

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

In Re: Phillip B. Ball, a member of
The West Virginia State Bar

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I.D. Nos.: 20-03-061
Transaction ID: 70319268
Supreme Court No: 22-582

REPORT OF THE HEARING PANEL SUBCOMMITTEE

I. PROCEDURAL HISTORY

Formal charges were filed against Phillip B. Ball (hereinafter “Respondent”) with the Clerk of the Supreme Court of Appeals on or about July 21, 2022, and served upon Respondent’s counsel, John Carr, Esquire, via certified mail on or about July 25, 2022. Chief Disciplinary Counsel filed her mandatory discovery on or about August 15, 2022. On or about August 23, 2022, Respondent filed a “Motion to Continue all Deadlines and Hearing Date” and requested a continuance of all deadlines in the disciplinary matter based upon a federal criminal investigation into Respondent based upon the same facts and circumstances alleged in the Statement of Charges. Respondent’s counsel represented that he expected the federal criminal investigation to conclude within thirty (30) days. Based upon the grounds for the continuance and the stated timetable, Chief Disciplinary Counsel did not object. On or about September 2, 2022, the Hearing Panel Subcommittee granted Respondent’s motion and the evidentiary hearing, as well as other deadlines, were continued.

On or about December 7, 2022, a scheduling conference was conducted and the hearing was rescheduled for January 30-31, 2023. Respondent filed his Answer to the Statement of

Charges on or about December 16, 2022. On or about January 20, 2023, a video prehearing was held, and it was determined that another brief continuance was necessary based upon a scheduling conflict for the lay member of the Hearing Panel Subcommittee, and the hearing was scheduled for February 6-7, 2023.

Thereafter, this matter proceeded to final hearing in Charleston, West Virginia, on February 6, 2023. The Hearing Panel Subcommittee was comprised of Clayton J. Fitzsimmons, Esquire, Chairperson; Timothy E. Haught, Esquire; and Helen Matheny, Layperson. Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel, appeared on behalf of the Office of Lawyer Disciplinary Counsel. Attorney John A. Carr appeared on behalf of Respondent, who also appeared, in person. The Hearing Panel Subcommittee heard testimony from John F. Williams, Jr. Esquire; The Honorable William J. Sadler;¹ former Sheriff of Mercer County, Don Meadows; and Respondent. In addition, ODC Exhibits 1-19, with Exhibit 7 under seal, were admitted into evidence as well as Joint Exhibit 1.

II. FINDINGS OF FACT²

1. Phillip B. Ball (hereinafter "Respondent") is a lawyer practicing in Princeton, Mercer County, West Virginia. Respondent, having passed the bar exam, was admitted to The West Virginia State Bar on September 30, 1996. As such, Respondent is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. [Stipulated, Joint Exhibit 1].

¹ Consistent with the Code of Judicial Conduct, Judge Sadler testified pursuant to a subpoena issued for his appearance. [ODC Exhibit 19].

² On or about February 6, 2023, the parties signed a stipulation of facts and the same was entered into evidence at the evidentiary hearing. Any facts that were so stipulated to are delineated as such.

COUNT I
I.D. No. 20-03-061
Complaint of Harold Wolfe, III, Esquire

2. Harold B. Wolfe, III, Esquire, a licensed member of the West Virginia State Bar,³ pursuant to his reporting requirements in Rule 8.3 of the Rules of Professional Conduct, filed a verified complaint against Respondent Phillip B. Ball, Esquire, a licensed member of the West Virginia State Bar. [Stipulated, Joint Exhibit 1.]

3. Fred B. Warden passed away testate on or about April 16, 2012. At the time of his death, he was the owner of a variety of property and assets, including liquid monetary assets in banks, real estate, as well as stock in BB&T Corporation, First Community Bank, and One Valley Bank. As part of Mr. Warden's estate planning, he had prepared a will that established a trust with the primary purpose of caring for his daughter, Ms. Leslee Burton, for life, with remainder of any trust assets to pass to other relatives upon Ms. Burton's death. [Stipulated, Joint Exhibit 1.]

4. Ms. Burton received/receives Supplemental Security Income (SSI) disability benefits and the Trust was to provide for his daughter after Mr. Warden's death. [Transcript at 13.]

5. The original Executrix on the Estate and Trustee of the Estate rejected the role as trustee and a petition was filed for the appointment of a successor trustee. [Stipulated, Joint Exhibit 1.]

³ Mr. Harold B. Wolfe, III, a member of the West Virginia State Bar, died on or about January 26, 2022. [Stipulated, Joint Exhibit 1]

6. Attorney John E. Williams, Jr. has represented Ms. Burton and Mr. Burton's interests as beneficiaries of the Estate of Fred Warden since 2013 and remains her counsel of record to date. [Transcript at 13 and ODC Exhibit 18.]

7. Any fees paid to Attorney John E. Williams, Jr. for services provided to the Burtons in this matter were paid out of the Trust. The legal fees were paid to Attorney Williams after an itemization of services was provided and approved by the Court by Order. [Transcript at 18.]

8. After a hearing held on or about July 9, 2013, after no objection from the beneficiaries of the Trust, the Sheriff of Mercer County was appointed as successor trustee. The Sheriff at the time of the appointment was Don Meadows. [Stipulated, Joint Exhibit 1.]

