159). A hearing was scheduled in March, 2019, where neither Mr. Perdue nor Mr. Morgan appeared. In May, 2019, the trial court appointed a different lawyer to represent Mr. Perdue. (January 28, 2020 Tr. 160). By October, 2019, Mr. Perdue had a hearing on his plea agreement, represented by his new counsel. (January 28, 2020 Tr. 161).

Mr. Morgan had no recollection of missing any hearings scheduled for Mr. Perdue, but he said it is possible. (January 28, 2020 Tr. 382). When Mr. Morgan was confronted with the court order noting he had failed to appear, Mr. Morgan did not dispute that allegation and agreed he should have been present. (January 28, 2020 Tr. 383). Mr. Morgan stated he did not know what happened in Mr. Perdue's case nor did he understand why there were communications issues. He also agreed

Mr. Perdue had not received good representation from him under these facts. (January 28, 2020 Tr. 413).

Mr. Morgan was **negligent** in failing to act competently and diligently in handling Mr. Perdue's case. Mr. Morgan was **negligent** in failing to keep Mr. Perdue reasonably informed about the status of his case and in communicating with Mr. Perdue. Mr. Morgan was **negligent** in expediting Mr. Perdue's case.

21. Count XXII ZANA G. OSBORNE (Mitchell Coles)

In Count XXII, the ODC alleges Mr. Morgan violated Rule 5.3 of the West Virginia Rules of Professional Conduct. Specifically, the ODC alleges Mr. Morgan failed to ensure his staff's conduct was compatible with his professional obligations.

Ms. Osborne testified that she retained Mr. Morgan to represent her in a personal injury action arising from an automobile accident. Because she was wheelchair bound and not able to climb the stairs into Mr. Morgan's office, Ms. Osborne met with Mr. Morgan's paralegal Mr. Coles, based upon her description. (January 28, 2020 Tr. 173). Thereafter, Ms. Osborne had problems communicating with Mr. Morgan's office. (January 28, 2020 Tr. 174-75). Ms. Osborne never obtained any settlement from this possible case and never obtained another lawyer. (January 28, 2020 Tr. 178).

Mr. Morgan testified that he was unable to find Ms. Osborne's file. (January 28, 2020 Tr. 291). Mr. Coles was authorized to accept documents from clients, but Mr. Morgan never met with Ms. Osborne and knew nothing about her possible case. Mr. Morgan never contacted Ms. Osborne to tell her about Mr. Coles and that he must have her documents. (January 28, 2020 Tr. 388, 414).

Mr. Morgan was **negligent** in supervising Mr. Coles, but otherwise should not be found guilty of any ethics violations for a client he had never met and did not know existed.

IV. Summary of argument

The Court should find that Mr. Morgan's actions were the result of negligence, rather than intentional acts, that the criminal actions of his employee is a mitigating factor, and that the problems he suffered with his health also is a mitigating factor. Taking the record as a whole and applying all of the relevant standards, the appropriate discipline is suspension, not annulment, and the imposition of other conditions the Court deems to be appropriate.

V. Statement Regarding Oral Argument and Decision

The Court already has scheduled this matter for what appears to be Rule 19 oral argument. Because this case presents the Court with the first time to address the issue regarding an employee in a law firm committing crimes against the lawyer and the clients as a mitigating factor, a decision authored by a Justice would be helpful for future reference. This fact pattern is not at all unusual as many law firms in this State have experienced the problems created by an employee stealing money from the firm or clients. This concern is even greater in a solo practitioner's office, where the lawyer often has to place a great deal of reliance on his or her staff.

VI. Argument

A. The Hearing Panel had the right to adopt the ODC's proposed order verbatim

Before addressing the substance of the issues raised, Mr. Morgan wants to address the elephant in the room—the fact that the Hearing Panel adopted verbatim the 158-page order proposed by the ODC. While in *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 214, 70 S.E.2d 162, 168 (1996), this Court has held that a trial court adopting a proposed order verbatim is not the preferred practice, ultimately on appeal, this Court will review the findings and conclusions made on the merits:

Verbatim adoption of proposed findings and conclusions of law prepared by one party is not the preferred practice, *see South Side Lumber Co. v. Stone Constr. Co.*, 151 W.Va. 439, 152 S.E.2d 721 (1967) (findings of fact *should* represent trial judge's own determination), but it does not constitute reversible error. *See, e.g., Freeman v. Poling*, 175 W.Va. 814, 824, 338 S.E.2d 415, 425 (1985); *E.E.O.C. v. Federal Reserve Bank of Richmond*, 698 F.2d 633, 641 (4th Cir.1983), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984). Rather, "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518, 527 (1985). *See also United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 615 n. 13, 94 S.Ct. 2856, 2866–67 n. 13, 41 L.Ed.2d 978, 992 n. 13 (1974). When viewed collectively, the above cases send a clear message: As an appellate court, we concern ourselves not with who prepared the findings for the circuit court, but with whether the findings adopted by the circuit court accurately reflect the existing law and the trial record.

