BEFORE THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

LAWYER DISCIPLINARY BOARD
Petitioner

v.

JAMES M. PIERSON,
Respondent.
I.D. No.: 18-03-191
Bar No.: 2907

BRIEF OF RESPONDENT JAMES M. PIERSON

DOCKET NO.: 21-0590

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STATEMENT OF THE CASE

A. Nature of the Proceedings

This case arises from a complaint to the Office of Disciplinary Counsel (hereinafter simply "ODC"), filed by an attorney on behalf of an individual whom said attorney had never represented, or even met in person prior to the hearing before the Board. The unusual nature of the origins of the Complaint may have little bearing on the ultimate analysis of the Respondent's violations and the sanctions ultimately imposed in this case, but these origins warrant mention in an attempt to understand the stance that the ODC has herein chosen to pursue against the Respondent in this matter.

The attorney who originally filed this complaint, namely Sherry Goodman Reveal, a close friend of Sherri Collias[1], stated in a matter-of-fact fashion on the record at the hearing before the Lawyer Disciplinary Board(hereinafter simply "Board") that, regardless of her distinct distance from the facts and allegations as well as the individual who actually purported to be damaged by the Respondent's conduct, she had apparently been enlisted specifically to author and file this complaint due to her close association with the ODC. Ms. Reveal stated, "...I was concerned that if I just said, here, you should file a complaint, that it might not come up with the same result."[2] One can only comprehend this assumption, that a complaint authored by Ms. Reveal would somehow elicit a different outcome, as opposed to a complaint filed by the actual injured party, [3] through looking at her apparent close relationship with her former employer, who she

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[1]Hrg. Tr. Pg. 9

[2] Hrg. Tr. Pg.13

[3] Id.

worked for in one capacity or another (beginning as Assistant Disciplinary Counsel for the State Bar Committee Legal Ethics sometime after 1983, then serving as Co-Bar Counsel in 1990, and later becoming Chief Lawyer Disciplinary Counsel for the newly formed Lawyer disciplinary Board through 1999) [4]. It should also be noted that this complaint was filed by Ms. Reveal via "hand delivery" delivering said complaint in person to her former employer, the Office of Disciplinary Counsel on May 29, 2018.

The case alleges one delayed subrogation payment to an insurance company, namely Nationwide, arising from an automobile accident settlement in which the Respondent represented Ms. Jones. The case was settled via payment from State Farm Insurance on or around August 2, 2016. Although Nationwide originally sought reimbursement of $2000.00, the exists evidence to support the fact that Respondent negotiated the acceptance of a lesser amount sometime between June 30, 2016 and March 27, 2017. The total amount of the reimbursement check eventually paid to Nationwide by the Respondent was $1,333,33.[5] The Respondent admitted to the delay in satisfying this subrogation claim in the facts jointly stipulated before the Board.

The Respondent was also alleged to have delayed, or failed to pay, a separate subrogation claim by CMS (Medicare) for reimbursement regarding the same matter, also concerning the automobile accident settlement negotiated by the Respondent on behalf of Cynthia Jones, in the amount of $362.78.[6] Although Ms. Jones eventually paid this subrogation claim personally at

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[4] Hrg. Tr. Pg. 8

[5] Respondent paid the Nationwide subrogation in full by check dated March 27, 2017, in the amount of $1,333.33, well before the institution of the present proceedings. [ODC Vol. I, Ex. 2, Sealed Bates 61]

[6] ODC Vol. I, Ex. 2, Sealed Bates 53

the diretion of her attorney, Sherri Collias, the Respondent eventually reimbursed Ms. Jones via a check for $538.92 including interest from the date of her payment.

In regards to the CMS subrogation payment, It is important to note that although the ODC stated unequivocally in its brief that Mr. Pierson "knew for some time that Ms. Jones had paid the subrogation claim herself and then did not issue a refund until the disciplinary hearing."[7], this is factually NOT the case, and the evidence at the hearing bears out this point. In fact, Mr. Pierson only ever actually became aware that Ms. Jones had written CMS a check once these proceedings had already begun and said payment was mentioned in Ms. Reveal's statements which were included in her original complaint.

Illustrating this point, a member of the hearing panel addressed Ms. Jones on the stand with questions about whether or not she had actually informed the Respondent that she had paid the CMS claim. The testimony lent no credence to the claim that Respondent had possessed actual knowledge that Ms. Jones had paid said claim herself. (Hrg. Tr. Pg. 32-33) In fact, Ms. Jones clearly could not state affirmatively under oath when or in what manner she claims to have informed Mr. Pierson of her payment. (Id.) Also, a letter from Sherri Collias, Ms. Jones' subsequent counsel, written months after she had paid the CMS subrogation claim makes no mention of Ms. Jones having paid this debt, although her counsel was well aware at such time. [Complainant's Exhibit 24, Pierson Exhibit bates 981]

The total amount reimbursed by the Respondent for the unpaid CMS subrogation claim was $538.92, including interest, and $1,333,33 for the claim by Nationwide, making the total amount for which the Respondent is accused of failing to promptly pay in this matter $1,872.25.

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[7]See ODC Brief pg. 24

Both of these subornation claims have now been either satisfied or reimbursed in their entirety and no amounts currently remain unpaid by Mr. Pierson to any person or entity in this matter.