9. Sheriff Don B. Meadows was the Sheriff of Mercer County West Virginia from 1989-1996 and returned to service as the Sheriff of Mercer County from 2009-2016. Respondent was serving as counsel for the Sheriff when he returned to office in 2009, and he continued to use him as counsel to handle estates. [Transcript at 93.]

10. A final Accounting of the Estate was filed by the Executrix of the Estate on or about October 29, 2013. [Stipulated, Joint Exhibit 1.]

11. The Fiduciary Commissioner filed a Final Settlement of the Estate with the Clerk's Office on or about December 2, 2013. The Final Settlement reflects disbursement of assets⁴ in excess of One Hundred and Ninety-Six Thousand (\$196,000.00) to the Sheriff of Mercer County, as Trustee. [Stipulated, Joint Exhibit 1.]

⁴ It is noted that there is a mathematical error on the appraisalment as it relates to the value of the stock for BB&T. [Stipulated, Joint Exhibit 1.]

12. On or about December 13, 2013, Ms. Burton, by and through counsel, filed a Motion to Interpret the Trust Provisions of the Last Will and Testament of Fred Warden. (Civil Action No. 13-C-99-OA) [Stipulated, Joint Exhibit 1.]

13. As the Trustee, the Sheriff was given control over the entire corpus of the trust assets and was responsible for complying with the Court's orders regarding distribution, which was primarily for Ms. Burton's rent and utilities. [Stipulated, Joint Exhibit 1.]

14. However, Sheriff Mcadows had "no idea" what he was supposed to do in his role as the Successor Trustee. [Transcript at 97.]

15. Attorney Williams testified that prior to filing the Motion with the Circuit Court, he asked Respondent, as counsel for the Sheriff, to give Ms. Burton a monthly allotment out of the Trust to pay for her monthly needs and Respondent refused to do. [Transcript at 19 and *See also* ODC Exhibit 16 at 552.]

16. By Order entered May 16, 2014, the Court issued an Order that set forth the terms and conditions of the Trust. The Court directed that Respondent, as counsel for the Sheriff of Mercer County, receive a copy of the Order. [Stipulated, Joint Exhibit 1.]

17. The Order reflects that "[c]ounsel for both parties reached an agreement as regards to the defendant's rent and cable. The Successor Trustee agreed to pay \$450.00 per month rent and the cable bill for Leslee Burton and Paul Burton. An agreement could not be reached with regard to Leslee Burton and Paul Burton receiving a monthly stipend from the trust account." [ODC Exhibit 16 at 567.]

18. The Court found that the Trust was created for the "future well-being of his daughter, Leslee Burton, and her husband Paul Burton." The Court ordered that the Successor

Trustee pay the rent and the cable bill (which was approximately \$533.00) as well as pay the Burtons a monthly stipend in the amount of \$500.00 from the Trust. [ODC Exhibit 16 at 568.]

19. The Court's 2014 Order for the allocation of monies to Mr. and Mrs. Burton did not change until in or about late 2019. Attorney Williams counseled Ms. Burton to be careful not to act in a manner so she would not deplete the corpus. [Transcript at 21-22.]

20. In 2019, Ms. Burton's attorney, John E. Williams, Esquire, suggested that the trust be used to purchase a home for Ms. Burton. However, because the purchase of the home was outside the purview of the Court's prior order regarding the trust, Court approval was required. [Stipulated, Joint Exhibit 1.]

21. In or about November 2019, Mr. Williams prepared a petition for approval to acquire the home for Ms. Burton with funds from the Trust. [Stipulated, Joint Exhibit 1.]

22. T.A. Bailey was elected as Sheriff and took office in or about January of 2017. Sheriff T.A. Bailey retained Attorney Wolfe for certain matters, but Respondent remained as counsel for the Sheriff in other estate matters. Attorney Wolfe appeared on behalf of Sheriff in his capacity as Trustee, but stated prior to November of 2019, he had not been aware of the particulars of the Trust. [Stipulated, Joint Exhibit 1.]

23. At the November 2019 hearing on Ms. Burton's petition, both Attorney Wolfe and Attorney Williams indicated that approximately \$77,000.00 remained in the trust for Ms. Burton. Judge Sadler approved the proposal for the purchase of the home, but expressed surprise that only \$77,000.00 remained in the Trust. [Stipulated, Joint Exhibit 1.]

24. Concerned, Judge Sadler testified that he later reviewed the final settlement of the Estate in the Court file and did some rough calculations, and determined there should be at least twice the amount that the Sheriff's Department reported was in the Trust. [Transcript at 129.]

25. Because Judge Sadler expressed concern during the hearing that there should be more money in the Trust, Judge Sadler testified that Attorney Wolfe stated that he would go to the Sheriff's Department and confirm the amount in the Trust after the hearing. [Transcript at 130.]

26. Attorney Wolfe then contacted Jessica Tibbs,⁵ an administrative assistant to the Sheriff to determine how "almost \$200,000.00 worth of assets had been reduced to approximately \$77,000.00 in roughly six years." Ms. Tibbs provided copies of the bank statements which outlined the deposits and withdrawals relating to the trust account. From review [of]⁶ the documents, the trust corpus was never the approximate \$196,000.00 as previously referenced in the Court's order creating the Trust. [Stipulated, Joint Exhibit 1.]

