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

LAWYER DISCIPLINARY BOARD,

Petitioner,

Vs. No. 20-0871

JEFFERY A. DAVIS,

Respondent.

RESPONSE TO BRIEF OF THE LAWYER DISCIPLINARY BOARD

Jeffery A. Davis (WVSB#6247)
Attorney at Law
Respondent
225 Main Street
Spencer, West Virginia 25276
304-927-2200 – Phone
304-927-2212 – Fax
jeffdavisattorneyatlaw@gmail.com

I. TABLE OF AUTHORITIES

Cases:

West Virginia Statutes and Rules:

II. STATEMENT OF THE CASE

Formal charges were filed against Jeffery A. Davis, Respondent, with the Clerk of the Supreme Court on November 4, 2020 as a result of a complaint filed with the Office of Disciplinary Counsel by Denver Rucker. Mr. Rucker complained that a request to relinquish the client file and such request has been ignored. [ODC Exhibit 1 Bates 2]

Thereafter Respondent filed an answer to the charges and the matter was set for hearing before the Hearing Panel Subcommittee. The hearing took place in Charleston, West Virginia on April 14, 2021. The members of the Hearing Panel Subcommittee were Rhonda L. Harsh, Chairperson, Gail T. Henderson Staples, and Loretta Sites. Jessica Donahue Rhodes represented

the Office of Disciplinary Counsel and the Respondent appeared pro se. Denver Rucker and his wife Luanne Rucker testified.

On July 22, 2021, the Hearing Panel Subcommittee issued its report. The Subcommittee found that Respondent had violated Rules 1.3, 1.4, 1.5(b), 8.1(b) and 8.4(d) of the Rules of Professional Conduct. The Subcommittee recommended that Respondent's license to practice law be suspended for a period of six months. Respondent filed an objection to the findings on August 16, 2021.

The West Virginia Supreme Court of Appeals entered a scheduling order in this matter and set the matter for oral argument during the January 2022 term.

III. SUMMARY OF ARGUMENT

Respondent asserts that the Hearing Panel Subcommittee was in error in their findings that Respondent violated the Rules of Professional Conduct. Further, that the recommended sanction of a six month suspension was excessive under the circumstances. Respondent asserts that there was no injury created to Mr. Rucker by the actions and inactions of Respondent. Mr. Rucker's only complaint at the aforementioned hearing being that he wished he had not pled to the felony charges in his case.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Honorable Court in its scheduling order has set oral argument in this matter for the January 2022 term of said Court pursuant to Rule 19 of the Rules of Appellate Procedure.

V. ARGUMENT

FACTS OF THE CASE

On or about November 7, 2017, Denver Rucker, the Complainant herein, was indicted for manufacturing a controlled substance, three counts of wanton endangerment with a firearm, use

or presentment of a firearm during the commission of a felony, illegal possession of destructive explosive materials, four counts of causing death or injury, and four counts of wanton endangerment with an explosive device. This indictment was Clay County Circuit Court Case Number 17-F-44.

The complainant was arraigned on November 14, 2017 and Respondent represented said complainant. On February 7, 2018, complainant pled guilty to manufacturing a controlled substance, one count of wanton endangerment with a firearm, and one count of wanton endangerment with an explosive device. The other counts of the indictment were dismissed as part of the plea agreement in the matter.

On March 19, 2018, complainant was sentenced before the Honorable Judge Jack Alsop, Clay County Circuit Judge. Complainant received one to five years for the charge of manufacturing a controlled substance. Complainant received five years for the wanton endangerment with a firearm charge. Complainant received two to ten years for the wanton endangerment with an explosive device charge. Complainant was given credit for 580 days served.

During the majority of the underlying case, complainant was hospitalized due to the explosion in which he eventually pled guilty. For the first few months, complainant was in an induced coma due to severe burns. As a result, Respondent corresponded by telephone and in person with complainant's wife, Luanne Rucker.

