IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: Oct 07 2025
02:17PM EDT
Transaction ID 77255295

LAWYER DISCIPLINARY BOARD,

Petitioner,

v. **No. 24-363**

BRIAN W. BAILEY,

Respondent.

REPLY BRIEF OF LAWYER DISCIPLINARY COUNSEL

Rachael L. Fletcher Cipoletti [Bar No. 8806]
Chief Lawyer Disciplinary Counsel
rfcipoletti@wvodc.org
Kristin P. Halkias [Bar No. 7167]
Lawyer Disciplinary Counsel
khalkias@wvodc.org
Office of Lawyer Disciplinary Counsel
West Virginia Judicial Tower, Suite 1200
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304
(304) 558-7999
(304) 558-4015 – *facsimile*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

West Virgina Rules and Statutes:

I. REPLY TO RESPONDENT'S BRIEF

In his brief, Respondent claims that a Hearing Panel Subcommittee ("HPS") of the Lawyer Disciplinary Board's findings were not supported in their entirety by reliable, probative, and substantial evidence. Respondent also claims that the HPS erred in its conclusion that Respondent's misconduct was knowing and that his actions caused actual harm. Additionally, Respondent asserts that he had "scant opportunity to present" evidence and that the Hearing Panel erred in failing to consider mitigating factors. Respondent's arguments are without merit and must fail.

II. ARGUMENT

At this stage in the proceedings, this Court has held that "[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board." *Lawyer Disciplinary Board v. Cunningham*, 195 W.Va. 27, 34, 464 S.E.2d 181, 189 (1995); *Committee on Legal Ethics v. McCorkle*, 192 W. Va. 286, 290, 452 S.E.2d 377, 381 (1994). This Court gives respectful consideration to the Hearing Panel Subcommittee's recommendations as to questions of law and the appropriate sanction, while ultimately exercising its own independent judgment. *Committee on Legal Ethics v. McCorkle,* 192 W.Va. 286, 290, 452 S.E.2d 377, 381 (1994). It is also well settled that "[t]his Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syllabus Point 3, *Committee on Legal Ethics of the West Virginia State Bar v. Blair,* 174 W.Va. 494, 327 S.E.2d 671 (1984), Syllabus Point 1, *Lawyer Disciplinary Board v. Scott*, 213 W.Va. 209, 579 S.E.2d 550 (2003).

Interestingly, the arguments contained in Respondent's brief support the HPS's finding that Respondent failed to exercise competence, proper communication, and diligence in his representation of his clients that resulted in repeated violations of the Rules of Professional Conduct, as well as a lack of appreciation for the extent of the actual harm his misconduct caused his clients. Respondent's misconduct, especially his disregard for his fiduciary duty to his clients, is so serious that the Lawyer Disciplinary Board ultimately recommended that the severest sanction of disbarment be imposed upon him.

1. **The Findings of the HPS were supported in their entirety by reliable, probative, and substantial evidence, and Respondent was not deprived of due process.**

In his brief, Respondent sets forth multiple instances where he claims he was deprived of due process in these proceedings regarding the stipulations and hearing. The Lawyer Disciplinary Board denies the same and hereby incorporates the arguments made in its brief and this reply in support thereof. There is no evidence that the Office of Lawyer Disciplinary Counsel ("ODC") failed to comply with the Rules of Lawyer Disciplinary Procedure or that Respondent's due process rights were violated at any stage of these proceedings.

Respondent's procedural and administrative allegations regarding Disciplinary Counsel are unfounded. Disciplinary Counsel and Respondent discussed the possibility of executing joint stipulations in the weeks leading up to the hearing. Based upon those discussions, Disciplinary Counsel spent many hours during the holidays preparing a draft document of proposed joint stipulations based upon Respondent's Answer to the Statement of Charges and his sworn statement, with citations thereto. Respondent was provided the draft document for review in Word format via email on January 8, 2025, six days in advance of the hearing, with Disciplinary Counsel stating willingness to make changes if he so desired. The stipulations were always optional.

Respondent had ample time to review the document and had opportunity to decline or propose alterations, yet after only a "fairly cursory review"[1], returned the draft the day before the hearing having made no changes. Respondent's failure to thoroughly conduct a proper review of stipulations in his own disciplinary matter, and blaming Disciplinary Counsel for said failure, is consistent with the complaints made herein and the record created during the disciplinary process wherein Respondent consistently deflected blame and failed to take responsibility for his own deficiencies.