See also Fruth v. Powers, 239 W.Va. 809, 806 S.E.2d 465 (2017)(Applying this same logic to a commission's wholesale adoption of a proposed order).

The members of this Hearing Panel devoted a lot of time and effort in this matter and Mr. Morgan's arguments are in no way intended to be a criticism of their efforts. However, the Hearing Panel's failure to mention or address even in a summary fashion some of the arguments raised by Mr. Morgan is very concerning and a serious deficiency in their analysis in light of the efforts all parties made in this matter to provide a complete record. The massive amount of material presented was challenging to present, to defend, and to absorb. For the most part, Mr. Morgan acknowledged his negligence throughout, but respectfully denied committing any intentional unethical acts. Therein lies the main dispute between the way the ODC and the Hearing Panel viewed the facts and Mr. Morgan's view.

Mr. Morgan's main criticism of the Hearing Panel's recommended order is that it failed to give Mr. Morgan the benefit of the evidence that his actions were negligent, as opposed to being intentional, and also failed to account and consider the mitigating circumstances relating to the actions of Mitchell Coles and his health problems. In this appeal, Mr. Morgan will focus on addressing these issues that the ODC and the Hearing Panel did not properly consider in reaching its conclusion.

B. General standards governing the imposition of lawyer discipline

In Syllabus Point 3 of *Lawyer Disciplinary Board v. Hassan*, 241 W.Va. 298, 824 S.E.2d 224 (2019), the Court outlined the general considerations governing the imposition of lawyer discipline:

3. "In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the Mr. Morgan 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." Syllabus Point 3, *Committee on Legal Ethics v. Walker*, 178 W. Va. 150, 358 S.E.2d 234 (1987).

The specific factors to be considered in deciding the appropriate sanction are spelled out in Syllabus Point 4 of *Hassan*:

4. "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, or 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.' "

Syllabus Point 4, *Office of Lawyer Disciplinary Counsel v. Jordan*,
204 W. Va. 495, 513 S.E.2d 722 (1998).

Mr. Morgan now will address each of these factors

1. Violated a duty owed to a client, to the public, or the legal system

In his practice, it is clear that while Mr. Morgan may have had good intentions, he was overextended and he relied heavily on his staff to keep the office functioning while Mr. Morgan was traveling from one court house to the other. The record developed demonstrates by clear and convincing evidence that Mr. Morgan violated multiple duties he owed to his clients, the public, and the legal system. There is a pattern of Mr. Morgan failing to do some of the basic things required by all lawyers: obtain written fee agreements explaining the terms of the representation, deposit retainers from clients into the trust account until such fees are earned, maintain a good system in his office where he could respond timely to calls from his clients, ensure that his employees were educated on the basic ethical obligations required to be followed in a law office, review the law firm bank statements on a routine and regular basis, making sure he could handle the number of different cases he accepted, having clients sign off on settlement sheets in all civil cases itemizing the complete distribution of the proceeds obtained, keeping track of the time he spent working on each case, and moving all cases expeditiously consistent with the client's interests.

Mr. Morgan heavily relied first on his wife and later on Mr. Coles to maintain his law firm's bank accounts. Mr. Morgan was negligent in failing to educate and train his wife and Mr. Coles on the ethics rules applicable to law firm operating and trust accounts. This negligence then caused client money, that should have been deposited first in the trust account, to be deposited in the operating account and being spent by the law firm prior to the fees being earned. This improper

practice was the result of poor supervision and negligence, as opposed to an intentional effort to steal money from clients before the fees were earned.