On October 23, 2018, Mr. Rucker requested Respondent to file a Motion to Reconsider the Sentence under Rule 35(b) of the Rules of Criminal Procedure, obtain the return of certain items of personal property and the relinquishment of his file. [ODC Exhibit 1 Bates 3] Respondent was of the opinion based upon his experience with the Court, that a 35(b) Motion

would not be successful. The Court at sentencing was very stern with complainant. The victims of the underlying case were West Virginia State Police. Therefore, Respondent was of the opinion that a Motion to Reconsider would be frivolous and discussed the matter with Ms. Rucker who relayed the same to complainant.

In discussions with Ms. Rucker, Respondent with the consent of Mr. Rucker, decided that a Motion for Compassionate Release was a better option than a Motion to Reconsider. This decision was based upon complainant's many medical conditions.

Regarding the return of property, Respondent spoke with the Prosecuting Attorney and was told that certain items, including a lap top computer, was still being investigated. Respondent knew that a Motion for the Return of said Items would not be successful under those circumstances. The State could legitimately hold those items seized as long as an investigation was ongoing.

With regard to the client file, the only items in said file was the original criminal complaint, a copy of the indictment, the police report and any orders that had been entered. All the materials in said file was provided as they came into the office. The "client file" was a collection of materials already provided. Ms. Rucker came to the office on a weekly basis and was provided whatever materials Respondent possessed at the time. Further, the letter of October 23, 2018 requested "a relinquishment of the file" "insomuch as our attorney/client relationship may be at an end." [ODC Exhibit 1 Bates 3] This was not a request for a copy of the client file, but a relinquishment of such based upon the lawyer/client relationship ending. After speaking with Ms. Rucker, I was told that complainant wanted me to continue to represent him, as such, Respondent did not relinquish the file at that time.

On December 6, 2018 Respondent received an ethics complain purported to have been filed by complainant herein. Respondent informed Ms. Rucker at the time that he did not feel he should continue to represent complainant with a complaint pending. Ms. Rucker assured Respondent that complainant wanted him to continue representation and that someone at the facility where complainant was housed had filed the complaint and complainant signed the same not fully realizing what it was. Respondent believes this is the person Ms. Rucker referred to as the "law master – or the guy out to St. Mary's." [Transcript 24] Based upon those representations, Respondent continued to represent complainant. Respondent filed an answer to said complaint in January 2019.

During this period of time, complainant's health was becoming worse. In discussions with Ms. Rucker, the Motion for Compassionate Release needed to be filed when complainant's health issues peaked in order to make the best argument. The Motion was filed on April 10, 2019 at a time when complainant was suffering from AFib, congestive heart failure, and lung cancer, in which he had recently started chemotherapy.

On April 11, 2019 the Honorable Judge Jack Alsop denied the aforementioned Motion without a hearing. In said Order, he had stated that a prior Motion for Reconsideration had been denied, which it was not. Therefore, on June 30, 2019, Judge Alsop issued an amended Order denying said Motion and clarifying that a prior Motion to Reconsider had not been filed. The Court noted in the amended order that "this court is of the opinion that the sentence imposed herein is in the proper administration of justice." Thus confirming the opinion of Respondent that a Motion to Reconsider the sentence would not have been successful months prior.

On July 1, 2019, Disciplinary Counsel inquired of Respondent if he had a signed retainer agreement with complainant. Respondent did recall a retainer agreement, employment contract,

but could not locate the same. Respondent asserted that at the time of the agreement, complainant was hospitalized. Respondent gave the agreement to Ms. Rucker to get complainant's signature. Respondent delivered to Disciplinary Counsel a blank form agreement that he uses in all retained cases.

The Hearing Panel Subcommittee found that Respondent violated Rules 1.3 and 8.4(d) of the Rules of Professional Conduct by failing to file a Motion to Reconsider and a Motion for the Return of Property. That Respondent violated Rule 1.4 by failing to communicate with complainant. That the Respondent violated Rule 1.5(b) by not having a retainer agreement with complainant. Lastly, Rule 8.1(b) by failing to respond timely to ODC.