Regarding Respondent's allegation concerning the disciplinary process and hearing being "effectively one sided", on June 27, 2024, Disciplinary Counsel provided Respondent with an informational six page document entitled "Prehearing Procedures and Scheduling Notice", which contained information concerning the hearing process. The document included sections covering Applicable Rules, Notice and Scheduling of Hearing, Filings of Pleadings, Hearing Panel Subcommittee information, Discovery, Notification to the HPS, Subpoenas (with a sample subpoena attached), Pretrial Hearing, Exhibit Format and Number of Copies, Motion in Limine and Pretrial Motions, Continuances, Hearing, and Proposed Recommendations Concerning Disposition, with each section directing Respondent to the corresponding Lawyer Disciplinary Procedural rule.

A Scheduling Conference was held on July 29, 2024, and an Order with relevant dates and information was provided that same date to Respondent, notifying him that his discovery was due August 21, 2024.[2] Per Rule 3.4 of the Rules of Lawyer Disciplinary Procedure, Respondent was to provide information regarding any witnesses he wished to call on the date his discovery was

[1] Respondent's Brief at page 15.
[2] ODC's discovery was served on Respondent July 22, 2024.

due. However, Respondent neither submitted discovery, nor provided a witness list, and Disciplinary Counsel filed a Motion to Exclude Testimony of Witnesses and/or Documentary Evidence or Testimony of Mitigating Factors with the HPS. After argument at the December 30, 2024 prehearing, the motion was granted by the HPS. However, at no point during any of these proceedings, including the hearing itself, did Respondent indicate a desire to call witnesses or submit additional evidence or information.

In attorney disciplinary matters, this Court has stated "[g]enerally, due process requires that the attorney be given notice of the allegations against him and an opportunity to be heard." *Committee on Legal Ethics v. Battistelli*, 185 W.Va. 109, 114, 405 S.E.2d 242, 247 (1991) (internal citations omitted). Here, there is no question that Respondent had proper notice, understood the charges filed against him, was provided with voluminous discovery to support the same, and was given extensive opportunity to respond. As such, there have been no due process violations in this disciplinary proceeding,

2. **Respondent's misconduct caused actual injury and harm**.

Respondent's claim in his brief that the injuries suffered by his clients "were either non-existent, or merely speculative", is shockingly callous and untrue.[3] However, it gives insight into Respondent's improper perspective regarding his duties to his clients, and might explain why he failed to properly and timely advance their interests during his representation. The record supports considerable injury and harm to his clients due to his misconduct. This Honorable Court has "emphasized that case delay and understandable frustration with the system establish actual injury." *Lawyer Disciplinary Board v. Schillace*, 247 W.Va. 673, 685, 885 S.E.2d 611, 623 (2022).

[3] Respondent's Brief at page 25.

In Count I, Ms. Lewis' case stalled completely when time was of the essence due to Respondent's failure to simply contact the court and request a scheduling conference, which only happened a year later due to her aunt's intervention. Respondent actually blamed Ms. Lewis for his failure to properly notify her of the Summary Judgment hearing, saying that her communication with Heather Queen ("Ms. Queen"), Respondent's assistant, "had faltered,"[4] and completely deflected his burden of notice and communication onto Ms. Lewis.[5]

Ultimately, Ms. Lewis suffered one of the most significant harms a client can endure when her case was dismissed due to Respondent's failure to deny requests for admissions and properly develop her case, heightened by Ms. Queen's crucial misstatement that discovery had been sent to opposing counsel months earlier.[6] Respondent stated that, "[a]nything which Ms. Queen shared with Ms. Lewis had my imprimatur, which is my general practice, as she is my paralegal and my agent."[7] However, Respondent's practice of relying on his non-lawyer staff to be the sole communicator with clients contributed greatly to the fatal misstep in Ms. Lewis' matter when they relied on her statement that discovery had been sent.[8] Respondent inexplicably claimed the hospice nurse "would not cooperate" with his investigation when she simply requested a subpoena.[9] The very foundation of the will contest was that the hospice nurse was present that day and knew Mr. Casto was incompetent, yet Respondent failed to speak with her even once during all the years he

[4] Respondent's Brief at page 6.
[5] Even though it was Respondent's duty to notify Ms. Lewis and not the other way around, Ms. Lewis testified at the hearing that she did attempt to communicate with Respondent but was unsuccessful. [Hrg. Tr. at 69-70].
[6] ODC Ex. 1 at 22
[7] Respondent's Brief at page 18.
[8] Hrg. Tr. at 116-117.
[9] Respondent's Brief at page 18.