2. Acted intentionally, knowingly, or negligently

The ODC proposed and the Hearing Panel adopted legal conclusions that virtually all of Mr. Morgan's actions were intentional. (Hearing Panel Order, p. 143). However, the description of Mr. Morgan's actions following that conclusion supports Mr. Morgan's assertion that he acted negligently. Yes, Mr. Morgan is responsible for safekeeping his client's funds; yes, he did not review his bank statements; and yes, he did not train and supervise his employees on the ethics rules governing the handling of client's funds. However, there is no evidence that Mr. Morgan sat down and intentionally made a decision to jeopardize his client's funds as suggested by the ODC and the Hearing Panel. By all appearances, Mr. Morgan is a hard working lawyer, who tried his best to make enough money to keep his law office viable while attempting to take care of all of his clients' needs. Because he had to attend hearings throughout the State to generate income, Mr. Morgan necessarily relied upon his staff, which included his wife for most of the years, to handle the operations of the firm. Characterizing Mr. Morgan's actions as intentional simply is not supported by the record. Throughout the hearing, the evidence demonstrated that any ethics violations committed by Mr. Morgan were the result of negligence. These negligent violations were exacerbated by the combination of medical problems Mr. Morgan suffered combined with his reliance on a paralegal, who took money directly from clients and kept the money for himself.

3. Amount of actual or potential injury caused by lawyer's misconduct

Each of the complainants explained in their own words how they believed Mr. Morgan's actions injured them. Some of Mr. Morgan's negligence caused justice to be delayed or denied completely. Ultimately, the best interests of Mr. Morgan's clients, who are involved in these various

ethics complaints, were not served and it cannot be disputed these clients suffered injuries as a proximate result of Mr. Morgan's negligence.

4. Existence of any aggravating factors

In Syllabus Point 7 of *Hassan*, the Court explained generally that any aggravating factors identified can be the basis for increasing the sanction imposed:

7. "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." Syllabus Point 4, *Lawyer Disciplinary Board v. Scott*, 213 W. Va. 209, 579 S.E.2d 550 (2003).

Mr. Morgan is not aware of any aggravating factors under the facts of this case.

5. Existence of any mitigating factors

In Syllabus Points 5 and 6 of *Hassan*, the Court explained the impact of mitigating factors in determining what discipline to impose:

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

6. "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." Syllabus Point 3, *Lawyer Disciplinary Board v. Scott*, 213 W. Va. 209, 579 S.E.2d 550 (2003).

(A). **Lawyer and clients victimized by a dishonest employee**

The list of mitigating factors above is not all inclusive and under the facts to this case, Mr. Morgan respectfully submits the Court should address an additional mitigating factor. The record establishes that Mitchell Coles, who was hired by Mr. Morgan as a paralegal, took retainer fees directly from clients, kept the money himself, and handled some cases himself without Mr. Morgan's knowledge. Mr. Morgan accepted full responsibility for hiring Mr. Coles and also agreed that Mr. Morgan was responsible for any damages suffered by clients as a result of Mr. Coles's actions. (January 28, 2020 Tr. 389-90). Although Mr. Morgan became aware of Mr. Coles's criminal record some time after he was hired, Mr. Morgan decided to give him a chance. Unfortunately, Mr. Morgan placed far too much trust in Mr. Coles and did not supervise him closely enough to prevent Mr. Coles from embezzling money from the clients and Mr. Morgan's law firm.

However, the Hearing Panel recommended that Mr. Morgan should be held accountable for multiple ethics violations for clients Mr. Morgan did not know as a result of Mr. Coles' actions. Thus, this issue addresses both mitigation and the ability of a lawyer to be found guilty of ethical obligations to a client the lawyer did not know anything about.

Solo practitioners and small law firms in general are susceptible to employees, who are entrusted with some responsibility over the firm's finances, embezzling money from the law firm and from the client's trust account. In *In re PRB Docket No. 2016-042*, 203 Vt. 635, 635, 154 A.3d 949, 951 (2016), the Vermont Supreme Court noted that the embezzlement of money by trusted employees is **"a problem common in legal practice, particularly for small firms and solo practitioners."** In fact, there are many examples in the State where a trusted employee in a law firm was later found to have stolen money from the firm.

In *PRB*, a trusted employee had embezzled over \$900,000 from the lawyer and over \$2,000 from the client trust account, which the lawyer paid back into that account once the embezzlement was discovered. In describing this lawyer's responsibility under these facts, where a trusted employee stole money from the lawyer and at least one client, the Vermont Supreme Court explained, 203 Vt. at 638, 154 A.3d at 954:

Respondent did not intend for his former employee to embezzle client money from his Vermont trust account, nor did he know that she had done so. Respondent's mental state was one of negligence. The degree of Respondent's negligence is shown, in part, by the fact the employee repeatedly embezzled money from Respondent's operating account, over a period of many years, without being discovered. The former employee embezzled a total of about \$962,000 from Respondent's operating account. (It must be emphasized that Respondent's operating account only held Respondent's money, not client money, and whatever losses Respondent suffered as a result of the thefts from his operating account were his alone.) (Emphasis added).