DISCUSSION

RULE 1.3 DILIGENCE

Rule 1.3 of the Rules of Professional Conduct states "a lawyer shall act with reasonable diligence and promptness in representing a client." In the instant case, Respondent acted with diligence and promptness. After noting the demeanor of the Court at sentencing, and discussing the matter with Ms. Rucker, the decision was jointly made to file a Motion for Compassionate Release rather than a Motion to Reconsider the Sentence under Rule 35(b) of the Rules of Criminal Procedure. Although Motion to Reconsider was discussed, the formal request in writing was outside the 120 day deadline. Additionally, the Motion for the Return of Property was not ripe in that the state was still investigating possible criminal conduct involving the seized electronic items. Respondent did file the Motion for Compassionate Release when complainant started his chemotherapy, noting that complainant's medical conditions had escalated.

Rule 8.4 Misconduct

Rule 8.4 states "It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice." Respondent asserts that based upon his twenty-eight years of experience, the demeanor of the judge, and the seriousness of the offenses, a Motion to Reconsider would not have been successful and, would therefore, have been a waste of Court time and resources. The Court noted in its June 30, 2019 Order that the "sentence previously imposed was in the fair administration of justice." [ODC Exhibit 15 Bates 194] Thus, confirming the opinion of Respondent. The matter can not be prejudicial to the administration of justice when the Court has already ruled it is in the fair administration of justice.

With regard to the Motion for the Return of Property, Respondent had confirmation that the seized items were still the subject of an investigation. Thus, any Motion for the return of said items would have to wait until said investigation was complete. To do otherwise would be to file a frivolous motion which would be a waste of Court time and resources.

RULE 1.4 Communication

Rule 1.4 states in part "(a) a lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law. (b) A lawyer shall explain a matter to the extent reasonably necessary t permit the client to make informed decisions regarding the representation."

The findings of the Hearing Panel Subcommittee found that the Respondent failed to communicate with the Complainant about the Motion to Reconsider in violation of Rule 1.4. In the matter, Respondent did communicate with Ms. Rucker, with complainant's permission. Given that complainant was hospitalized during much of the time that the matter was pending, was in an induced coma, and was in a hospital setting while housed by the Department of Corrections at St. Marys Correctional Facility. Respondent communicated through Ms. Rucker that the Motion to Reconsider, in Respondent's opinion, would not be successful. Additionally, it was Ms. Rucker who did additional research and suggested a Motion for Compassionate Release as an alternative to the Motion to Reconsider under Rule 35(b). Both complainant and Ms. Rucker testified before the Hearing Panel Subcommittee that post sentencing communication was done through Ms. Rucker with permission of complainant.

The matter below was not ordinary given that throughout much of the case, complainant was hospitalized, in a coma, or in a hospital setting. The communication through Ms. Rucker was not the way communication is normally done in a case, but because of the circumstances, it was a legitimate alternative.

Rule 1.5 Fees

Rule 1.5 states in part "(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing to the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate or the fee or expenses shall also be communicated to the client in writing."

Respondent asserts that there was a fee agreement/employment contract in the matter below. At the time of the employment, complainant was hospitalized at the Huntington hospital

burn unit, then later to St. Mary's Correctional Facility, and then to Huntington Health Rehab Center.

Respondent testified at the hearing before the Hearing Panel Subcommittee that he specifically remembered an employment contract that set forth his fee. [Transcript 96-97] The contract was drawn up and given to Ms. Rucker for signatures since complainant was in the hospital. Respondent does not have any independent recollection of Ms. Rucker bringing the signed contract back to him but assumed that she brought it to the office when he was not there. However, after a diligent search, Respondent was unable to locate the contract. To complicate the search, Respondent moved his office from Clay to Spencer, West Virginia in August through September 2019.