represented Ms. Lewis. Respondent illogically claimed that "we never made it to that point in time," when the case was dismissed just a month prior to its trial date.[10]

Respondent compounded that huge mistake by failing to notify Ms. Lewis of the summary judgment hearing she needed to attend, and then equivocated and misled the court about her absence and involvement in the case during the hearing itself. In the meantime, she lost her beloved animals and was left heartbroken. Although Respondent states that her damages were only speculative because no one knows what a jury would do, he seemingly failed to understand that his actions significantly impacted the speculative nature of the case. He handicapped Ms. Lewis so severely with his lack of case development and discovery failures that he enabled a summary judgment grant that withstood appeal due to the record, or lack thereof, for which he was solely responsible. His comments ostensibly gloss over his involvement in creating that situation, instead, just chalking it up to will contests are challenging because there are people on the other side.

Regarding Count III, for Respondent to state that Mr. Ellis did not suffer harm is confounding. Mr. Ellis was forced to represent himself in court on a contempt petition that was precipitated due to Respondent's dilatory conduct in communicating with opposing counsel, and then misleading opposing counsel into blaming Mr. Ellis for the delay. Mr. Ellis faced jail and a fine and testified to how genuinely scared he was that he was going to go to jail. Respondent defended his failure to appear in court when he still represented Mr. Ellis by saying that he had seen other lawyers do that, which is absolutely no defense.[11] Respondent then listened to Mr. Ellis be berated in court and even provided an inaccurate date about when he had sent the corrected deed to Mr. Ellis, who testified he never received the corrected deed. Respondent repeatedly

[10] Id.
[11] Respondent's Brief at page 18.

claimed to have never received mail from ODC, but he disregarded and did not believe his client's assertion that he, himself, failed to receive mail from Respondent.

Most importantly, Mr. Ellis definitely suffered actual harm when Respondent betrayed his fiduciary duty to Mr. Ellis by accepting payments well after he had paid his agreed upon fee in full. Despite asserting in his brief that there were "hundreds of hours"[12] spent on this case, Respondent provided no billing records for the time spent working on the matter, and the reliable evidence fails to support that assertion. The evidence shows that Respondent left early from two mediations leaving Respondent without legal representation, a site visit, a bench trial that lasted 2-3 hours, and some email correspondence to opposing counsel, before ultimately abandoning him.

Ms. Queen, whom Respondent said "acted as counsel's agent at all times named herein,"[13] was Mr. Ellis' main contact at the firm and she told him she would let him know when he had paid in full. Mr. Ellis testified that Ms. Queen was aware that he was functionally illiterate and struggled with reading and he trusted her. It was not until considerable time had passed and he asked his granddaughter to go over his accounts and receipts when he realized he had way overpaid his $3,000 fee by more than $2,000. Respondent had ample opportunity to provide invoices and bank accounts showing deposits and where the retainer was paid in full, as well as billable hour invoices, but he never did. To compound that failure, Respondent never executed written fee agreements with his clients so there is no evidence of an agreed upon hourly rate, and even with flat fees, lawyers have a duty to earn their fees. Sadly, the record shows that Respondent ultimately failed to bring the case to conclusion, requiring Mr. Ellis to represent himself in the contempt matter and

[12] Respondent's Brief at page 9.
[13] Respondent's Brief at page 6.

execute the deed himself. Given the forgoing, Respondent saying that "[n]o damages were incurred by Mr. Ellis" is shockingly abhorrent.[14]

In Count IV, Mr. Stobart's ability to exercise his constitutional right to file a Habeas Corpus petition was impacted by Respondent's disregard of his repeated requests for a copy of his file. Respondent's lack of concern for Mr. Stobart's situation is commensurate with his lack of effort to return the file. Likewise, Respondent discounted his failure to file the Motion for Reconsideration for Mr. Moats in Count III by saying the chance of him prevailing was "next to zero".[15]

Respondent's statement that Count V was not pursued at the request of the Complainant is inaccurate, as Complainants do not determine whether a charge is pursued by the Lawyer Disciplinary Board, and there is no evidence in the record supporting Respondent's assertion. Ms. Thomas filed a verified complaint with ODC on September 21, 2023. In that complaint, she stated that Respondent was her attorney for five years, that he retained "all [her] paperwork and money,"[16] and she was unable to reach him to have it returned to her. She said she called him "100 times". However, Respondent never answered this complaint and thereby violated Rule 8.1(b) of the Rules of Professional Conduct, which is demonstrated by the record and agreed to by Respondent in the joint stipulations. Respondent's continual diminishment of the impact of his incompetent representation and dilatory conduct is very revealing as it pertains to the regard he holds for his clients in relation to his obligations and duties.