Additionally, and related to the same underlying case, the Respondent is accused of having failed enter into a contract outlining his fees and obligations with Ms. Jones in relation to her automobile accident. Although the Respondent maintained that there did exist such a contract for services, none was ever located. Ms. Jones also admitted during her deposition that she recalled signing a contingent fee agreement in the automobile accident matter. [Deposition of Cynthia Jones, pg.24-25] It should however be noted that the Respondent had entered into a written agreement with Ms. Jones in regards to his prior divorce representation, and there was no allegation that there existed any misunderstanding as to Mr. Pierson's fees or obligations in the matter of her subsequent automobile accident representation. [Deposition of Cynthia Jones, pg. 35]

The Respondent notes that the Hearing Panel's recommendation appears to be more reasonable by far than the original recommendations which were submitted by the ODC's counsel in their *Proposed Findings of Fact and Conclusions of Law*, even though the hearing panel's report agreed with the ODC's assertion that there were no mitigating factors regarding the Respondent's violations. However, it is clear that the stipulated facts, which were negotiated and discussed among the parties in good faith, evidence that the Respondent has acknowledged his mistakes and various violations, is remorseful, and has cooperated with the ODC's investigation and prosecution, and such actions pursuant to previous rulings by this Court should be considered as mitigating.[8]

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[8] See *Lawyer Disciplinary Board v. Scott*, 213 W.Va. 209 at 216, 579 S.E.2d 550 at 557(2003)

The Respondent is not now challenging the Hearing Panel's recommendation in an effort to achieve an uncommon or over-lenient result. In fact the Respondent would readily accept any admonishment or reprimand including whatever supervision and/or education requirements the Court feels would serve in avoiding similar misconduct and mistakes in the future. The Respondent simply feels that regardless of the ODC's insistence that the current violations somehow present a pattern on the part of the Respondent, none of the present violations have previously ever been alleged against the Respondent during his more than 37 years of practice[9] and his successful representation of hundreds of clients throughout these years.

The Respondent's mistakes and admitted violations of the Rules of Professional Conduct, although serious, notably do not include allegations of dishonesty, fraud, misappropriation or conversion of client funds, incompetence, lack of diligence, failure to expedite litigation or failure to communicate with his client. It is undisputed that the Respondent is a competent and diligent attorney who has for years now represented many clients zealously and within the bounds of the law.

Respondent submits that the violations herein charged and complained of and to which he has co-operatively stipulated, although true and of great import, are the result of inadvertence and the compounding of numerous minor errors in judgement and not of actual malice or intent[10], and

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[9] See Report of Hearing Panel Subcommittee, pg 20-21outlining the 4 previous admonishments the Respondent has received during his years of practice.

[10] Allowing notices to pay to go unheaded and unsatisfied, even after multiple letters are sent informing one of the debt, can easily be attributed to inadvertence and the result of mistake and/or simple negligence and do not necessarily evidence malice or an intent to avoid payment on the part of the obliger. As anyone who has operated an office knows, important matters sometimes simply slip past notice, even important things which would normally be remedied immediately, can elude ones attention at times. These matters can often be the result not only of inattention on the part of the responsible manager, but also accident and breakdowns in communication between subordinates as well.

thus do not rise to the level where a suspension of his privilege to practice law would serve in assuring public confidence, nor would they proportianally punish the Respondent for his actions. Further, the Respondent maintains that the proceedings have already effectively instilled in him the serious intention and desire to avoid similar mistakes in the future.

SUMMARY OF ARGUMENT

That the Respondent has admitted that he failed to timely pay the Nationwide subrogation claim. Also, that he failed to satisfy the CMS subrogation claim prior to the institution of these proceedings. The total amount at issue in these two (2) subrogation claims totals $1,872.25. The nationwide clam was satisfied well before the filing of the present complaint[11]. [It should be noted as well that the CMS subrogation claim has since also been satisfied in full and reimbursement has been effected to Ms. Jones including interest from the date of payment[12], making the actual harm inflicted by the Respondent in this case negligible at best after said restitution in full. Although these failures and mistakes show that the Respondent has clearly violated duties he owed to his client, the evidence that his violations extended to the public and the legal professions as a whole are less than clear.

The ODC would claim the fact that the Respondent only ever reimbursed Ms. Jones after these disciplinary procedures had begun should now negate consideration of his reimbursement, yet there is credible evidence that Respondent was unaware that Ms. Jones had paid the claim until after these proceedings were instituted, especially in light of the letter sent from Ms. Collias after the payment was allegedly made which failed to mention said payment and which stated that Ms. Jones bankruptcy proceeding had already begun as it was "pending". [Complainant's Exhibit 24, Pierson Exhibit bates 981] Additionally, Ms. Jones' testimony during the hearing

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[11] Respondent paid Nationwide by check dated March 27, 2017, in the amount of $1,333.33[ODC Vol. I, Ex. 2, Sealed Bates 61]

[12]Respondent provided a check to Ms. Jones at the hearing befreo the Board in the amount of $538.92. [Joint Ex. 2] which represented "the amount of the CMS payment plus the statutory rate of interest from the time it was paid to Ms. Jones. In her deposition, they provided a copy of the check that she sent, so we used the date of the check to the date of today, and it's approximately $500.00." [Hrg. Tr. 25-26]

when questioned by the board member that she could not state under oath ever actually informing the Respondent of her payment supports this fact. (Hrg. Tr. Pg. 32-33) In light of these facts, Mr. Pierson's reimbursement to Ms. Jones after the commencement of the proceedings is understandably justified. and not evidence of some more nefarious intent or of an attempt to avoid his financial responsibility.