Respondent asserts herein that the actual contract would have been the best evidence herein of the existence of said contract, however, absent the actual document, Respondent's testimony should be considered in this matter. Further, Respondent's testimony should be given sufficient weight and credit, as opposed to the lack of memory of Ms. Rucker on the matter. [Rule 601 Rules of Evidence]

Rule 8.1 Bar Admission and Disciplinary Matters

Rule 8.1 states in part "[A] lawyer...in connection with a disciplinary matter, shall not; (a) knowingly make a false statement of material fact; or (b) ... knowingly fail to respond to a lawful demand for information from... disciplinary authoriy..."

Respondent asserts he did not violate Rule 8.1. The Report of the Hearing Panel Subcommittee sets forth in its Findings of Fact, Paragraph 7, Page 4, that complainant filed the ethics complaint herein on December 6, 2018. That although, said Findings fail to state when said complaint was served upon Respondent, Respondent filed his response January 14, 2019.

Further, found in paragraph 13, page 7, Respondent informed Disciplinary Counsel that a Motion for Compassionate release had been denied by the Court and that the complainant's file had been sent to complainant. On July 22, 2019, Disciplinary Counsel inquired of Respondent regarding a written fee agreement. (Paragraph 17., Page 8 of Findings.) Disciplinary Counsel asserted that Respondent failed to respond to said July 22, 2019 letter, so the letter was sent again by certified mail on August 27, 2019, to which Respondent signed for on August 30, 2019. Respondent responded on September 5, 2019. (Paragraph 20, Page 9 of Findings.)

Respondent at the hearing (pages 125 and 126, HPS transcript) did not recall receiving the July 22, 2019 letter, but recalls the August 27, 2019 certified letter and responded timely. Respondent did, however, note that he was in the process of moving his office from Clay to Spencer, West Virginia during August and September 2019 as a possible explanation for not getting said letter, but again, has no recollection of receiving said letter of July 22, 2019.

VI. CONCLUSION

The original ethics complaint in this matter complained that the client file was not relinquished pursuant to a written request made by letter dated October 23, 2018. A reading of the October 23, 2018 letter indicates that the author, purported to be complainant, did not request a copy of the client file, but instead wanted the file relinquished because the attorney/client relationship appeared to be ending. After talking to Ms. Rucker, the attorney/client relationship did not end, but continued in order to move the Court for a compassionate release due to health problems of complainant. Copies of items in said file were provided to Ms. Rucker, for complainant, as they came in. Therefore the request to relinquish the file pursuant to the attorney/client relationship ending did not occur until after the final order of the circuit court in

the matter below. Therefore, complainant's request for a relinquishment of his file was moot when Respondent continued to represent complainant.

The request made for a Motion for Reconsideration of Sentence requested in writing in October 2019 did not occur. Upon speaking to Ms. Rucker regarding the matter, a Motion for Compassionate Release based upon complainant's health issues appeared to be a better option. Although, the Motion (for Compassionate Release) was filed due to complainant's declining health, the lower Court nevertheless denied said Motion and found that the original sentence imposed was in the fair administration of justice. Thus, confirming Respondent's experienced opinion that a Motion for Reconsideration under Rule 35(b) would have been fruitless. Incidentally, the request in writing for a 35(b) motion, was not made to Respondent within the required 120 days for such a motion. Based upon the lower Court's denial of any alternative sentence, the denial of a compassionate release, and finding the original sentence was in the fair administration of justice, the complaint was not harmed by Respondent not filing a Motion to Reconsider.

Regarding the return of personal property items that were seized by law enforcement when complainant was arrested, Respondent did make diligent inquiries regarding those items. At first Respondent was told the local detachment sergeant was not available but would be contacted by the prosecuting attorney when he returned. Upon further inquiry, Respondent was informed that the items seized were still part of an investigation. The items included a laptop computer, a camera SD card and an ipad that could possible contain evidence relating to drug trafficking and needed to be gone through by the State Police Lab. Any motion for the return of the items under those circumstances would have been denied since they were lawfully seized as part of a drug charge on complainant. Respondent did not file the motion he considered to be

frivolous, and neither did his successor counsel. [Transcript 45] Complainant was not harmed by the Respondent not filing a motion for the return of those items.