[14] Respondent's Brief at page 27.
[15] Respondent's Brief at page 27.
[16] ODC Ex. 77 at 137-38.

3. **Any delay in Disciplinary Proceedings was due to Respondent's failure to respond to additional complaints received after the Sworn Statement.**

Pursuant to a subpoena, Respondent appeared at ODC for a Sworn Statement on June 14, 2023, to provide testimony regarding Counts I-III, which were the only open complaints pending at that time. During his testimony, Respondent admitted to not using his IOLTA account, and Disciplinary Counsel subpoenaed his bank records in July 2023.[17]

ODC received Mr. Stobart's complaint, which is Count IV, on July 14, 2023.[18] Pursuant to Rules 2.4 and 2.5 of the Rules of Lawyer Disciplinary Procedure, ODC notified Respondent of the complaint by letter dated July 21, 2023, and requested a verified response within twenty days, noting that such was considered a lawful request for information pursuant to Rule 8.1 of the Rules of Professional Conduct. Respondent failed to respond to the first letter sent by ODC, as well as the second certified letter.[19] Eventually, Respondent responded, and Mr. Stobart filed a reply to his response in December of 2023.[20] ODC sent the letter to Respondent and requested a response.[21] However, Respondent never responded despite being sent multiple requests and certified letters and email, with the last certified letter returned to ODC as unclaimed on March 4, 2024.[22]

ODC received Ms. Thomas' complaint, which became Count V, on September 21, 2023. In accordance with the Rules, Correspondence was sent to Respondent on October 10, 2023, requesting a response, with multiple attempts made via certified mail, U.S. Mail, and email over a

[17] ODC Ex. 85.
[18] ODC Ex. 61.
[19] ODC Ex. 62-62.
[20] ODC Ex. 68.
[21] ODC Ex. 69-75.
[22] ODC Ex. 75.

period of months, and Respondent never responded.[23] The last certified mail attempt was returned as unclaimed to ODC on March 2, 2024.[24] Formal charges were issued three months later in June 2024 at the next available meeting of the Investigative Panel of the Lawyer Disciplinary Board.

In summary, during the time between Respondent's Sworn Statement and Statement of Charges, Disciplinary Counsel was diligently investigating the three open complaints that make up Counts I-III, the two additional complaints filed after the Sworn Statement, acquiring and reviewing bank records, and repeatedly mailing Respondent requests for information and awaiting his responses that were never sent. Any delay in the proceedings was the result of Respondent's failure to respond in violation of Rule 8.1(b).

4. <u>The HPS correctly found no mitigating factors outweighed aggravating factors to justify a reduction in the degree of discipline.</u>

In his brief, Respondent casually disregarded his prior discipline and even omitted one of the warnings he had received. The four complaints were for rule violations also committed herein, including billing matters, communication and diligence issues, and return of client files. Respondent received warnings in the first three complaints in which he was given grace for not having prior discipline, and he received an admonishment for a Rule 1.16(d) violation, which is one of the same rule violations as in Count IV herein. Respondent argues that the current sanction is too harsh, however, it is obvious from Respondent's discussion regarding these prior complaints that the warnings and admonishment he received were insufficient in their severity to prompt Respondent to make adjustments to his practice following their rendering, and the record shows additionally clients suffered as a result.

[23] ODC Ex. 78-74.
[24] ODC Ex. 84.

Although Respondent argued that COVID and Ms. Queen's personal issues are mitigating factors, the record does not support this assertion. Respondent has a duty to manage his caseload and to protect his clients and their cases from any personal issues he or his staff may suffer. Regardless, the violations Respondent committed were due to his own conduct and lasted for years.