Under these facts, the Vermont Supreme Court imposed an **admonition** against the lawyer for his negligence in supervising the actions of his employee. *See also In re Bennett*, 32 So.3d 793 (La. 2010)(Where paralegal had embezzled money from client funds and lawyer was able to pay money back to client, the recommended **suspension of one year and one day was deferred and lawyer placed on probation for two years**); *In re Ponder*, 375 S.C. 525, 654 S.E.2d 533 (2007)(Where legal assistant embezzled over \$200,000 from trust account and lawyer was able to deposit sufficient money in his trust account to make up for the loss using personal funds as well as insurance proceeds, lawyer received a **public reprimand**); *Disciplinary Counsel v. Davis*, 156 OhioSt.3d 414, 128 N.E.3d 199 (2019)(Where an associate lawyer was found to have embezzled \$185,000 and the managing lawyer paid back some of the money himself and through insurance proceeds, the managing lawyer received a **public reprimand**).

In this case, Mr. Morgan has provided free work for some clients, who paid money to Mr. Coles, and has reached an agreement to pay one person about \$300 a month. Mr. Morgan also is pursuing an insurance claim, based upon Mr. Coles' actions, but this \$10,000 claim has not yet been resolved. (January 28, 2020 Tr. 408). Throughout his testimony, Mr. Morgan never hesitated to admit that he owes money to various clients victimized by Mr. Coles. However, unfortunately, Mr. Morgan has not had the financial means to pay back all of these victims. Thus, while the cases cited above do recognize that a lawyer, whose clients as well as the lawyer lose money to a dishonest employee in the law firm, can be a mitigating factor, the relatively minor sanctions imposed were based, in part, on the ability of the lawyer to pay the money back to the clients. Nevertheless, the Court should recognize the actions of Mr. Coles as being a mitigating factor with respect to any sanctions recommended against Mr. Morgan and the Court further should hold that Mr. Morgan cannot be held accountable for any ethical obligations to these clients he did not know, other than his general negligence in his supervision of Mr. Coles.

(B). Prior disciplinary record

Prior to this case, Mr. Morgan has never received any lawyer discipline from the Court. According to records reviewed by the ODC, on one prior occasion, Mr. Morgan received an admonishment from an Investigative Panel for failing to communicate with a client and obtaining a written fee agreement. (Tab 53, at 2143-44).

(C). Absence of dishonest or selfish motive

Mr. Morgan became overwhelmed by the number of cases he was handling and overextended himself to the point where his clients suffered. However, there was no evidence in connection with

any of the charges proven that Mr. Morgan committed any of these violations for a dishonest or selfish motive.

(D). Personal or emotional problems

In the verified **RESPONDENT'S ANSWER**, Mr. Morgan provided a summary of the serious health issues he suffered from November, 2017, through July, 2018. Even after recovering from that surgery, Mr. Morgan went through another surgery on June 11, 2019. These medical issues severely impacted Mr. Morgan's ability to represent his clients. As he explained in this sworn statement, Mr. Morgan is a Type 2 diabetic with high blood pressure. His legs started cramping to the point where he could not climb the 23 stairs into his office. Between September, 2017, and May, 2018, Mr. Morgan went through five different catheterizations as his physicians tried to develop a diagnosis. They determined that his left iliac artery was about 90 percent blocked in his left leg and 60 percent blocked in his right leg. On May 21, 2018, the surgeon performed an aortic bifemoral bypass. Mr. Morgan remained in ICU for a while and was discharged from the hospital around May 28, 2018. (Tab 53, at 2158-59). The recovery period took several weeks and Mr. Morgan was not able to return to work until about July, 2018. (Tab 53, at 2159-60).

Mr. Morgan was in the hospital when he learned that Mr. Coles had been arrested in Virginia for an outstanding warrant from Pennsylvania. Once Mr. Coles was arrested, Mr. Morgan's office was completely unstaffed. Mr. Morgan did ask Rob Frank, another Lewisburg lawyer, to assist, but during this time, bills were not paid and the telephones were disconnected. (Tab 53, at 2164-65). In summing up this period in his life, Mr. Morgan explained he was upset and depressed over his own divorce, suffered from a lot of physical pain from his medical condition and the surgery, and

was in a dark place. The surgery was successful and Mr. Morgan now said he was in a much better place. (January 28, 2020 Tr. 438-39).