Also, the Respondent agreed to stipulate to the majority of facts and violations alleged in this matter, which stipulations evidencing cooperation and remorse on the part of the Respondent have been entirely overlooked and without consideration. In addition to the negligible monetary/actual damage there exists no further damages in this matter alleged besides Ms. Jones instance that the CMS subrogation claim could have effected her disability claim. No evidence exists on the record to support this unspecified claim. In fact, CMS' correspondence itself had informed Ms. Jones that a bankruptcy proceeding would relieve her any collection activity in regards to the subrogation claim.

STATEMENT REGARDING ORAL ARGUMENT

The Respondent requests oral argument in this matter. Additionally, this Court's February 2, 2023 Order indicated that this matter would be scheduled for oral argument pursuant to Rule 19 of the Rules of Appellate Procedure.

ARGUMENT

In lawyer disciplinary matters, 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 Disciplinaty 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). Although this Court gives respectful consideration to the Lawyer Disciplinary Board's recommendations as to questions of law and the appropriate sanction, it ultimately exercises its own independent judgment. *Id.*

Accordingly. This Court is the final arbiter of formal legal ethic charges and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law. Syl. Pt. 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984); Sy!. Pt. 7, *Committee on Legal Ethics v. Karl*, 192 W.Va. 23, 449 S.E.2d 277 (1994).

A. Respondent's violated duties to his client, but NOT to the public, the legal system, or the legal profession.

In Section A of the Discussion portion of the Hearing Panel's Report, and also in the brief submitted by the ODC, it is stated broadly and in a conclusory fashion that Respondent has violated duties not only to his client, but to the public, to the legal system, and to the legal profession. Yet, in the outlined facts which are used to support this claim, the Board puts forth the Respondent's failure to enter into a written contract with Ms. Jones, his failure to timely pay the Nationwide subrogation claim, as well as his failure to pay the CMS subrogation claim as evidence of violations of his duty to his client, but then presents nothing which would evidence

or establish the proposition that Respondent herein has violated any duties to the public, the legal system, or the profession.

The Board agreed with the ODC and concluded that "Respondent's noncompliance with the Rules as exhibited in the record is clearly detrimental to the legal system and profession, and his conduct has brought the legal system and legal profession into disrepute. The conduct exhibited by Respondent also undermines the integrity and public confidence in the administration of justice." There is no evidence however in the record that the public was ever implicated in this matter, and indeed the matter revolves around issues concerning only one client. The rulings of the Board as well as the allegations by the ODC in regards to the Respondent's duty and the subsequent injury to the legal system, the profession and the public's confidence are conclusory at best, and are not supported by any specific facts or evidence.

As such, the Respondent asks this Court to disregard the same and to accordingly hold that the duty which the Respondent owed and subsequently violated was to his client alone. The Respondent does not argue this point in order to minimize the seriousness of his breach of duty, for the duty an attorney owes to his client is of the upmost importance, and the Respondent has sufficient remorse regarding his failures without including vague unspecified duties to other groups.

B. Respondent's culpability in this matter comports more with accident, negligence and/or mistake than with intentional or knowing acts.

Although the Respondent may have possessed knowledge at a certain point that there were subrogation claims owed for Ms. Jones, the ODC presented no evidence that Respondent's

failure to timely pay such claims was an intentional or knowing act. After all, the Respondent satisfied the subrogation claim by Nationwide well before the institution of the present action. [ODC Vol. I, Ex. 2, Sealed Bates 61] As discussed earlier, the CMS letters and the letter from Ms. Collias read together would have logically led the Respondent to believe that the CMS subrogation claim was no longer at issue, and the Respondent reimbursed Ms. Jones after learning of her payment.

In fact in *Lawyer Disciplinary Board v. Kupec (Kupec II)*. 204 W.Va. 643, 515 S.E.2d 600 (1999) the Supreme Court found very similar conduct by an attorney to evidence merely negligence with regard to handling of client funds, not intentional or knowing acts as are alleged against the Respondent. (The attorney in that case had operated an account "contrary to the strictures of the Rules of Professional Conduct" and client monies were in turn lost and/or misappropriated entirely, notably without ever apparently being reimbursed).

Also, the Board concluded, quite correctly, that the evidence established that the Respondent's improper use of his IOLTA Bank Account was due to accident and had resulted in no harm to any client or other entity. Thus the ODC's accusation that Respondent is somehow guilty of multiple occasions of improper use of his IOLTA accounts was never proven and no evidence or testimony was ever presented in support of such a misleading and damning statement.

The only testimony and only evidence given on the record regarding this incident was the Respondent's testimony under oath regarding an accidental Remote Capture Deposit of $2,734.25 on December 5, 2016, and on the same day a Debit of $2,700.00 in an attempt to

remedy said accident[13], and which testimonial evidence was not only convincing and logical as explained, but also supported by the documentary evidence[14]. Thus the Board was quite correct in ruling that no injury was ever alleged to any client and no controverting evidence was ever produced by any witness for the ODC nor any argument made in opposition to the explanation given by the Respondent.