5. **The HPS correctly found Respondent's conduct to be knowing and recommended the correct sanction.**

The HPS correctly found Respondent's conduct to be knowing. Respondent engaged in a pattern and practice over a period of years where he disregarded many Rules of Professional Conduct, including competence, client communication, diligence, supervision of non-lawyer staff, and safekeeping of property, to name a few. Respondent delegated the majority of his law office duties to his one assistant, who has no post-graduate legal training, and his clients were left exposed and vulnerable without having access to the legal representation for which they had paid. Additionally, Respondent repeatedly betrayed his fiduciary duty to his clients by never depositing unearned client money into his IOLTA account, and by failing to have an adequate accounting system in place, resulting in misappropriation and commingling of client funds. This repeated conduct over a period of years, even if negligent initially, became knowing after he repeatedly engaged in the dangerous conduct of failing to communicate with his clients, knowing he was to deposit client funds into his IOLTA but failing to do so because it was easier to put it elsewhere. That is at least knowing, if not intentional, conduct, and it caused harm and damage to his clients.

Rule 1.15 clearly directs attorneys to use and IOLTA account to protect the public from financial misuse of their money by lawyers. Respondent has pleaded ignorance about his IOLTA account, but ignorance of how to operate an IOLTA account is not a defense to IOLTA infractions.

Before a lawyer takes money from a client, he is *required* to properly use his IOLTA account and its safeguards to honor the fiduciary duty he has to his client. Additionally, Respondent's use of flat fees and "flexible payments" is not a defense to IOLTA account misuse. His assertion that he was often underpaid is not supported by any evidence of record, especially when he kept no records of his hours worked and did not have an accurate accounting system. Moreover, there is no honor in charging a client a discounted flat fee, and then providing them with unreliable and inadequate representation that causes considerable frustration on his clients' part, takes years to conclude, and ends with a bad result.

Respondent referenced the recent disciplinary case, *Lawyer Disciplinary Board v. Curnutte*, in which Mr. Curnutte received a six-month suspension, and Respondent argued he should be given the same or similar consideration. *Lawyer Disciplinary Board v. Curnutte*, 251 W.Va. 839, 916 S.E.2d 681 (2025). Respondent and *Curnutte* both committed communication, diligence and failure to respond to disciplinary counsel violations. However, the HPS found that Respondent committed many additional Rule violations than *Curnutte*. The HPS found that Respondent violated the following Rules of Professional Conduct: 1.1, 1.3, 1.4(a)(1), 1.4(a)(3) and 1.4(a)(4) 1.5(b), 1.15(a) and 1.15(c), 3.2 and 8.4(d), 5.3(b), and 3.3(a)(1) in Count I; 1.1, 1.2(a), 1.5(b), 1.15(a) and 1.15(c), 1.16(d), and 8.1(b) in Count II; 1.4(a)(3) and 1.4(a)(4), 1.5(b), 1.15(a) and 1.15(c), 1.16(c) and 1.16(d), 3.2 and 8.4(d), 8.4(c), 5.3(b) and 8.4(d), 3.4(c) and 8.4(d), and 8.1(b) in Count III; 1.3, 1.4(a)(3) and 1.4(a)(4), 1.16(d) and 8.4(d), and 8.1(b) in Count IV; and 8.1(b) in Count V. Respondent's additional violations involve trust account and fiduciary violations and are considerably more significant than the violations in *Curnutte*. The Hearing Panel found the misconduct committed by Respondent, an attorney with a substantial amount of experience, to be knowing, and appropriately examined Respondent's prior history of misconduct.

Curnutte can be distinguished from Respondent's matter in that Respondent committed many more violations of the Rules, and included misappropriation of client funds and improper trust account use. The record demonstrates that Respondent engaged in a practice where he essentially abdicated his legal obligations to his clients to his assistant and then failed to properly supervise her, and his clients relied on her to their detriment. Additionally, Respondent's dilatory conduct and failure to communicate with Mr. Ellis ultimately resulted in Mr. Ellis facing multiple contempt charges that could have resulted in fines and jail. Mr. Ellis testified that Respondent had failed to notify him of both the contempt charges and the hearing, and he only discovered the matter by speaking with the judge's office.[25] Mr. Ellis testified that he was very worried they would put him in jail based on his experience during the contempt hearing when the judge was blaming Mr. Ellis for failing to execute the deed that had an improper property description.[26] During that hearing, Respondent appeared on the phone after being called by the judge, and he placed his own interests above his client's when specifically asked about the matter by the judge. Respondent provided an incorrect date for when he alleged Mr. Ellis had received the corrected deed, which also served to impugn Mr. Ellis' testimony in court that day, all while Respondent still represented him.