27. By Order entered December 11, 2019, because it was discovered the funds were not deposited into the Trust as previously ordered by the Court, the Court directed Attorney Wolfe, as counsel for the Trustee, to obtain all financial records as it related to the Estate and the Trust. [Stipulated, Joint Exhibit 1.]

28. Attorney Wolfe's investigation ultimately revealed the entirety of Mr. Warden's shares of stock in First Community Bank consisting of 84.607133 were transferred to

⁵ Upon information and belief, Ms. Tibbs became the administrative assistant at the Sheriff's Office in charge of administering trusts, estates, and guardianships in or about 2018. Prior to Ms. Tibbs, Ms. Loretta Lusk handled all of these matters until her retirement. [Stipulated, Joint Exhibit 1.]

⁶ The word "of" was left out of the original Joint Stipulations.

Respondent and his wife as joint tenants on or about March 12, 2015. [Stipulated, Joint Exhibit 1.]

29. Attorney Wolfe's investigation further revealed that the entirety of Mr. Warden's shares of stock in BB&T consisting of 1,840.544327 were transferred to Respondent and his wife as joint tenants on or about March 13, 2015. [Stipulated, Joint Exhibit 1.]

30. Attorney Wolfe advised both the Court and Attorney Williams of his findings and Attorney Williams then informed his clients that an investigation revealed that stocks were missing from the Trust. [Transcript 30.]

31. Attorney Williams stated that he informed his clients they could file a civil suit against the Sheriff's Department, but his clients were happy to recover the funds. [Transcript at 32-33.]

32. Judge Sadler testified that when Attorney Wolfe reported to him that Respondent had transferred the missing stock to himself and his wife, Attorney Wolfe "was shocked and surprised." Judge Sadler testified that Attorney Wolfe did not represent to him that he believed Respondent's actions were inadvertent. [Transcript at 131-132.]

33. Judge Sadler testified that he also did not "know how anybody could transfer stock that belonged to a trust and should be titled in a trust or at least titled in the estate or Mr. Warden's name, could inadvertently transfer that to a personal account. I mean maybe to a trust account or something like that, but not to a personal account. [Transcript at 132.]

34. On March 13, 2015, the value of the First Community Bank stock was approximately \$16.71 a share, and with 84.607 shares the total value was approximately \$1,413.78. On March 13, 2015, the value of the BB&T stock was approximately \$38.91 a share,

and with 1,840.544 shares the total value was approximately \$71,615.57. The total approximate value of the converted stock shares was approximately \$73,029.35. [Stipulated, Joint Exhibit 1.]

35. Neither Respondent, nor his wife had an account at Compushare prior to opening the account. [Transcript at 61.]

36. Neither Respondent, nor his wife owned any stock shares prior to converting the Warden stocks. [Transcript at 66.]

37. Respondent and his wife received monthly statements regarding the Compushare account from April 2015 through March 2020. [Exhibit 14, at 501; Transcript pg. 48.]

38. Respondent personally paid taxes on the income generated from the converted Warden stock for 5 years. [Transcript at 63, 87.]

39. There is no notation on the joint Ball Compushare account that reflects that Respondent was holding the transferred Warden stock in trust or as a Trustee as the Mercer County Sheriff's Department. [Transcript at 61-62.]

40. The necessary documents regarding the transfer of the stocks were drafted by Respondent and notarized by Respondent's law office staff on or about March 10, 2015. [Transcript at 62-63 and Stipulated, Joint Exhibit 1.]

41. Sheriff Meadows trusted Respondent and as expected in an attorney-client relationship, Sheriff Meadows relied solely upon Respondent's representations in the handling of the Warden Estate. In that regard, Sheriff Meadows testified that he was aware that the Warden stocks were transferred into Respondent's own account. Sheriff Meadows believed that Respondent had to transfer the stock to himself so he [Respondent] could later transfer it to the Sheriff's Department. [Transcript at 99; 102; and 105.]

42. Attorney Wolfe, in addition to reporting the findings to the Court and law enforcement, pursuant to his reporting obligations, filed an ethics complaint at the Office of Disciplinary Counsel on or about February 19, 2020. ODC received the complaint on or about February 21, 2020. [Stipulated, Joint Exhibit 1.]

43. Attorney Williams testified that because Attorney Wolfe advised him that he believed he was duty bound, both as a lawyer and as counsel for the Sheriff, a public servant, to file an ethics complaint, and did so, that he did not believe it was necessary for him or his clients to file a separate ethics complaint. [Transcript at 40-41.]

44. Judge Sadler testified that he believed that because Respondent was in a fiduciary position as the trustee took assets as a fiduciary and converted to his own personal use that he had an obligation under the Code of Judicial Conduct to report Respondent's actions. [Transcript at 135.]

45. Judge Sadler testified that because Attorney Wolfe was the person who discovered Respondent's conduct, they both agreed that he was the person who should report Respondent to both disciplinary counsel and law enforcement. [Transcript at 133.]

46. Attorney Williams testified that based upon his knowledge and Attorney Wolfe's investigation, he did not believe Respondent's actions were "inadvertent". [Transcript at 34.]

47. After the March 2015 conversion of the Warden Stock, Sheriff Meadows testified that he recalled that Respondent advised him on a few occasions that he had stock in his account but could not remember whose stock it was. Sheriff Meadows testified that in February of 2020, Respondent told him "I found out whose stock that was and I found out today..." [Transcript at 100.]