C. The amount of actual injury to Respondent's former client is not extensive

The amount of "real injury" in this matter as concerns Ms. Jones is minimal, if any at all, after Respondent's reimbursement of all costs. Interestingly, the Board as well as the ODC both quote Ms. Jones, as saying that it took her "six years to get here', and that she "had to pay a lot of money out of her own pocket.", yet puts forth no evidence to support or otherwise explain either of these statements. These "six years" would seem to include the period of time when Ms. Jones was represented quite successfully by the Respondent in her divorce proceeding and in which Ms. Jones herself has acknowledges Respondent's ongoing communications and discussions as well as the ultimate successful outcome achieved on her behalf. [Deposition of Cynthia Jones p. 27]

In point of fact, the only potential harm to the Complainant Cynthia Jones as a result of the non-payment of her CMS subrogation claim which was ever proven, specifically by the admission of the CMS letter to Ms. Jones dated January 24, 2017, was described as being, at worst, an eventual offset of Ms. Jones' Federal Tax Refund or other Federal Benefit (i.e. Social Security Disability Payments) in an amount no greater than the original subrogation claim, plus

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[13] Hrg. Tr. Pg. 56-57

[14] See ODC Vol. I, Ex. 26, Bates 884

any accrued interest. It is worthy of note that no such offset ever actually occurred. (See Pierson Exhibit pg. 974-977)

The record clearly states that Respondent's former client had delivered several letters regarding the outstanding CMS subrogation claim. These letters were dated September 8, 2016, October 20, 2016, and January 24, 2017 respectively. [see ODC Vol, I, Ex. 2, Bates 5-7, Sealed Bates 65-94; Hrg. Tr. 21-23] The letter of January 24, 2017 was titled "*Notice of Intent to Refer Debt to the Department of Treasury for Cross-Servicing and Offset of Payments*". Shortly after receiving this letter[15] Ms. Jones apparently consulted Sherri Collias regarding filing bankruptcy regarding this and other debts. Even though this debt was clearly dischargeable in bankruptcy Ms. Jones was advised[16] by her bankruptcy attorney, Sherri Collias, to immediately pay the CMS debt personally via a personal check written by Ms. Jones while sitting in Ms. Collais' Law Office on February 1, 2017, in the amount of $456.71. [Hrg. Tr. 21-23]

This fact, however, was never disclosed to the Respondent prior to the filing of the current disciplinary action. A member of the Hearing Panel questioned Ms. Jones during her testimony at the hearing before the subcommittee in this matter regarding her assertion that she had notified the Respondent she had paid the CMS debt, and it became clear during said questioning that Ms. Jones could not affirmatively testify under oath when or how she actually provided the Respondent with notice that she had paid the subrogation claim personally a little

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[15] Although this letter is dated January 24, 2017, no one testified as to when Ms. Jones was actually in receipt thereof. It is however safe to assume that since the letter was delivered via US Mail that Ms. Jones would not receive the letter for a period of some days after its date of creation, thus making Ms. Jones' payment on February 1, 2017 an even more expeditious act than originally assumed.

[16] Ms. Collias in fact testified that she advised Ms. Jones to both list this debt in her bankruptcy proceeding, and also to "go ahead" and pay the debt. [Hrg. Tr. 38]

over one week after the date on last letter from CMS. (Hrg. Tr. 32-33)

The aforementioned letters from CMS which were actually provided to the Respondent by Ms. Jones, when read in concert with the letter received by the Respondent from Ms. Jones' bankruptcy attorney, Sherri Collias, deserve closer scrutiny in regards to the information which they supplied to the Respondent and hence the "knowledge" that he actually possessed prior to the filing of the present complaint.

First, it should be noted that the final letter from CMS, dated January 27, 2017 [See ODC Exhibit 20, ODC disclosure bates 87-93], states clearly that if a bankruptcy proceeding were filed on behalf of Ms. Jones she would no lonegr be subject to any offset. In addition, the letter from Sherri Collias dated May 26, 2017, states clearly that Ms. Collias was at that time representing Ms. Jones in what she referred to as a "pending bankruptcy proceeding". [Complainant's Exhibit 24, Pierson Exhibit bates 981]. Also, Ms. Collias stated unequivocally at the hearing that had this debt been listed in Ms. Jones' bankruptcy it would have discharged, and further that it SHOULD have been listed.[17]

The Respondent interpreted the word "pending" to mean that said bankruptcy proceeding had actually been instituted and filed. This was not true. The Respondent's interpretation of the word "pending" however is supported by case law, as this Court has previously dealt with whether or not an action is "pending", by saying:

> "This Court considered the meaning of the first factor — whether there was a pending or potential civil action — in *Mace v. Ford Motor Co.*, 221 W.Va. 198, 653 S.E.2d 660 (2007) (per curiam). We noted that the dictionary definition of "pending" is:
>
> > Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment.

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[17] Hrg. Tr. 43

> Thus, an action or suit is "pending" from its inception until rendition of final judgment. (quoting Black's Law Dictionary (5th Ed. 1979))
> *Williams v. Werner Enters*, 235 W. Va. 32 at 39; 770 S.E.2d 532 at 539 (2015)

Thus, upon receipt of Ms. Collias' May 26, 2017 letter, the Respondent would have justifiably believed that the issue of Ms. Jones' outstanding CMS subrogation to be a moot point, as said debt would have rightfully been dealt with and discharged in the bankruptcy[18] and the potential offset no longer a possibility according to the letter from CMS.

Therefore, the evidence presented in the form of the letters received by the Respondent regarding the CMS subrogation claims shows clearly that the Respondent not only had no reason to believe that Ms. Jones had paid the subrogation personally, but also that said subrogation had likely been encompassed and discharged in her bankruptcy proceeding. These facts directly contradict the assertions that the Respondent knew that Ms. Jones' had personally paid this debt[19]. In fact, it is clear that Ms. Collias knew by May 26, 2017, that Ms. Jones had paid this debt[20], but for some reason failed to inform the Respondent in her letter. Also, these facts go directly to why the Respondent had made no effort to repay Ms. Jones until after the institution of the current proceedings against him. How could the Respondent possibly have repaid Ms. Jones without possessing any knowledge that she had ever paid the debt herself, and also assuming said debt had been discharged in a bankruptcy proceeding?