Respondent committed trust account violations, whereas Mr. Curnutte did not. Mr. Ellis provided receipts and payments showing that he overpaid the $3,000 flat fee by $2,250. Respondent provided no evidence showing deposits of Mr. Ellis' payments or any documentation of hours he worked on the case, and he had no fee agreement with Mr. Ellis to establish an hourly

[25] Hrg. Tr. at 173-174.
[26] Id. at 193.

rate. Moreover, Respondent failed to bring the case to resolution, yet retained the entire fee plus the additional payments. Mr. Ellis notified Ms. Queen of his concerns of overpayment and Respondent failed to respond to his concerns.

Respondent's conduct in Ms. Lewis' matter can be distinguished from *Curnutte* in that Respondent's dilatory conduct and communication violations, among other Rule violations, resulted in Ms. Lewis' case being dismissed without her knowledge. Ms. Lewis had to expend an additional $1,700 to retain another lawyer at the last minute to file an appeal she lost due to the record established below by Respondent.

In *Curnutte*, this Honorable Court found that Mr. Curnutte's conduct was knowing and intentional, stating that his "clients repeatedly sought information and action, and in addition to their repeated requests and expressed frustration, his decades of experience practicing law made him well aware of the potential consequences of failing to act diligently," and the records supports this being true for Respondent, too. *Curnutte*, 251 W.Va. 839, 916 S.E.2d 681, 692. (2025). Respondent's pattern and practice affected every part of his law practice, and the result was significant delay, frustration, and harm to his clients, which he has consistently downplayed and disregarded.

Most concerning is Respondent's diminution of his misconduct in addressing remorse in his brief. Respondent said that he "accepts that [he] missed one deadline" in Ms. Lewis' case, which is a wholly inaccurate and self-serving account of what happened to Ms. Lewis as a result of his misconduct over a period of years that resulted in her case being dismissed. He reduced Mr. Ellis' trauma and financial damage to saying he "should have appeared" at the contempt hearing and filed a motion to withdraw, and did not even address charging him a $3,000 flat fee he never placed in his IOLTA, then accepting an additional $2,250. Respondent failed to review the

overpayments when they were brought to his attention, and abandoned him before the case concluded. A lawyer has a fiduciary duty to his client to manage client funds properly and to only accept the money that is due, and to promptly place those funds in an IOLTA account.

Respondent inaccurately stated that the "primary contention" in Mr. Stobart's complaint is that he "did not respond to some letters he wrote to me", when Mr. Stobart's "letters" were requests for information and for him to provide him with a copy of his file, which was the main contention of the complaint, and which Respondent was required to provide him. He said that although he should have responded to Mr. Stobart's letters, "he remains in the same position he was at the time of his complaint", inferring that since Mr. Stobart did not immediately file a Habeas petition when given his file a couple of months ago, he did not need it.[27] However, Respondent's duty to provide the client file and documents to Mr. Stobart upon withdrawal existed regardless of what Mr. Stobart planned to do with the file. Regarding Mr. Moats, Respondent said although he should have filed Mr. Moats' Motion for Reconsideration, he believed he made the best argument he could have made, which is confusing because it sounds like he is praising the quality of the motion he never filed for Mr. Moats.

Most importantly, Respondent's discussion in his brief addressing remorse actually demonstrates that he does not appreciate the depth of the damage caused by his inaction and misconduct, that he significantly harmed his clients. Instead, he just glosses over all the facts and details of his clients' struggles being represented by a lawyer who never communicated with them and failed to properly manage and litigate their cases to their detriment.

[27] There is no confirmation that Respondent provided a copy of the file to Mr. Stobart other than Respondent's assertion in his brief.

Respondent wrongfully commingled, misappropriated, and converted client funds to his own use when he failed to deposit unearned client funds into his IOLTA account, and it is enough to justify the recommendation of Respondent's disbarment based upon the legal precedent of this Honorable Court. *See, e.g., Lawyer Disciplinary Board v. Coleman*, 219 W.Va. 790, 639 S.E.2d 882 (2006); *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. Duty*, 222 W.Va. 758, 671 S.E.2d 763 (2008); *Lawyer Disciplinary Board v. Battistelli*, 206 W.Va. 197, 523 S.E.2d 257 (1999); *Committee on Legal Ethics v. White*, 176 W.Va. 753, 349 S.E.2d 919 (1986); *In re Hendricks*, 155 W.Va. 516, 185 S.E.2d 336 (1971).