The lack of communication alleged between Respondent and complainant does not have merit. Complainant was very ill during the representation of Respondent and much of the time he was in a hospital or hospital setting by the Department of Corrections, along with be in an induced coma due to severe burns at the beginning of the case. Due to the extraordinary circumstances a lot of the communication was through complainant's wife, Luanne Rucker. This was done with the consent of complainant. [Transcript 50, 53] It is clear from the record that Ms. Rucker was in the office of Respondent weekly. This was done without scheduled appointments. When she stopped in, she either spoke with Respondent if he was not in court, or with one of his staff. The communication was frequent with the office staff and Respondent, with whom Ms. Rucker had access at the office, by personal phone and at church, where she attended with Respondent.

The Hearing Panel Subcommittee found no fee agreement/employment contract. This finding was made after complainant and Ms. Rucker stated they did not remember such a document. Although the agreement could not be located by Respondent after Ms. Rucker took it to be signed, Respondent does remember that it existed. However, his testimony before said Panel was ignored and apparently deemed not credible. Given that the document itself would be the best evidence in the matter, in its absence, testimony by Respondent established its existence.

Upon being given the opportunity to be heard by the Hearing Panel Subcommittee, complainant said that this matter has given him a "bad taste in his mouth" for the judicial system. [Transcript 59] His reasoning was not that Respondent did not file a Motion to Reconsider, nor a lack of communication with Respondent, nor the not returning personal property seized, nor the

absence of a lost fee agreement, but rather he stated only that he wished he had taken the matter to trial and not pled to the charges. [Transcript 59, 62, 64] Ms. Rucker's grievance, although she was not the client, was that she needed someone to lean on during this hard time in her life and the Respondent was not always available. Ms. Rucker testified before the Panel that she thought she and Respondent should have been in constant contact almost. [Transcript 27-28].

The matters addressed herein are not the complaint of Denver Rucker, Luanne Rucker, nor the public. These matters are the complaints of the Office of Disciplinary Counsel.

Respondent asserts to this Honorable Court that he communicated with complainant, some times in person, but mostly through Ms. Rucker. Further, Respondent asserts that he acted professionally and appropriately under the circumstances of the underlying criminal case. Respondent admits that he did not get all of the results he had hoped in the case, but results depended upon the decisions of the lower Court.

The recommendation of the Hearing Panel Subcommittee agreed with Disciplinary Counsel to the point that the decision of the Panel and the brief submitted by the Disciplinary Counsel are identical in form and language in many places. Respondent does not believe that he had adequate consideration by said Panel and that their recommended findings be rejected by this Honorable Court.

Further, the recommended sanctions by the Panel included a suspension of Respondent's license to practice law for a period of six months. Respondent asserts this is excessive considering the allegations. Respondent did not steal client money, commit a felony or any other heinous act that would warrant such a recommendation.

This Honorable Court when imposing sanctions, if any are warranted under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure, are to consider four factors, to-wit: (1) whether the

lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. Syl. Pt. 4. Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998).

Respondent asserts that he has not violated the Rules of Professional Conduct toward complainant, the public, the legal system nor the profession. The complainant was asked at length during the hearing before the Hearing Panel Subcommittee regarding his complaint against the Respondent. The complainant stated that his experience left a "bad taste in his mouth." [Transcript 59] When asked to explain, complainant stated that he would have preferred a jury trial. [Transcript 59] When asked if he believes he had proper representation by Respondent, he responded again that he would rather have went to trial than pled [Transcript 59], but admitted he pled voluntarily. When asked if he believed he was injured by Respondent, he replied, "mentally I can't say because I think that induced coma messed me up more than anything." [Transcript 59] When Ms. Rucker was asked, she stated that she felt Respondent should have been in constant contact with her. [Transcript 27-28].

