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

LAWYER DISCIPLINARY BOARD,

Petitioner,

vs. **No. 21-0590**

JAMES M. PIERSON,

Respondent.

REPLY BRIEF OF THE OFFICE OF LAWYER DISCIPLINARY COUNSEL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

West Virginia Statutes and Rules:

I. REPLY TO RESPONDENT'S BRIEF

This matter is before this Honorable Court pursuant to the "Report of the Hearing Panel Subcommittee" filed December 16, 2022, wherein a Hearing Panel Subcommittee of the Lawyer Disciplinary Board [hereinafter "HPS"] found that the evidence established that Respondent had violated Rules 1.15(d); 1.15(a); 1.15(b); 1:15(f) of the Rules of Professional Conduct; and West Virginia State Bar Administrative Rule 10. Based upon the evidence and in consideration of the factors outlined in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure, the HPS recommended the following as the appropriate sanction in this matter: (1) that Respondent's law license be suspended for a period of ninety (90) days[1]; (2) that upon his reinstatement, Respondent be placed on one (1) year of supervised practice by an active attorney in his geographic area in good standing with the West Virginia State Bar and as agreed upon by ODC; (3) that Respondent must complete nine (9) additional hours of continuing legal education in the area of law office management, including at least six (6) of those hours in IOLTA account management prior to Respondent's reinstatement; (4) that Respondent must comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure; and (5) that Respondent be ordered to pay costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure and that the same shall be paid prior to reinstatement.

Both the Office of Lawyer Disciplinary [hereinafter "ODC"] and Respondent filed objections to the Report of the HPS. ODC respectfully asserted that the clear and convincing evidence also supported finding that Respondent committed a violation of Rule 1.5(c) of Rules of Professional Conduct as stipulated to by the parties.[2] Moreover, ODC respectfully asserted

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[1] Presumably with automatic reinstatement pursuant to Rule 3.31 of the Rules of Lawyer Disciplinary Procedure but it was not specified in the Report of the HPS.

[2] *See*, Joint Exhibit 1, pp. 14-15.

that the HPS' recommended sanction of a ninety (90) days suspension, among other sanctions, did not take into consideration the seriousness of the proven charges, the fact that the HPS found that Respondent's misconduct was both knowing and intentional, and that the HPS found numerous aggravating factors were present but no mitigating factors.

In his brief, Respondent argues that the HPS's recommendation is not supported by the evidence on the record and that this Court should impose an admonishment or reprimand, rather than a suspension.

II. ARGUMENT

At this stage in the proceedings, this Court has held that "[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board." Lawyer Disciplinary Board v. Cunningham, 195 W.Va. 27, 34, 464 S.E.2d 181, 189 (1995); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 290, 452 S.E.2d 377, 381 (1994). While the Court grants substantial deference to factual findings made by the Hearing Panel Subcommittee, a *de novo* standard of review applies to questions of law, questions of application of the law to the facts, and questions of appropriate sanction to be imposed. Roark v. Lawyer Disciplinary Board, 207 W. Va. 181, 495 S.E.2d 552 (1997); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994). It is also well settled that "[t]his Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syllabus point 3, Committee on Legal Ethics of the West Virginia State Bar v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984)," Syllabus Point 1, Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E.2d 550 (2003).

Respondent begins his submission to this Court with a reference to the "origins" of the underlying complaint, arguing that he might have received a different outcome to the complaint filed against him if the complaint had been authored by someone other than an attorney or, more specifically, by someone other than Ms. Reveal. [Respondent Brief at 4] Respondent also implies that Ms. Reveal enjoys some sort of "apparent close relationship" with the ODC due to her former employment as Chief Lawyer Disciplinary Counsel. [Respondent Brief at 5] Finally, Respondent seems to argue that Ms. Reveal somehow had a sinister motive because the complaint was "hand delivered" to ODC for filing rather than, perhaps, placing the same in the U.S. Mail. [Id.]

Respondent's attempt to cast doubt on the underlying complaint and this disciplinary proceeding with his "origins" story by insinuating that Ms. Reveal, Ms. Collias and ODC pursued ulterior motives or engaged in some unspecified conspiracy against him fails because the ODC is charged with evaluating and investigating "all information coming to its attention by complaint or from other sources alleging lawyer misconduct or incapacity."[3] In other words, ODC would evaluate and investigate a complaint alleging facts, that if true, constituted a violation of the Rules of Professional Conduct regardless of who the complainant was or how the information came to be known by ODC. For instance, in Lawyer Disciplinary Board v. Ball, the lawyer was ultimately disbarred based upon information alleging lawyer misconduct which came to ODC anonymously. Lawyer Disciplinary Board v. Ball, 219 W.Va. 296, 300, 633 S.E.2d 241, 245 (2006). Furthermore, this Court has noted in Committee on Legal Ethics of West Virginia

[3] Rule 2.4(a) of the Rules of Lawyer Disciplinary Procedure provides, in part, that "[t]he Office of Disciplinary Counsel shall evaluate all information coming to its attention by complaint or other sources alleging lawyer misconduct or incapacity....If the information alleges facts that, if true, would constitute a violation of the Rules of Professional Conduct, the Office of Disciplinary Counsel shall also conduct investigations as may by the Investigative Panel of the Lawyer Disciplinary Board...."