In *Lawyer Disciplinary Board v. Scotchel*, 234 W.Va. 627, 768 S.E.2d 730 (2014), this Court disbarred an attorney with no prior disciplinary record based upon the finding that he was unable to present any persuasive evidence to show that he earned his fees[28] in matters he handled for a client and instead attempted to fabricate his involvement to support his misappropriation. The Court found such conduct "very serious and showed the intentional nature of [the lawyer's] misconduct." Id. at 646, 749. Disbarment is also appropriate when a lawyer knowingly abuses the fiduciary relationship by deceiving a client with the intent to benefit himself, or another, and causes serious injury or potentially serious injury to a client or to the profession.

[28] "The general rule places the burden on an attorney to establish his fee agreement where there is a dispute as to the fee." Syl. Pt. 2, *Committee on Legal Ethics of West Virginia State Bar v. Tatterson*, 177 W.Va. 336, 352 S.E.2d 107 (1986).

The Hearing Panel had the opportunity to observe Respondent's testimony and also was able to hear and observe the testimony of multiple witnesses which the Hearing Panel found to be credible. The recommendation of the HPS shows that based upon the clear and convincing evidence adduced at the hearing it could not find Respondent to be a fit or safe person to be entrusted with the duties of a member of the legal profession.

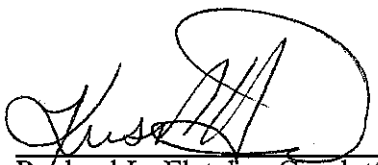
The principal purpose of an attorney disciplinary proceeding is "protect the public, to reassure it as to the reliability and integrity of attorneys and to safeguard its interest in the administration of justice[.]" *Lawyer Disciplinary Board v. Taylor*, 192 W.Va. 139, 144, 451 S.E.2d 440, 445 (1994). Discipline must serve as both instruction on the standards for ethical conduct and as a deterrent against similar misconduct to other attorneys. Syllabus Pt. 3, *Committee of Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987). A review of the record establishes that the charges against Respondent have been proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure, and that he has transgressed all four factors set forth in Syllabus Point 4 of *Office of Lawyer Disciplinary Counsel v. Jordan*, 204 W.Va. 495, 513 S.E.2d. 722 (1998). 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.

Respondent's violations in these cases are egregious and touch the very essence of the public's perception of the legal profession. There is no evidence that the HPS or the ODC failed to afford Respondent due process in these proceedings. Indeed, the HPS properly found that the evidence established by clear and convincing proof that Respondent committed multiple serious violations of the Rules of Professional Conduct and made an appropriate recommendation. The recommended sanctions of the HPS are firmly supported by the evidence and applicable law.

III. CONCLUSION

For the reasons set forth above, and in its August 4, 2025 brief, the Lawyer Disciplinary Board urges this Honorable Court to send a message that the conduct engaged in by Respondent as contained in the record will not be condoned. By ordering a strong sanction in this proceeding, this Honorable Court will be serving its goals of protecting the public, reassuring the public as to the reliability and integrity of attorneys, and safeguarding its interests in the administration of justice. Therefore, the Board urges that this Honorable Court adopt the report and recommendations of its Hearing Panel Subcommittee in full.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel



Rachael L. Fletcher Cipoletti [Bar No. 8806]
Chief Lawyer Disciplinary Counsel
rfcipoletti@wvodc.org
Kristin P. Halkias [Bar No. 7167]
Lawyer Disciplinary Counsel
khalkias@wvodc.org
Office of Lawyer Disciplinary Counsel
West Virginia Judicial Tower
4700 MacCorkle Avenue SE, Suite 1200
Charleston, West Virginia 25304
(304) 558-7999
(304) 558-4015 – facsimile

CERTIFICATE OF SERVICE

This is to certify that I, Kristin P. Halkias, Senior Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 7th day of October, 2025, served a true copy of the foregoing **"Reply to Respondent's Brief"** upon Respondent Brian W. Bailey, electronically via File & Serve Xpress, to the following address:

bwbaileyesq@gmail.com

Kristin P. Halkias

CERTIFICATE OF SERVICE

This is to certify that I, Kristin P. Halkias, Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 7th day of October, 2025, served a true copy of the foregoing **"REPLY BRIEF OF DISCIPLINARY COUNSEL"** upon Respondent Brian W. Bailey, electronically via File & Serve Xpress, to the following address:

bwbaileyesq@gmail.com

Kristin P. Halkias