In truth, Ms. Jones' insistence upon paying her CMS subrogation claim was founded upon an unreasonable fear, such fear being that said debt would or could somehow result in a

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[18] Hrg Tr. 43

[19] Deposition of Cynthia Jones p. 69

[20] Deposition of Cynthia Jones p. 59-60

review of her disability claim. Ms. Collias' advice to Ms. Jones regarding the CMS subrogation claim, to "[j]ust go ahead and pay it" (see Hrg. Tr. 38), appears unjustified and questionable advice at best. (see Pierson Exhibit bates 974-976).

Under a similar set of circumstances, our Court has rejected the consideration of a former client's unfounded or unreasonable claims of a potential or imagined injury to constitute actual evidence or proof of an injury, either potential or realized. See *Lawyer Disciplinary Board v. Hardison*, 205 W.Va. 344, 518 S.E.2d 101 (1999) In *Hardison* the Court stated, "the client contends that if her complaint had been timely filed, she would have obtained a larger settlement from the first global settlement, however, no evidence was submitted to support this contention." and thus the Court rejected consideration of such a speculative argument. (see Id. at 348 and 105) Similarly, in the matter at hand, no evidence was produced or submitted to support Ms. Jones' contention that Respondent's failure to pay the Ms. Jones' CMS subrogation claim could or would ever have negatively impacted Ms. Jones' disability award.

Although the Complainant testified that her disability claim was reviewed at one point,[21] no evidence was offered or sumbitted which would serve to link such a review with her unpaid CMS subrogation claim. Section 221(i) of the Social Security Act[22], as amended, requires periodic eligibility reviews for all Disabled Beneficiaries at least every 3 yrs. Cynthia Jones actually testified in her deposition that even tho there was no way to assure that the unpaid CMS subrogation ever led to a review of her disability claim, and further that the Social Security

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[21] Hrg. Tr. 23.

[22] [42 U.S.C. 421]

Office would never admit the two issues were connected, she would continue to believe this was the actual cause until she goes to her "grave". [cynthia Jones Transcript p. 80-81]

Thus the Respondent's eventual reimbursement to Complainant of her original payment of $456.71 plus the statutory interest incurred since the time of her original payment, for a total reimbursement amount of $538.92, clearly makes the amount of "real injury" suffered by Ms. Jones in this matter minimal in its financial amount, and totally reimbursed at present. There currently exist no outstanding debts from the settlement of Ms. Jones''s automobile accident.

ODC's citation to *Lawyer Disciplinary Board v. Kupec (Kupec _I)*, 202 W.Va. 556, 505 S.E.2d 619, (1998) stating that some courts have failed to consider in mitigating when restitution is paid after the commencement of disciplinary action or under the threat thereof simply does not relate to the Respondent's current case, due to the aforementioned fact that, according to Ms. Jones' own admission when questioned by William L. Mundy, Esq., she could not confirm under oath ever actually informing the Respondent of her making the payment of $456.71 to CMS. (Hrg. Tr. Pg. 32-33)

Thus the fact that the Respondent never sought to reimburse Ms. Jones until after Disciplinary proceedings had begun should not now serve to now disparage the Respondent if he reasonably believed the claim had been discharged in a pending bankruptcy and additionally had no idea Ms. Jones had paid it personally prior to the filing of the current charges.

As to the allegation that Respondent failed to enter into an agreement as regards his fees and obligations concerning Ms. Jones' automobile accident claim, the evidence in this regard was not at all clear. It is undisputed between Complainant and Respondent that Ms. Jones was paid

her portion of the settlement, yet she returned it in total to pay towards her outstanding legal bill from her divorce proceedings. (See specifically agreed stipulation No. 38 and No. 23, and footnote 8). Not only does it appears that the Respondent and Ms. Jones fully understood all aspects of the case and the eventual settlement, but Ms. Jones herself testified that she recalled signing a contingent fee agreement at one point.[23] Ms. Jones actually stated clearly that the Respondent always communicated and explained everything thoroughly with her regarding his representation.[24]

D. The existence of Mitigating Factors

The Brief of the ODC makes a great deal of their assertion and claim that there are no mitigating factors present to be considered in Respondent's case. However, although mentioned previously in their brief, the ODC fails to mention later in regards to mitigation that the Respondent had clearly admitted to his wrongdoing, accepted responsibility and evidenced remorse for his actions when he entered into an agreement to stipulate to various vilations and facts in this matter.

It is clear from the record that the Respondent showed obvious willingness to stipulate to the alleged facts and violations, which act the Court has previously ruled to be indicative of cooperation and remorse and thus to serve as a mitigating factor to be considered in Respondent's favor. See *Lawyer Disciplinary Board v. Scott*, 213 W.Va. 209 at 216, 579 S.E.2d 550 at 557(2003). The stipulated facts in this case are in fact quite extensive, and were

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[23]Deposition of Cynthia Jones, pg.24-25

[24] Deposition of Cynthia Jones p. 43

obviously negotiated without the intention of minimizing or excusing the Respondent's actions. The Respondent therefor accordingly requests that this Court now consider his acceptance of responsibility as evidenced by the agreed stipulations, which were negotiated and presented in good faith. Additionally, it is clear that the Respondent herein lacked any articulable dishonest, selfish or fraudulent motive.