State Bar v. Smith, 184 W.Va. 6, 10, 399 S.E.2d 36, 40 (1990), that "[t]he investigation of a legal ethics complaint is not under the direction and control of the original complainant. Rather the Investigative Panel, with its goal of protecting the public, must consider the issues raised by the complainant and any attendant issues. See In re Daniel, 153 W.Va. 839, 173 S.E.2d 153 (1970; Syllabus Point 3, Daily Gazette Co., Inc. v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984)."

Respondent also seems to forget that members of the West Virginia State Bar, such as Ms. Reveal and Ms. Collias, are under a duty to report professional misconduct pursuant to Rule 8.3(a) of the Rules of Professional Conduct.[4] As to an "apparent close relationship" between Ms. Reveal and ODC, it should be noted that since her employment as Chief Lawyer Disciplinary Counsel ended in 1999, Ms. Reveal has represented respondents as opposing counsel to ODC in lawyer disciplinary matters beginning in or about 2002. See Lawyer Disciplinary Board v. Stimmel, No. 30188, (WV 7/2/02)(*unreported*), Office of Disciplinary Counsel v. Rowe, No. 04-1602 (WV 11/2/04)(*unreported*) and Lawyer Disciplinary Board v. Coleman, 219 W.Va. 790, 639 S.E.2d 882 (2007). Finally, ODC only accepts original complaints therefore, complainants only have two options for filing a complaint, either using a postal delivery service or by hand delivery. Complainants and respondents use both methods of delivery of documents to ODC. Respondent's allegations regarding the "origins" of the complaint filed against him and the ensuing investigation by ODC are neither relevant nor supported by any evidence and should not be considered by this Court in reaching a determination on the merits of Respondent's misconduct.

[4] Rule 8.3(a) of the Rules of Professional Conduct provides that "a lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

Respondent argues that this case merely concerns a "delayed subrogation payment to an insurance company" and a "delayed, or failed to pay, a separate subrogation claim by CMS (Medicare) for reimbursement" constituting a "not extensive" total amount of $1,872.25. [Respondent Brief at pp. 5-6, 15] Respondent asserts that he only violated his duties owed to a client, not to the public, the legal system or the legal profession. Respondent also asserts that his misconduct in general was "accidental" or at only amounted to "negligence and/or mistake." He also argues that there are mitigating factors in this matter such as acceptance of responsibility by entering into Stipulations and that he expressed remorse by entering into those Stipulations.

Respondent mischaracterizes the seriousness of the misconduct which he admitted to and which the HPS found that he had violated, particularly in regard to the violations of Rule 1.15(a), (b), (d), (f) and Administrative Rule 10, which involve the safekeeping of property that belongs to clients and third parties and the comingling. The evidence is clear and convincing on these rule violations regarding Respondent's duty to safekeep property belonging to clients and third parties and his subsequent comingling of the same with his own personal property. Respondent received a settlement check from State Farm on behalf of Ms. Jones and deposited the check into his Premier Bank Account (9166) (now known as First Now) on August 2, 2016. [ODC Ex. 30, Bates 2008-1009] A Settlement Statement is contained within Ms. Jones' file which indicated that Respondent would receive $1,666.66 in attorney's fees and had advanced expenses in the amount of $217.37 for a total to Pierson Legal Services of $1884.97, leaving $3,115.97. The Settlement Statement then indicated that the following would be paid from the settlement: (1) subrogation claim of Nationwide in the amount of $1,260.88; (2) escrowed from settlement pending verification of subrogation claim of Medicare Part B in the amount of $362.78. The statement indicated that the "TOTAL PAID OR ESCROWED FOR SUBROGATION" was

$1,623.66 and the "TOTAL TO BE PAID DIRECTLY TO CLIENT" was to be $1,492.31. [ODC Vol. I, Ex. 1, Bates 4, Sealed Bates 53] Respondent has been unable to explain how the settlement funds were actually distributed in this matter other than that the Nationwide subrogation claim was paid on or about March 27, 2017. [ODC Vo. 1, Ex. 2, Sealed Bates 61] Ms. Jones eventually paid the CMS (Medicare) subrogation claim herself on or about February 1, 2017, after her attempts to have Respondent submit payment to CMS (Medicare) in the fall of 2016 were unsuccessful. [ODC Vol. 1, Ex. 2, Bates 5-7, Sealed Bates 65-94; Hrg. Tr. 21-23] Respondent then did not tender a reimbursement to Ms. Jones until the date of the hearing on August 23, 2023.