48. Respondent did not advise Sheriff Meadows of the Court ordered investigation into the missing funds from the corpus of Warden Trust. [Transcript at 102.]

49. After he learned from Attorney Wolfe's investigation that Respondent converted and misappropriated the Warden Stock to his and his wife's personal account, Attorney Williams decided to advise Respondent's senior law partner, Attorney Tom Lilly, of Respondent's unethical actions. He did so because he didn't think Respondent would do "anything quick" and he knew if he contacted Mr. Lilly that "something would get done." [Transcript 37-38.]

50. On or about February 26, 2020, after being asked about the Estate of Fred Warden by his senior partner on the same date, Respondent sent a letter regarding self-reporting his actions. [Stipulated, Joint Exhibit 1.]

51. On or about February 27, 2020, Respondent contacted Attorney Wolfe and advised him that he had control of the Warden Estate stocks, agreed that he would transfer the stocks to an account designated by Attorney Wolfe. [Stipulated, Joint Exhibit 1.]

52. By letter dated February 28, 2020, ODC sent the Complaint to Respondent by First Class Mail and requested a verified response to the same within twenty (20) days. ODC also requested that Respondent provide all relevant banking information and records relative to the transactions. [Stipulated, Joint Exhibit 1.]

53. As a result of the COVID-19 pandemic, in early March of 2020, the judicial branch declared a judicial state of emergency and issued multiple Orders relating to the operation of the Courts. The Court issued an Order on or about May 6, 2020, that allowed for the resumption of operations. [Stipulated, Joint Exhibit 1.]

54. On or about March 6, 2020, Attorney Wolfe sent Respondent the appropriate documents to transfer the stocks converted by Respondent and his wife. The transfer of the converted stocks was completed on or about April 1, 2020. [Stipulated, Joint Exhibit 1.]

55. At the time Respondent transferred the converted stock shares back to Ms. Burton's Trust, the value of Mr. Warden's stocks converted by Respondent and his wife were in excess of One Hundred and Five Thousand Dollars (\$105,000.00). [Stipulated, Joint Exhibit 1.]

56. Attorney Williams testified that his clients are now confident in the administration of the Trust. [Transcript at 39.]

57. After receiving an extension of time to consult with counsel and acknowledging the shutdowns relating to COVID-19, Respondent filed a timely response to the complaint on or about May 14, 2020. [Stipulated, Joint Exhibit 1.]

III. CONCLUSIONS OF LAW

The evidence establishes by clear and convincing evidence that Respondent failed to competently safeguard and/or diligently deposit the Warden Estate shares of stock into the corpus of the Trust and instead on or about March 12, 2015 and March 13, 2015, he wrongfully misappropriated and converted all of the Warden Estate shares of stock his personal account he opened for he and his wife's own personal use, and as such violated Rule 1.1; 1.3; 1.15(d); 8.4(b); 8.4(c) and 8.4(d) of the Rules of Professional Conduct. The evidence establishes by clear and convincing evidence that on or about August 11, 2017, Respondent's mother passed away and he inherited 4,500 shares of BB&T stock, and he deposited those shares into the same account he held the wrongfully converted stock shares, and as such he violated Rule 1.15(a) of the Rules of Professional Conduct. The evidence establishes by clear and convincing evidence

since the date of the March 12 and March 13, 2015 wrongful conversion of the Warden Estate stock that rightfully belonged to the Trust until the April 1, 2020 forced return of the converted property, Respondent enjoyed the benefits associated with the shares of stock, including but not limited to the financial benefits, including growth, dividends, and any tax advantages associated with the wrongfully converted shares of stock, and as such has violated Rules 8.4(b); 8.4(c); and 8.4(d) of the Rules of Professional Conduct.

III. ANALYSIS UNDER RULE 3.16 OF THE RULES OF LAWYER DISCIPLINARY PROCEDURE

The Supreme Court has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but also to protect the public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard its interests in the administration of justice. Lawyer Disciplinary Board v. Taylor, 192 W.Va. 139, 451 S.E.2d 440 (1994). Factors to be considered in imposing appropriate sanctions are found in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure. These factors consist of: (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. *See also* Syl. Pt. 4, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998). "Although Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates the factors to be considered in imposing sanctions after a finding of lawyer misconduct, a decision on discipline is in all cases ultimately one for the West Virginia Supreme Court of Appeals. This Court, like most courts, proceeds from the general rule that, absent compelling extenuating circumstances, misappropriation, or conversion by a lawyer of funds

entrusted to his/her care warrants disbarment.” Lawyer Disciplinary Bd. v. Coleman, 219 W. Va. 790, 797, 639 S.E.2d 882, 889 (2006).

A. Respondent violated duties to his client, the beneficiaries of the Trust, the public, the legal system, and the legal profession.

In determining the nature of the ethical duty violated, the standards assume that the most important ethical duties are those obligations which a lawyer owes to clients. In addition to duties owed to clients, the lawyer also owes duties to the public. Members of the public are entitled to expect lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty, or interference with the administration of justice. Lawyers also owe duties to the legal system. Lawyers are officers of the court and must abide by the rules of substance and procedure which shape the administration of justice. Lawyers must always operate within the bounds of the law and cannot engage in any other illegal or improper conduct. Finally, lawyers owe duties to the legal profession. Unlike the obligations mentioned above, these duties are not inherent in the relationship between the lawyer and the community. These duties do not concern the lawyer’s basic responsibilities in representing clients, serving as an officer of the court, or maintaining the public trust, but include other duties relating to the profession.