E. The Agrivating Factors alleged, prior disciplinary proceedings

The Respondent's prior admonishments, although cited as aggravating factors, were admonishments for violations which are unrelated factually to the current charges and thus they should not serve as evidence that the Respondent has failed to learn from his past violations and mistakes. Several cases which were cited in support of the broad conclusion that even unrelated prior disciplinary proceedings should always be considered an aggravating factor, do not actually support such a contention.

In *Committee on Legal Ethics v. Tatterson.* 173 W.Va. 613 at 619, 319 S.E.2d 381 at 388 (1984) states merely that "where there are a number of disciplinary infractions involving different clients funds we have considered this pattern of ethical violations to warrant an annulment..." , and in Respondent's case his prior infractions did not involve the same issues as are alleged currently, or even involving the handling of client funds or property. Interesting enough, In *Tatterson* (Supra), the attorney had failed to reach an agreement at all as to his fees, failed to make any accounting of the settlement he had reached, failed to place the proceeds into a trust account of any kind, and blatantly lied to his clients regarding the settlement distribution, all of which are much more egregious acts than the Respondent here is charged with, and yet the

punishment in *Tatterson* (1 year suspension) is somehow the same which is currently being recommended by the ODC for the Respondents current violations.

The sanction in *Lawyer Disciplinary Board v. Sturm*, 237 W.Va. 115, 785 S.E.2d 821 (2016) were increased due to the fact that the attorney had previously been admonished for **similar misconduct,** unlike our current Respondent. In *Lawyer Disciplinary Board v. Kupec (Kupec _I)*, 202 W.Va. 556, 569-570, 505 S.E.2d 619, 632-633 (1998) and *Lawyer Disciplinary Board v. Kupec (Kupec II)*. 204 W.Va. 643, 515 S.E.2d 600 (1999), the same attorney had failed to act with any reasonable diligence, had engaged in conduct prejudicial to the administration of justice, and had misappropriated over $20,000.00 of client money and yet he ultimately received a suggestion of a 60 days suspension, which was later reduced to a mere admonishment.

In *Lawyer Disciplinary Board v. Sturm*, 237 W.Va. 115, 785 S.E.2d 821 (2016) the attorney had been admonished for similar Conduct before these proceedings (again unlike our Respondent herein), and had evidenced a pattern of not filing pleadings after being retained by clients, showed a pattern of not communicating with clients, violated his duties of candor, diligence and honesty, did not get clients consent prior to accepting retainer from client's mother, allowed the mother to make decisions and not client, kept no contemporaneous time records, had never deposited funds into a trust account, had failed to properly refund clients and disobeyed a supreme court order, and yet the board therein recommended a 30 day suspension and she ultimately received a 90 day suspension, when her conduct was clearly inflicted much more actual damage and her actions being much more egregious than those of the Respondent's herein.

In *Lawyer Disciplinary Board v. Grindo*, 231 W.Va. 365, 745 S.E.2d 256 (2013) the attorney had in the past also been admonished in disciplinary proceedings for **similar conduct** to what he had again been accused and yet he failed to timely file an appellate brief even after being contacted by the clerk and reminded and given extra time, and also had failed to perfect an appeal entirely in another matter by again not filing a brief, and the Court ultimately there issued only a public reprimand after initially receiving a recommendation of admonishment.

In *Lawyer Disciplinary Board v. Blyler*, 237 W.Va. 325, 787 S.E.2d 596 (2016) the attorney lost nearly one-hundred thousand dollars of client money ($96,851.80) by mislabeling an account and allowing it to then be seized to satisfy his personal tax debt, failing to then disclose the seizure, thereby seriously damaging his client who never managed to recover their loss although the attorney in this case had substantial experience in the field of law in which he was engaging. In this case, although the initial recommendation was for disbarment, the attorney ultimately received only a 60 day suspension.

In *Lawyer Disciplinary Board v. Sullivan*, 230 W.Va. 460, 740 S.E.2d 55 (2013), the attorney ignored numerous requests from his client to correct a sentencing order and failed to communicate with his client where he had been **previously admonished 5 times for similar conduct** and the client was injured through being deprived of their freedom through imprisonment for a period of 6 addtional months due to incorrect Order which lawyer never moved to correct, the Court issued a 30 day suspension with supervision after an original recommendation of merely a reprimand and supervision.

In *Committee on Legal Ethics of W.Va. State Bar v. Pence*, 216 W.va. 236, (1975), the attorney had failed to pay a client their settlemt funds entirely, wrongfully commingled clients funds, had no excuse for his behavior and committed actual fraud upon the investigative court through forgery, attempted to mislead regarding the offense and yet still he received merely a one-year suspension for significantly much more horrendous, deliberate and malicious actions, with clear and actual provable injury without restitution.

F. Improper use of IOLTA account and failure to safeguard client funds

The Respondent's failing to immediately pay the CMS subrogation claim regarding Medicare reimbursement was through inadvertence and/or mistake and not due to a depletion in available funds, evidenced by the fact that during the original period of disbursement (around July of 2016) the Respondent's IOLTA account with First Now Bank was noted to have carried an average balance of $78,548.17 as of July 31, 2016. [ODC disclosure bates 2003].