Respondent admits that communication between himself and complainant, post sentencing, took place through Ms. Rucker. Complainant testified before the Hearing Panel Subcommittee that he consented to such and that he was "kind of not available" due to his hospitalizations and medical conditions. [Transcript 50]

Complainant stated that he does not remember being informed of a possible Motion for Reconsideration. [Transcript 53] Respondent asserts that there was discussions with Ms. Rucker regarding a Motion to Reconsider under Rule 35(b). However, a Rule 35(b) motion is not an

automatic duty of an attorney without being requested. In the matter below, said request was communicated to Respondent in writing by the October 2019 letter which was outside the time for filing such a motion. Additionally, Respondent was of the belief, and later proven correct, that the lower Court would not grant relief pursuant to a Motion to Reconsider. Further, a Motion for the Return of Personal Property seized would not have been successful due to an ongoing investigation of the items seized, which were a laptop computer, an Ipad, and an SD card from a camera.

As set forth above, the complainant never asked for a copy of his file. The request was for the relinquishment of the file pursuant to a termination of the lawyer/client relationship. Respondent asserts that the lawyer/client relationship did not end, and the file was in turn not relinquished. Once the relationship ended upon the final order denying relief by the lower Court, Respondent relinquished said file, which incidentally contained documents that had previously been provided albeit over time.

Respondent also asserts that neither the public nor the legal profession has been harmed by his representation of complainant. Noting in the matter was done which publicly drew negative attention to Respondent nor the legal profession at large.

Respondent admits that he was sanctioned in 2019 for not responding timely to Disciplinary Counsel requests. Respondent was given a thirty day suspension, one year of supervised practice, and was required to take an additional twelve hours of Continuing Legal Education. Respondent admitted the allegations raised in that proceeding and did not object to the sanctions imposed.

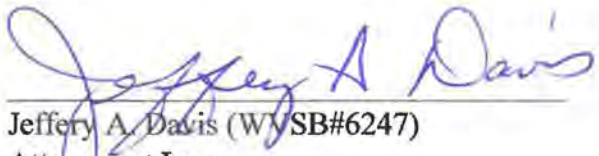
In this matter, Respondent asserts that the recommended sanction of six months suspension is excessive. A suspension for six months would not only be detrimental to Respondent's career, but also to his current clients, the local court and the public in general.

Respondent is engaged in the practice of law primarily in Roane and Calhoun counties. In counties such as these, there are only a handful of attorneys available. The suspension recommended would limit the availability to the public of legal counsel even further. This would place a hardship on the public needing legal representation/counsel of travelling outside the area to obtain legal counsel, and in many situations result in higher fees than what is common in rural areas. This point is shown by the testimony of Ms. Rucker before the Hearing Panel Subcommittee in which she testified that she called 15 or 20 attorneys and the retainers ranged between twenty-five and seventy-five thousand dollars, but Respondent only charged ten thousand. [Transcript 37]

Respondent also asserts that the effect on his current clients and the local courts would be detrimental with a six month suspension. Delays associated with obtaining new counsel, new counsel coming into a case, and all of the previous consultation being moot, would have a dramatic negative affect.

Finally, Respondent prays that this Honorable Court finds that the Rules of Professional Conduct were not knowingly, intentionally nor negligently violated by Respondent in the underlying matter and that the sanctions recommended by the Hearing Panel Subcommittee not be imposed.

Respectfully submitted,
Jeffery A. Davis, pro se



Jeffery A. Davis (WVSB#6247)
Attorney at Law
Respondent
225 Main Street
Spencer, West Virginia 25276
304-927-2200 – Phone
304-927-2212 – Fax
jeffdavisattorneyatlaw@gmail.com

CERTIFICATE OF SERVICE

I, Jeffery A. Davis, Respondent, pro se, do hereby certify that I have served a copy of the foregoing Response to Brief of the Lawyer Disciplinary Board by regular first class U.S. mail on this the ~~18~~ 24th day of November 2021 to the following:

Rachael L. Fletcher Cipoletti
Chief Lawyer Disciplinary Counsel
Office of Lawyer Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304

Jeffery A. Davis