The evidence in this case establishes by clear and convincing proof that Respondent violated his duties owed to his client, a public servant, the Sheriff of Mercer County, West Virginia; to the vulnerable beneficiaries of the Warden Trust; and the legal system.

B. Respondent acted intentionally.

The most culpable mental state is that of intent when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that

of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his conduct, both without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

There is no dispute that Respondent's actions of converting the Warton Estate stocks valued at nearly \$75,000.00 at the time of the conversion were entrusted into his client's care as the Successor Trustee was intentional. Respondent is an experienced lawyer, and he drafted the documents for the transfer of the Warden stocks. His law office notarized the transfer documents. He directed his client, who trusted and believed he was acting in compliance with the law, to make the transfer. He opened a Compushare account in his and his wife's names, and immediately caused the transfer of nearly \$75,000.00 converted Warden stocks to his own personal ownership and use. He did not have any personal stocks prior to misappropriating and/or converting the Warden stocks. After converting the stocks, Respondent then paid taxes on the converted stocks each year until it was discovered that that Warden stocks were not initially deposited. And, when his mother died, he then commingled the Warden stocks with his inherited stocks in the Compushare account.

Respondent also testified that he knew it was improper to deposit the stocks into his personal account and commingle the funds with other personal money. Respondent explained that the reason he kept the stocks for as long as he did is because he forgot whose stocks they were and who the client was. [Transcript, 91.] Given the facts as discussed above, Respondent's explanation is not credible. The only logical and reasonable conclusion that can be drawn from

the evidence is that Respondent—maybe not initially but at some point during the 5-year period he had possession of the stocks—formed an intent to convert and misappropriate the Warden stocks to his own personal use but was eventually caught. It is also not credible for Respondent to claim he did not know whose stock it was that he was keeping in his personal account and, therefore, his actions and conduct of retaining the stock constitutes knowing, deceitful, and dishonest conduct.

C. The amount of real injury is significant.

Of course, with the misappropriation of over \$75,000.00 in stock property rightfully belonging to the Trust, there was injury to the Trust, itself, even though the stocks were eventually returned and had appreciated in value. Additionally, the beneficiaries of the Trust also suffered real injury. Respondent's unethical and criminal actions also exposed his client and the Mercer County Sheriff's Department, to civil liability. Moreover, when a lawyer uses his experience, education and his privilege to practice law to steal it causes significant harm to the public's regard for the legal profession and undermines the public's confidence in the ability of attorneys to abide by the rule of law. Conversion and/or misappropriation of funds and property is a breach of trust that reflects poorly on the entire legal profession and erodes the public's confidence in lawyers.

D. Aggravating and Mitigating Factors.

Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Court to examine when considering the imposition of sanctions. Elaborating on this rule, the Scott Court held "that aggravating factors in a lawyer disciplinary proceeding 'are any considerations, or factors that may justify an increase in the

degree of discipline to be imposed.” Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E. 2d 550, 557 (2003) quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.21 (1992). The aggravating factors present in this case are 1) multiple prior disciplinary offenses; 2) dishonesty; 3) selfish motive; 4) multiple offenses; 5) vulnerability of the individuals the Trust was created to serve; and 6) substantial experience in the practice of law.

In addition to adopting aggravating factors in Scott, the Scott court also adopted mitigating factors in a lawyer disciplinary proceeding and stated that mitigating factors “are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.” Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E.2d 550, 557 (2003) quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.31 (1992). It should be clear that mitigating factors were not envisioned to insulate a violating lawyer from discipline. There are no mitigating factors present in this case.⁷

IV. SANCTION

The ABA Standards state that:

5.11 Disbarment is generally appropriate when: . . . (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer’s fitness to practice.

ABA Standards for Imposing Lawyer Sanctions, Std. 5.11(b).

The ABA Standards further state that:

⁷ Respondent suggests that his ultimate return of the stolen stock – i.e., restitution-- should mitigate in his favor. However, the Panel does not find this to be a mitigating factor as this was only as a result of his misconduct being discovered and reported to the Court, law enforcement and the Office of Lawyer Disciplinary Counsel. Kupcc I provides that “[w]here the restitution has been made after the commencement of disciplinary proceedings, or when made as a matter of expediency under the pressure of the threat of disciplinary proceedings, some courts have refused to consider it a mitigating factor.” Kupec I, 515 S.E.2d at 570, citations omitted.

7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, with the intent to obtain a benefit for the lawyer...and causes serious or potentially serious injury.

ABA Standards for Imposing Lawyer Sanctions, Std. 7.1. Respondent has violated the most basic professional obligations to the public and the legal system, the pledge to maintain personal honesty and integrity. Respondent violated his oath that he would honestly demean himself in the practice of law. *See* W. Va. Code § 30-2-3.