Additionally, regarding the other alleged misuse of Respondent's IOLTA account, once the Respondent realized that there was an inadvertent deposit from unrelated farming proceeds in the amount of $2,734.25 into his IOLTA account on December 5, 2016, he immediately acted on that very same day to remedy the mistake by effecting a withdraw of the funds, and further the funds caused no actual harm to any client or entity. (Hrg. Tr. Pg. 56-57) Further, the Board agreed with the Respondent's explanation of this one-time mistake and ultimately determined that it should not be considered in making their recommendation. In regards to this incident, it is worth noting that after requesting, acquiring and reviewing approximately One-thousand Nine-hundred and Ninety-one (1,991) pages of bank records relating to the Respondent's law practice,

the Respondent is accused of only one single instance of commingling personal funds with client funds on December 5, 2016. . [ODC disclosures bates 261-2252]

As regards the accusations that the Respondent failed to safeguard the funds that were due in subrogation to both Nationwide and CMS, the Respondent has admitted his fault in this regard. However, the Respondent maintains that this was inadvertent and not the result of an attempt to convert or misappropriate funds which he owed to third parties. Again, it is clear that the Respondent had ample funds to pay these claims at the original time Ms. Jones' case was settled. However, the failure of the Respondent to timely pay both the Nationwide and CMS claims did eventually result in the depletion of these funds in Respondents IOLTA account below the amount required to satisfy the claims.

It should be noted that although the Respondent eventually satisfied both claims via payment from his general account, had the Respondent attempted to transfer the funds necessary into his IOLTA account at a later date said acts would have been disingenuous at best. It is of note that the Respondent committed no acts of dishonesty, fraud or deceit in order to cover or conceal his earlier mistakes or mishandling of his account as this Court has regularly witnessed from other attorneys over the years.

There exists precedent before this Court of numerous cases in which attorneys have exhibited much more egregious violations and behavior regarding their IOLTA accounts and the safekeeping of client or third party funds. These other cases present instances of attorneys failing to safe keep others property in much more blatant, harmful and sometimes deceptive manners than our Respondent has been accused, which surprisingly has resulted in similar or sometimes

even significantly lesser recommended sanctions or censure than what the Respondent herein faces currently.

For instance, in *Lawyer Disciplinary Board v. Thorn,* 236 W. Va. 681, 783 S.E.2d 321 (2016), an attorney was found to have regularly taken retainers from clients without later performing the related work, file in his diligence on eight (8) occasions, failed in his duty to expedite litigation on seven (7) occasions, Failed to communicate or keep clients reasonably informed on seven (7) occasions, failed to properly terminate representation on five (5) occasions, had at one point pursued an action for a client in the improper court, regularly deposited unearned retainers into his operating account instead of an IOLTA account and failed to refund unearned portions of various retainers (in amounts exceeding approximately $9,000.00 or more) , practiced law in jurisdictions in he was not licensed and further negotiated an unscrupulous contract after missing a statute of limitations in a attempt to pay off a client to avoid disciplinary action and/or malpractice claims,, and the Board ultimately recommended only a 90 day suspension, and this Court in turn suspended the attorney for one (1) year. These violations, unlike the present violations asserted against the Respondent, are much more serious in nature, involve numerous clients and include actual dishonesty in an attempt to avoid liability for his malpractice.

Similarly, in *Lawyer Disciplinary Board v. Atkins* 243 W. Va. 246, 842 S.E.2d 799 (2020), the attorney failed to forward funds to the debtor's representative until after the filing of an ethics complaint , held in the attorney's "client account" which was notably not his IOLTA account, and which had been acquired in a debt collection action for which the attorney had been

engaged by his client, the debtor's representative. Of the $14,807.55 which the attorney had commingled with other law firm funds, $10,000.00 was immediately misappropriated the very next day and converted for use by his law firm's. It was determined that the attorney had failed to inform the client of his receipt of the proceeds and further had lied to the client about when he actually received the funds. In this matter the Board had recommended a 90 day suspension, yet this Court ultimately issued a one (1) year suspension. As distinguished from the Respondent's current case, this case clearly involved a far greater amount of money, the attorney intentionally and deceitfully attempting to lie to his client about the funds he had received, refusal to even utilize an IOLTA account to safeguard funds belonging to another party, and intentional theft of a large portion of the settlement amount, all of which make this case a much more egregious and serious ethical matter.

Additionally, in *Lawyer Disciplinary Board v. Downes* 239 W. Va. 671, 805 S.E.2d 432 (2017), an attorney was found to have wrongly deposited a settlement check for $15,000.00, of which a portion belonged to a party not represented by the attorney, into a fiduciary account and then later moved to an operating account, and which funds were later misapproiated and converted for the attorney's firms use. Although there was evidence that the original deposit may have been unintentional, the attorney had obviously breached his duty to safe-keep funds not his own. Once the attorney became fully aware of his mistakes he quickly issued payments to all parties in an effort to make tem whole. This attorney was licensed in Virginia, D.C. and West Virginia, and since these actions arose from the attorney's practice in Virginia, he was charged initially by the Virginia Bar Counsel with misconduct. The attorney and the Virginia Bar Counsel agreed to stipulate to the facts surround the misappropriation of these funds and he was

issued a public reprimand with probationary terms. When D.C. became aware of these facts another ethical violation proceeding was begun in that jurisdiction. However, since the attorney rarely practiced in D.C. he quickly agreed to a suspension of his licenses as opposed to litigating or negotiating further.