Respondent's assertion that his misconduct was accidental, a mistake or at most, negligent, is not credible. Respondent certainly knew that Ms. Jones had a personal injury matter as he had Ms. Jones sign a "File Review Agreement." Respondent had knowledge that there were subrogation claims to be paid in Ms. Jones' case, including the CMS (Medicare) claim, as evidenced by the Settlement Statement pursuant to the August 2016 settlement check, the fact that he paid the Nationwide claim on or about March 27, 2017, and the fact that Ms. Jones delivered the letters she received from CMS (Medicare) regarding the subrogation claim to Respondent's office.

In his brief at page 7, Respondent seems to again maintain that a contingent fee agreement existed in this matter despite the fact that he entered into Stipulations admitting that a contingent fee agreement could not be produced, and that this constituted a violation of Rule 1.5(c) of the Rules of Professional Conduct. Respondent cited testimony by Ms. Jones at her deposition that she seemed to recall some sort of signing a contingent fee agreement. However, the document that the testimony refers to is a document entitled "File Review Agreement."

[ODC Vol. I, Ex. 1, Bates 2, Sealed Bates 14] This document in no way comports with the requirements for a contingent fee agreement as outlined in Rule 1.5(c). In fact, this document specifically provides that Respondent or his firm has not agreed to undertake legal representation, that Respondent and his firm has only agreed to review the file and that it might be necessary to execute a separate retainer agreement if Respondent or his firm agree to represent Ms. Jones in her potential personal injury claim. [Id.] Respondent then proceeded to work on the personal injury matter, reached a settlement and produced a Settlement Statement detailing the contingent fee distribution of the settlement proceeds. Furthermore, at the hearing, upon questioning by a member of the HPS regarding Respondent's procedure regarding written fee agreements for a personal injury client, Respondent said that "in every case" it was standard for him to have written fee agreement in personal injury cases and that "I'm always present when documents are signed. My paralegal, normally would prepare one, bring it to me, I review it, and then take it to the client." [Hrg. Tr. 76-77] The Supreme Court has held that "lawyers who engage in the practice of law in West Virginia have a duty to know the Rules of Professional Conduct and to act in conformity therewith." Lawyer Disciplinary Board v. Ball, 219 W.Va. 296, 633 S.E.2d 241 (2006). The Rules of Professional Conduct require written contingent fee agreements and Respondent admitted to not having one in this matter.

The HPS properly found that there were several aggravating factors present in this case, including (1) dishonest or selfish motive, (2) pattern of misconduct, (3) multiple offenses, (4) vulnerability of victim, (5) substantial experience in the practice of law, (6) indifference to making clearly owed restitution and (7) prior disciplinary offenses. The HPS did not find that there were mitigating factors present in this case. Respondent argues that his mitigation consists of remorse and acceptance of responsibility. However, Ms. Jones testified at the hearing that

Respondent had never expressed any remorse to her. [Hrg Tr. 28] Finally, Respondent did not offer any statement of remorse to Ms. Jones at the hearing.

Contrary to his assertion that he only violated duties he owed to his client, the evidence also establishes and the HPS correctly found that Respondent also violated duties he owed to the public, the legal profession and the legal system. Respondent admitted noncompliance in safekeeping property owed to third parties, Nationwide and CMS (Medicare), violated his duties owed to the legal profession, the legal system, and the public. Respondent's admitted noncompliance with State Bar Administrative Rule 10 by improperly utilizing his IOLTA bank accounts likewise violated his duties owed to the legal profession, the legal system and the public.

Because the legal profession is largely self-governing, it is vital that lawyers abide by the rules of substance and procedure which regulates the legal system. Respondent's noncompliance with these rules as exhibited in the record is clearly detrimental to the legal system and profession, and his conduct undermines the integrity and public confidence in the administration of justice.

III. CONCLUSION

Discipline must serve as both instruction on the standards for ethical conduct and as a deterrent against similar misconduct to other attorneys. Moreover, a principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999).

Accordingly, for the reasons set forth above, the Office of Disciplinary Counsel requests that in addition to the rule violations found by the HPS, that this Honorable Court also find that

Respondent violated Rule 1.5(c) of the Rules of Professional Conduct, a violation to which Respondent had stipulated to and adopt the following sanctions:

1. That Respondent's law license be suspended for at least six (6) months;
2. That Respondent petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure;
3. That if reinstated, Respondent be placed on one (1) year of supervised practice by an active attorney in his geographic area in good standing with the West Virginia State Bar and as agreed upon by ODC;
4. That Respondent must complete nine (9) additional hours of continuing legal education in the area of law office management, including at least six (6) of those hours in IOLTA account management prior to Respondent's reinstatement;
5. That Respondent must comply with the mandate of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure; and
6. That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Respectfully submitted,
The Office of Disciplinary Counsel
By Counsel

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CERTIFICATE OF SERVICE

This is to certify that I, Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 24th day of May, 2023, served a true copy of the foregoing "**Reply Brief of the Office of Lawyer Disciplinary Counsel**" upon Paul Saluja, Esquire, counsel for Respondent James M. Pierson, by emailing and mailing the same via United States Mail with sufficient postage, to the following address:

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