The Supreme Court has consistently held that “[d]etaining money collected in a professional or fiduciary capacity without [a] bona fide claim coupled with acts of dishonesty, fraud, deceit or misrepresentation justify annulment of an attorney’s license to practice law.” Syl. Pt. 5, Committee on Legal Ethics of W. Va. State Bar v. Pence, 161 W. Va. 240, 240 S.E.2d 668 (1977); *see also* Lawyer Disciplinary Board v. Kupec, 202 W. Va. 556, 569, 505 S.E.2d 619, 632 (1998). “The general rule is that absent compelling extenuating circumstances, misappropriation or conversion by a lawyer of funds entrusted to his/her care warrants disbarment.” Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998); Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 561, 505 S.E.2d 619, 631 (1998) *remanded with directions*, *See* Lawyer Disciplinary Board v. Kupec (Kupec II), 204 W.Va. 643, 515 S.E.2d 600 (1999). *See also* Lawyer Disciplinary Board v. Wheaton, 216 W.Va. 673, 610 S.E.2d (8) (2004); Lawyer Disciplinary Board v. William H. Duty, 222 W.Va. 758, 671 S.E.2d 763 (2008). The Kupec I Court recognized as follows:

The term misappropriation can have various meanings. In fact, the misuse of another’s funds is characterized as misappropriation or conversion. Black’s defines misappropriation as “[t]he unauthorized, improper, or unlawful use of funds or other property for purposes other than that for which intended . . . including not only stealing but also unauthorized temporary use for [the] lawyer’s own purpose, whether or not he derives any gain or benefit from therefrom.

Black's Law Dictionary (6th ed.1990). See In re Wilson, 81 N.J. 451, 409 A.2d 1153, 1155 n.1 (1979) (defining misappropriation as 'any unauthorized use by the lawyer of client's funds entrusted to him including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom").

Kupec I, 202 W.Va. at 202-3, 505 S.E.2d at 262-3.

As the Supreme Court stated in Lawyer Disciplinary Board v. Coleman, 219 W. Va. 790, 639 S.E.2d 882 (2006) "we do not take lightly those disciplinary cases in which a lawyer's misconduct involves the misappropriation of money. In such instances, we have resolutely held that, unless the attorney facing discipline can demonstrate otherwise, **disbarment is the only sanction** befitting of such grievous misconduct." Id., 219 W.Va. at 797, 639 S.E.2d at 889. [emphasis added] In addition, "[m]isappropriation of funds by an attorney involves moral turpitude; it is an act infected with deceit and dishonesty and will result in disbarment in the absence of compelling extenuating circumstances justifying a lesser sanction." Id. (quoting Lawyer Disciplinary Bd. v. Kupec, 202 W.Va. 556, 571, 505 S.E.2d 619, 634 (1998) (additional quotations and citation omitted).

See e.g., Lawyer Disciplinary Board v. Keith L. Wheaton, 216 W.Va. 673, 610 S.E.2d 8 (2005) [Respondent failed to deposit monies into a trust account and converted those funds for his own personal use. Respondent's law license was annulled]; Lawyer Disciplinary Bd. v. Brown, 223 W. Va. 554, 678 S.E.2d 60 (2009); [Respondent converted approximately \$8,000 from his client trust account to his own use. Respondent's law license was annulled. Court did not find that the converted funds were used to support a drug addiction a compelling extenuating circumstance justifying a lesser sanction.]; Lawyer Disciplinary Board v. Nathan H. Wasser, 226 W.Va. 348, 700 S.E.2d 800 (2010) [Respondent misappropriated over \$91,000.00 of client funds

and his law license was annulled in Maryland. A petition was filed pursuant to Rule 3.20 of the Rules of Lawyer Disciplinary Procedure and Respondent's West Virginia law license was annulled]; Lawyer Disciplinary Board v. John C. Scotchel, Jr., 234 W.Va. 627, 768 S.E.2d 730 (2014) [Respondent charged excessive fees totaling \$170,000.00 and refused to provide an accounting for the same to his client. Respondent's law license was annulled]; Lawyer Disciplinary Board v. Edward R. Kohout, 238 W.Va. 668, 798 S.E.2d 192 (2016) [Respondent failed to keep legal fees in his trust account and paid a filing fee from an account that did not have sufficient funds in one case, and failed to pay medical bills from a settlement received in a second case. Respondent's law license was annulled, and he was ordered to make full restitution to a client]; Lawyer Disciplinary Board v. E. Lavoyd Morgan, Jr., 243 W.Va. 627, 849 S.E.2d 627 (2020) [Respondent overbilled the Public Defender Services on numerous occasions; accepted a settlement check and spent the funds; failed to pay a contract employee; and accepted retainer fees from several clients, then failed to perform the work and failed to refund the retainers. Respondent's law license was annulled; and he was ordered to issue refunds to the Public Defender Services and ten clients, and to pay the judgement obtained by his former employee]; and Lawyer Disciplinary Board v. David R. Tyson, ___ W.Va. ___, 880 S.E.2d 97 (2022) [Respondent overbilled Public Defender Services on numerous occasions and accepted a retainer fee without performing the work. Respondent's law license was suspended for three (3) years, and he was ordered to pay restitution to Public Defender Services in the amount of \$58,812.46, and to one of Complainant in the amount of \$3,225.00. Thereafter, in a subsequent filing, Respondent filed his consent to disbarment and his law license was annulled].