When the West Virginia LDB eventually discovered these other proceedings they determined that our reciprocity rules demanded this attorney's immediate suspension in line with the D.C. sanction. The attorney argued that his punishment should be more in line with Virginia, yet because the attorney was alleged to have failed to self report the disciplinary proceedings in both other jurisdictions as required by our rules, therefore although the Board recommended probationary terms the Court ultimately issued a a thirty (30) day suspension. This case has many similarities to the present one, such as inadvertence, restitution, and lack of dishonest, selfish or fraudulent motive, and it too involved a significantly greater amount of money than that to which the Respondent stipulated.

Likewise, *LDB v. Blyler* (supra), which was mentioned earlier, dealt also with an allegation concerning the safekeeping of another's money, and like the previously mentioned cases it also involved significantly more funds than are at issue with the Respondent, notably $96,851.80, a significant portion of which remained unrecovered at the time of the decision. Also unlike the Respondent's current case, the attorney in *Blyle*r was determined to have acted with "an element of deceit" when he failed to inform the interested parties that the funds had been seized and were no longer available, although multiple oportunities existed for him to do so, and that his subsequent failure to expedite litigation by not seeking in any way to timely recover

these funds resulted in substantial harm to the heirs of the estate. Unlike Respondent's current case however, the Board recommended only a public reprimand, and this Court determined that a sixty (60) day suspension was adequate.

Also, in *Lawyer Disciplinary Board v. Niggemyer*, No. 31665 (W.Va. May 11, 2005) (unreported) the attorney was found to have violated a plethora of the Rules of Professional Conduct, namely Rules 1.3 (lack of diligence), l.4(a) (communication, failure to keep the client informed about the status of a case), 1.15(a) (safekeeping funds or property of clients or third parties), l.15(b) (promptly delivering funds or property to clients or third parties), l.15(d) (properly maintaining an IOLTA account), 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) and 8.4(d) (engaging in conduct prejudicial to the administration of justice) stemming from his mishandling of a client's settlement funds. In this case, surprisingly, the attorney received merely a reprimand, where his actions were much more egrigoius than the Respondent's and notably include dishonesty, fraud, deceit or misrepresentation. Again, the Respondent is guilty of a only a fraction of the violations Mr. Niggemyer committed, and notably never engaged in acts of dishonesty or fraud in an attempt to conceal or distract from his mistakes as he willingly and in good faith admitted to violations through the negotiation of stipulated facts in this matter.

Lastly, in *Lawyer Disciplinary Board v. Chittum*, 225 W.Va. 83, 689 S.E.2d 81 1 (2010), this Court determined that the attorney rarely utilized his IOLTA account, regularly deposited personal funds therein, deposited client funds into his law office account, co-commingled client funds with his own funds, and eventually and without explaination dissolved his IOLTA account

entirely. Althoguh this attorney was found to have violated the additional rule concerning acting with diligence in matters of representation, the Board recommended and this Court ultimately accepted a reprimand as well.

CONCLUSION

The Respondent in the present case has clearly evidenced remorse and acceptance of responsibility through his stipulated admissions and also his reimbursement and/or satisfaction of any and all outstanding obligations, including interest thereon. He has never evidence any acts of fraud or deception in attempt to conceal his actions, nor were dishonest or selfish motives their impetus. Ultimately his mistakes and resulting violations can be explained primarily through inadvertence and mistake, or at most negligence and inattention. However, when these violations are considered in the light of his over 36 years of successful practice and his successful representing of hundreds of other clients, all in an effective and in a lawful manner, his actions can be seen as, if not excusable, then at least sympathetic, understandable and worthy of mercy and consideration. The actual injury sustained by Ms. Jones was clearly crucial and all important in her life, yet so too was her divorce proceeding in which no one has contested that the Respondent successfully represented her previously and for an extended period of time prior to agreeing to assist her with her auto accident claim. In fact, the Respondent only agreed to represent her in her automobile accident claim once the statute of limitation thereupon had become imminent, and after she offered the Respondent the entire proceeds in which to apply to her then substantial and outstanding Divorce bill. [deposition of Cynthia Jones p. 32]

The Respondent understand that Ms. Jones may now imply motives to the him that he never had and never intended, and which he knows that he unfortunately may never convince her otherwise. Undoubtedly if given the opportunity to repair the damage and misgivings his acts have caused, he gladly would. The Respondent is fully and completely remorseful and intends to monitor and utilize his IOLTA accounts properly and entirely in compliance with the applicable rules in the future, and will from now on obviously always monitor any subrogation obligations closely. Indeed he is willing to accept and embrace whatever monitoring provisions or probationary terms which this Court feels would be helpful in avoiding similar misconduct or mistakes in the future.

Accordingly, the Respondent herein requests that this Court rule that he be admonished and/or reprimanded, publicly or privately, that this Court institute a requirement that his law practice be supervised by a competent and acceptable attorney fo a period of one (1) year, he complete nine (9) hours of additional continuing legal education in the area of law office management and further that be ordered to pay the costs of these proceedings.

Respectfully submitted this 4th day of April, 2023.

By Counsel

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BEFORE THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

LAWYER DISCIPLINARY BOARD
Petitioner

v.

JAMES M. PIERSON,
Respondent.
I.D. No.: 18-03-191
Bar No.: 2907

DOCKET NO.: 21-0590

CERTIFICATE OF SERVICE

I, Paul S. Saluja, Counsel for Respondent, do hereby certify that I have served a true and exact copy of the attached "Brief of Respondent James Pierson" upon the Petitioner and each of the Hearing Panel members, via United States Postal Service, first class mail, postage pre-paid as follows:

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