When this ODC inquiry began over the PDS billing, Mr. Morgan did meet with a counselor associated with the JLAP program, who determined that Mr. Morgan suffered from depression and attention deficit disorder. Mr. Morgan was depressed from his divorce and from the medical issues. While Mr. Morgan did not otherwise participate in the JLAP program, he informally gets counseling from his priest and from a forensic psychologist friend and fiancée. (January 28, 2020 Tr. 391-92).

(E). Timely good faith effort to make restitution or to rectify consequences of misconduct

While Mr. Morgan testified that he has been able to provide free legal work for some clients, who paid money to Mr. Coles, and entered into a payment agreement with one such client, he certainly has not been able to make restitution to all of the clients injured in this case. Mr. Morgan anticipates such restitution will be part of any sanctions imposed in this case and Mr. Morgan hopes he will be in a position to rectify the consequences suffered by his clients.

(F). Full and free disclosure to disciplinary board or cooperative attitude toward proceedings

Mr. Morgan cooperated fully throughout this investigation and during the hearings. Mr. Morgan appeared for his sworn statement and produced the original client files he could find. Even before the hearings, Mr. Morgan provided the ODC with the McKinneys' file, which he had not found previously.

The record reveals there were multiple responses filed by Mr. Morgan and his counsel throughout the course of the ODC's investigation into all of these charges. The index created shows about 24 letters and emails exchanged. There were many additional emails exchanged between the

ODC and Mr. Morgan's counsel that are not included in this record. Many of the ODC letters that did not generate a response were marked "unclaimed." Looking at the dates, Mr. Morgan's office was a disorganized mess during the time Mr. Morgan underwent his aortic bifemoral bypass surgery and that is when some of these ODC letters were sent.

Although the ODC correctly notes that either Mr. Morgan or his counsel failed to respond to some of its many inquiries, there was no evidence that such failures were based upon a deliberate or intentional act. Documents were taken from Mr. Morgan's office and his office was unstaffed when he was in the hospital. One of the ODC letters was sent to the wrong address, which was explained in the untimely response filed by Mr. Morgan's counsel. (Tab 348). Whether any other ODC letters were sent to the wrong address is not clear in this record. Mr. Morgan should not be held responsible for any ODC letters sent to his counsel, for which no response was made. There simply is no evidence that Mr. Morgan deliberately refused to respond to the multiple ODC requests for information made.

(G). Inexperience in the practice of law

Mr. Morgan is an experienced lawyer, who began running his own law firm in January, 2000. (January 28, 2020 Tr. 392). Inexperience is not a factor in this case.

(H). Character or reputation

From the record, Mr. Morgan had a good reputation in his area as an effective lawyer, judging particularly by the number of clients he had. Furthermore, the fact that judges continued to entrust Mr. Morgan with criminal appointments demonstrates these judges believed Mr. Morgan was responsible and competent to handle those cases. (January 28, 2020 Tr. 398).

(I). Physical or mental disability or impairment

The issues relevant to Mr. Morgan's health are discussed above

(J). Delay in disciplinary proceedings

Mr. Morgan was not responsible for any delay in these proceedings.

(K). Interim rehabilitation

As discussed above, now that Mr. Morgan has undergone the surgeries discussed, he now is much healthier than he was during much of the time covered in this case.

(L). Imposition of other penalties or sanctions

Mr. Morgan has not had any other penalties or sanctions imposed.

(M). Remorse

Mr. Morgan gave the Hearing Panel his background, going from being a high school dropout, to working as a correctional officer obtaining his undergraduate degree at the same time, and ultimately graduating from law school. "I genuinely care about my clients and I have always tried to give the best service I can, and I've been fairly successful. I've got a really good reputation with the judges and with the magistrates that I work with and prosecuting attorneys and other attorneys.....I love the practice of law and I do a lot of good for a lot of people, I think. And I would like the opportunity to continue to do that." (January 28, 2020 Tr. 439).

(N). Remoteness of prior offenses

There are no prior offenses, remote or otherwise.