See also Lawyer Disciplinary Board v. Tracy B. Lusk, No. 29972 (2002) (unreported) [Respondent was a public defender and took a fee from his client's mother in one case. Respondent's law license was annulled, and he was ordered to make restitution]; Lawyer Disciplinary Board v. Bert M. Whorton, No. 30455 (2003) (unreported) [Respondent kept monies from a real estate transaction. Respondent's law license was annulled, and he was ordered to pay restitution to the Client Protection Fund and to six people/businesses, with interest]; Lawyer Disciplinary Board v. Robert W. Kagler, No. 30934 (2003) (unreported) [Respondent embezzled funds from an estate. Respondent's law license was annulled. He was ordered to make restitution as determined by the collateral civil action, but not less than \$82,500.00 plus interest]; Lawyer Disciplinary Board v. Glenn M. Nichols, No. 30136 (2003) (unreported) [Respondent took retainer fees, then failed to perform the work and failed to refund the retainer. Respondent's law license was annulled, and he was ordered to pay restitution to 18 former clients, with 10% interest accruing on the restitution amounts]; Lawyer Disciplinary Board v. Hobert F. Muncey, No. 30769 (2004) (unreported) [Respondent falsely advised clients he had filed documents on their behalf and failed to return unearned portions of retainers. Respondent's law license was annulled; and he was ordered to pay restitution to three (3) clients and the Client Protection Fund, with 10% interest accruing on the restitution amounts until they are paid in full]; Lawyer Disciplinary Board v. Jeffrey L. Barton, No. 34623 (2010) (unreported) [Respondent kept settlement monies and, when the elderly client passed away and he was asked to account for the money, he asserted that no money was owed to the estate. Respondent's law license was annulled, and he was ordered to make full restitution to the estate]; Lawyer Disciplinary Board v. Harold S. Albertson, No. 12-1225 (2014) (unreported) [Respondent

wrongfully commingled, misappropriated, and converted client funds to his own personal use. Respondent's law license was annulled; and he was ordered to pay restitution in the amount of \$500.00 to his client]; Lawyer Disciplinary Board v. Mark A. Glover, No. 18-0093 (2019) (*unreported*) [Respondent was treasurer for a soccer league and converted the league's funds to his own use. Respondent's law license was suspended for forty-two (42) months]; Lawyer Disciplinary Board v. Rebecca L. Eritano, No. 18-0852 (2019) (*unreported*) [Respondent accepted retainer fees from several clients, then failed to perform the work and failed to refund the retainers. Respondent's law license was annulled; and she was ordered to pay restitution totaling \$13,650.00 to six clients unless those individuals have already received reimbursement from the Client Protection Fund]; Lawyer Disciplinary Board v. Franklin D. Cornette, No. 18-1096 (2020) (*unreported*) [Respondent overbilled the Public Defender Services and signed a Conciliation Agreement whereby he agreed to a reduction of future vouchers until he repaid \$12,657.80 to Public Defender Services. Respondent also accepted retainer fees, then failed to perform the work and failed to refund the retainer. Respondent's law license was annulled; and he was ordered to pay restitution totaling \$2,550.00 to two clients]; and Lawyer Disciplinary Board v. Jonathan R. Seabolt, No. 20-0868, (2021) (*unreported*) [Respondent forged checks and took funds from his grandmother's bank account, then converted the funds to his own use. Respondent's law license was annulled, and he was ordered to refund \$24,787.24 to his grandmother's estate].

Another significant consideration in this matter is Respondent's prior disciplinary history. The Supreme Court has looked to the overall history of the lawyer, including such things as prior wrongdoing and discipline, when determining what sanction to impose. Syl. Pt. 5, Committee on

Legal Ethics v. Tatterson (Tatterson II), 177 W. Va. 356, 352 S.E.2d 107 (1986). The Supreme Court stated that “prior discipline is an aggravating factor in a pending disciplinary proceeding because it calls into question the fitness of the attorney to continue to practice a profession imbued with a public trust.” Tatterson II, 177 W.Va. at 364, 352 S.E.2d at 115-6.

Respondent has been admonished by the Investigative Panel of the Lawyer Disciplinary Board on four (4) prior occasions. First, in ODC v. Phillip B. Ball, Esquire (Complaint I.D. No. 02-02-055) it was alleged that Respondent, who was an Assistant Prosecutor at the time, made sexual advances toward an unrepresented criminal defendant and offered lenience in her criminal case in exchange for sexual favors. It is undisputed that no sexual activity ever occurred between the criminal defendant and Respondent, and the criminal case against Respondent was ultimately dismissed. However, Respondent was in a position of heightened scrutiny because of his public position as an Assistant Prosecuting Attorney⁸ and as City Attorney of Princeton. After a review of the evidence, the Investigative Panel believed that, at a minimum, attempting to exploit a criminal defendant’s vulnerability was in violation of Rule 8.4(d) of the Rules of Professional Conduct and Admonished Respondent. [ODC Exhibit 17 at 580-587.]

Then, in ODC v. Phillip B. Ball, Esquire (Complaint I.D. No. 10-03-280) Respondent met with a potential client in his office inquiring about representation in a claim against the Department of Highways. The following week, Respondent traveled to her home to view the damage to home in connection with the claim. Respondent asserted that while he was at her home, she made sexual advances to him and that they engaged in sexual activity. Respondent stated that thereafter, she filed a *pro se* complaint against the Department of Highways. On the

⁸ As a public official, Respondent had a higher ethical obligation than other lawyers, including the obligation of avoiding the appearance of impropriety. See generally State ex rel. Morgan Stanley v. MacQueen, 416 S.E.2d 55, 60 (1992), citing Graf v. Frame [applying the appearance of impropriety standard to public officials].

complaint, she listed Respondent as her counsel, although he contended that he had not agreed to represent her. Respondent subsequently agreed to represent her in the matter and also in a domestic matter. During that time, Respondent asserted that the consensual sexual relationship between him and his client continued.

Respondent stated that the sexual relationship ended in or about June 2008 and Respondent assumed that his representation also ended at that time. However, his client contacted him in or about December 2009 and threatened to expose their sexual relationship if Respondent did not pay her money. Respondent agreed to pay her Fifteen Thousand Dollars (\$15,000.00). Respondent was later served with the formal civil complaint that was later settled for defense costs.

The Investigative Panel admonished Respondent for a violation of Rule 1.8(h) of the Rules of Professional Conduct.⁹ In addition to payment of the Fifteen Thousand Dollars to his client, Respondent had her execute a Complete Release and Settlement. This release included language that not only released Respondent, but also the Department of Highways for the State of West Virginia, from any and all possible actions that may arise from the subject real property and her personal relationship with Respondent. The Panel determined that the release violated Rule 1.8(h) of the Rules of Professional Conduct and Respondent was admonished.¹⁰ ODC Exhibit 17 602-609]

⁹ Because the former client was not cooperative with ODC, it could not meet its burden with respect to a violation of Rule 8.4(g) of the Rules of Professional Conduct.

¹⁰ Moreover, as the Investigative Panel was troubled by Respondent's pattern of misconduct as it pertained to sexual advances and sexual relationships with women. In addition to the admonishment, Respondent sought counseling with a medical provider of ODC's choosing for a period of one (1) year to address the issues that lead to these behaviors. Respondent also agreed to perform 8 hours of community service (not *pro bono* legal services) and complete an additional 3 hours of Continuing Legal Education above and beyond that which is required by the Mandatory Continuing Legal Education in the area of legal ethics.

Then, in Linda H. Iorio v. Phillip B. Ball, Esquire, (I.D. No. 14-02-393) Respondent was admonished for failing to diligently represent the interests of the estate consistent with his obligations under Rule 1.3 of the Rules of Professional Conduct. [ODC Exhibit 17 610-614] Finally, in Roger Stacy v. Phillip B. Ball, Esquire (I.D. No. 16-05-358) Respondent was admonished for violating Rule 1.18(c) of the Rules of Professional Conduct. Respondent had a free consultation with a potential client about a boundary line dispute and reviewed all the potential client's documentation, plats, and deeds. The potential client ultimately filed suit and Respondent appeared as counsel for the opposing party. [ODC Exhibit 17 627-634.]

Based upon Respondent's misconduct, together with the aggravating factors discussed above, the Panel finds that annulment is an appropriate sanction. Respondent's actions, which includes misappropriation and conversion of stocks entrusted to him as the retained attorney for the Sheriff, dishonest and deceitful conduct, and engaging in conduct that is prejudicial to the administration of justice, clearly establishes that Respondent is unworthy of public confidence and unfit to be entrusted with the duties or privileges of a licensed member of the legal profession. A severe sanction is also necessary to deter other lawyers from engaging in similar conduct as 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). For the public to have confidence in our disciplinary and legal systems, lawyers who engage in the type of conduct exhibited by Respondent must be removed from the practice of law for some period of time. A license to practice law is a revokable privilege and when such privilege is abused, the privilege should be revoked. Such sanction is also necessary to deter

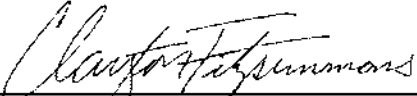
other lawyers from engaging in similar conduct and to restore the faith of the victims in this case and of the general public in the integrity of the legal profession.

V. CONCLUSION

For the reasons set forth above, the Panel recommends the following sanctions:

- 1 That Respondent's law license be annulled;
- 2 That Respondent must comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure; and
- 3 That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure, such repayment to be made in full prior to petitioning for reinstatement.

SUBMITTED: July 6, 2023



Clayton A. Fitzsimmons, Esquire
Chairperson
Hearing Panel Subcommittee

/s/ Timothy E. Haught

Timothy E. Haught, Esquire
Hearing Panel Subcommittee

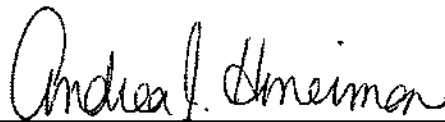
/s/ Helen Matheny

Helen Matheny, Laymember
Hearing Panel Subcommittee

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 6th day of July, 2023, served a true copy of the foregoing "**Report of the Hearing Panel Subcommittee**" upon John A. Carr, counsel for Respondent Phillip B. Ball, by mailing the same via United States Mail, with sufficient postage, and electronically via File & Serve Xpress, to the following address:

John A. Carr, Esquire
179 Summers Street, Suite 209
Charleston, West Virginia 25301
jcarr@jcarrlaw.com



Andrea J. Hinerman