C. Appropriate discipline under the facts of this case

In the March 20, 2020 order, the Court already decided that Mr. Morgan's license to practice law was suspended as of that date. By the time this case will be argued, Mr. Morgan will have been suspended for more than five months. The ultimate question to be decided by the Court is whether the appropriate discipline for Mr. Morgan is a suspension for a period of time or a complete annulment.

Annulment is the most severe discipline available to the Court. The Court has annulled the law license of a lawyer who was convicted of a crime (*Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989)), a lawyer who embezzled money from clients, lied to clients, and deceived the ODC about settlement proceeds (*Office of Lawyer Disciplinary Counsel v. Tantlinger*, 200 W.Va. 542, 490 S.E.2d 361 (1997)), a lawyer who failed to represent clients competently, failed to communicate with clients, failed to respond to ODC requests for information, and failed to oppose annulment (*Committee on Legal Ethics v. Keenan*, 192 W.Va. 90, 450 S.E.2d 787 (1994)), a lawyer who took client funds to pay for his cocaine habit (*Lawyer Disciplinary Board v. Brown*, 223 W.Va. 554, 678 S.E.2d 60 (2009)), a lawyer who drafted a will that benefitted himself (*Lawyer Disciplinary Board v. Ball*, 219 W.Va. 296, 633 S.E.2d 241 (2006)), a lawyer who stole money from a law firm (*Lawyer Disciplinary Board v. Coleman*, 219 W.Va. 790, 639 S.E.2d 882 (2006)), and a lawyer who criminally assaulted a client with a baseball bat (*Lawyer Disciplinary Board v. Robinson*, 230 W.Va. 18, 736 S.E.2d 18 (2012)).

In these annulment cases, the Court has concluded the lawyer committed intentional acts that often benefitted the lawyer financially, to the detriment of the clients involved, or which were criminal in nature. Nothing like that occurred in the present case. Mr. Morgan worked hard to develop an extensive practice in his area of the State, litigating divorces, criminal cases, and a variety of civil and personal injury actions. His biggest failing was not attending to the many details required to operate a law firm efficiently and ethically. However, this failing was the result of negligence rather than any intentional actions on his part.

Many of the cases relied upon by the ODC and the Hearing Panel to justify annulment involve the mishandling of client funds. However, this Court has never held that annulment is the

automatic penalty when client funds are mishandled. In fact, the Court has found cases where suspension is more appropriate.

Mr. Morgan respectfully submits that the facts here are most similar to the facts in *Lawyer Disciplinary Board v. Adkins*, ___ W.Va. ___, 842 S.E.2d 799 (2020). In *Adkins*, the lawyer was accused of failing to properly handle settlement money received on behalf of a client. Although this Court has many cases holding that the intentional misappropriation of a client's money often justifies annulment, when the misappropriation is the result of negligence, a suspension is appropriate. In *Adkins*, the hearing panel and the Court concluded that his negligent supervision of his staff, which took the client's money and placed it in the firm's operating account, warranted suspension. In deciding that suspension rather than annulment was proper, the Court stated, ___ W.Va. at ___, 842 S.E.2d at 809, "This Court has previously issued suspensions in cases involving lawyers who improperly dealt with client property. See *Lawyer Disciplinary Board v. Santa Barbara*, 229 W. Va. 344, 729 S.E.2d 179 (2012); and *Lawyer Disciplinary Board v. Blyler*, 237 W. Va. 325, 787 S.E.2d 596 (2016)."

In *Santa Barbara*, the lawyer admitted he relied upon his office staff to handle the finances of his law firm and he was negligent in supervising their actions. Although the facts there similarly resulted in the mismanagement of client funds, this Court imposed a suspension of his law license. Mr. Morgan respectfully submits this Court's resolution of similar facts in *Adkins* and *Santa Barbara* supports his request for a period of suspension, rather than complete annulment.

Mr. Morgan worked too hard to get to where he is today. While during a suspension he is unlikely to earn the kind of money he will need to pay any restitution to his former clients, he would take this opportunity to better himself personally, professionally, and educationally so that if he is given another opportunity to practice law again, he will do it the right way. Mr. Morgan respectfully

asks that instead of annulling his law license, the Court consider a suspension for a period of time and any other disciplinary conditions the Court deems to be appropriate.

VII. Conclusion

For the foregoing reasons, Respondent E. Lavoyd Morgan, Jr., humbly and respectfully asks this Court to provide him with HOPE by imposing whatever discipline the Court deems to be appropriate, short of annulment.

E. LAVOYD MORGAN, JR., Respondent

–By Counsel–



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