IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

LAWYER DISCIPLINARY BOARD,

Petitioner,

v. **No. 24-376**

PHILLIP S. ISNER,

Respondent.

REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. REPLY TO RESPONDENT'S BRIEF

In his brief, Respondent admits to committing multiple violations of the Rules of Professional Conduct in these proceedings but asserts that a Hearing Panel Subcommittee of the Lawyer Disciplinary Board erred in its findings of additional Rule violations. As a result, Respondent asks that a lighter sanction be imposed upon him, despite the severity and number of instances of his misconduct and the existence of aggravating factors, which include multiple prior disciplinary offenses. Respondent's arguments are without merit, and to serve the public policy interests of these proceedings this Honorable Court should uphold the findings and recommendations of the Hearing Panel Subcommittee.

II. ARGUMENT

At this stage in the proceedings, this Honorable 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." Syl. Pt. 3, Committee on Legal Ethics v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984), Syl. Pt. 1, Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E.2d 550 (2003).

A. The findings of the Hearing Panel Subcommittee are supported by the clear and convincing evidence.

In the instant proceeding, the Hearing Panel Subcommittee (hereinafter "HPS") found that Respondent committed twenty-eight violations of the Rules of Professional Conduct regarding a seven-count Statement of Charges. The misconduct found by the HPS in Respondent's representation of multiple clients is clearly supported by the record and the credible testimony adduced at the hearing. The HPS heard testimony from six former clients of Respondent, who all expressed their experiences and frustrations with Respondent regarding his lack of communication and diligence during his representation of them. Respondent also had the opportunity to present his own testimony to the HPS. The HPS gave credibility and weight to all of the testimony and made its findings accordingly. Indeed, substantial deference is to be given to the Lawyer Disciplinary Board's findings of fact unless the findings are not supported by reliable, probative, and substantial evidence on the whole record. Syl. Pt. 3, Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994). Further, the HPS "hears testimony of the witnesses firsthand and, being much closer to the pulse of the hearing, is much better situated to resolve such issues as credibility." Id. at 290, 381.

Respondent's argument that the evidence is insufficient to demonstrate a violation of the Rules of Professional Conduct relating to Count II and Count VI is simply not supported by the record. The testimony of Adam Kramer and his wife, Desirae, was consistent, credible, and heartbreaking. Their descriptions of waiting for Respondent to do the job he was paid to do, to return their calls, and his admitted failure in missing scheduled meetings with them clearly meets

the burden of proof for a violation of both Rules 1.3[1] and Rule 1.4[2] of the Rules of Professional Conduct. The Kramer's also presented documentation of the many unsuccessful attempts to communicate with Respondent throughout the representation. The HPS did not find that Respondent needed to be on demand at all hours of the day for the Kramer's, or for any of his clients, but that his conduct could not meet the reasonableness test under the circumstances. Ronald Kesner's testimony was likewise credible regarding Respondent's lack of communication and diligence in his case. Notably, the testimony of Mr. and Mrs. Kramer and Mr. Kesner was corroborated by the experiences of the other witnesses who testified at the hearing, to which Respondent appears to not dispute.

The Preamble to the Rules of Professional Conduct provides that "[i]n all professional functions a lawyer should be competent, prompt and diligent." It cannot be said that Respondent's conduct in these cases conforms to the expectations of the profession as stated in the Rules of Professional Conduct. Based upon Respondent's admissions, the documentary evidence, and witness testimony from the hearing, during which Respondent was present and engaged in cross-examination of the witnesses, it is evident that the findings of the HPS are supported by clear and convincing evidence and should not be disturbed.

B. Respondent's conduct was not mere negligence.

The *ABA Standards for Imposing Lawyer Sanctions* states that the most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish

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[1] Rule 1.3. Diligence.
A lawyer shall act with reasonable diligence and promptness in representing a client.

[2] Rule 1.4 Communication.
(a) A lawyer shall:
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information[.]

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. The HPS correctly found that the evidence supported that Respondent acted with conscious awareness of the nature or attendant circumstances of his conduct.

Rule 1.0(f) of the Rules of Professional Conduct states that a person's knowledge may be inferred from circumstances. In the instant proceedings, Respondent's misconduct did not involve "discrete period" as he claims, but continued over the course of several years, including after receiving multiple admonishments for similar misconduct and both during and after a time when he was facing charges of similar violations of the Rules of Professional Conduct [*See* Lawyer Disciplinary Board v. Isner, No. 22-570 (Unreported Order June 9, 2023) (Statement of Charges filed June 11, 2022) ODC Ex. 52, pages 723-763]. Respondent's actions were not isolated. He repeated the same misconduct on numerous occasions. For years Respondent failed to communicate with his clients, failed to diligently act in their best interests, failed to immediately refund their money despite their requests, and failed to timely complete orders in compliance with Court Rules. Also, as Counts III and IV outlined, in April of 2023, Respondent missed a deadline to perfect an appeal in a proceeding, resulting in the dismissal of a case – strikingly similar to the conduct that resulted in the dismissal of a case for his failure to perfect service several years prior, which was encompassed in Count II of his previous charges. Thus, the record fully supports that

Respondent had knowledge that his ongoing conduct was in violation of the Rules and that the same knowledge failed to stop the misconduct.

C. The sanction recommended by the Hearing Panel Subcommittee is appropriate.

The HPS determined that Respondent committed multiple violations of the Rules of Professional Conduct. Pursuant to its careful analysis under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure, HPS found that Respondent violated duties he owed to his clients, the public, the legal system, and the profession, that his misconduct was knowing and resulted in harm, and appropriately applied aggravating and mitigating factors. It is evident that the HPS found that the aggravating factors present, which include prior disciplinary offenses analogous to those of the instant proceeding, as well as a pattern and practice of misconduct encompassed in the many complaints that have been filed against Respondent, should be given significant weight in this matter.

Because this Honorable Court strives for consistency, the HPS explicitly relied on a line of precedent for cases involving the lack of diligence and a pattern of knowingly ignoring communications from clients coupled with prior discipline for ethical misconduct. The Board found that a sanction of suspension was consistent with these prior cases and the Court's obligation to protect the public interest and dissuade similar conduct in the future. Indeed, a suspension is the presumptive discipline for lawyers who knowingly fail to perform services for a client or engage in a pattern of neglect and causes injury or potential injury to a client. *See Standard 4.42 of the ABA Standards for Imposing Lawyer Sanctions.* A suspension is also generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system of the profession. *See Standard 8.2 of the ABA Standards for Imposing Lawyer Sanctions.*

In his brief, Respondent attempts to minimize his conduct. He claims that the "great bulk" of misconduct took place before his court-ordered supervised practice began. He claims that none of his clients suffered any tangible losses, despite the HPS ordering him to refund Mr. Kesner $2,500.00, and argues that his failure to produce proposed orders did not result in any damage. As the HPS properly found however, and the record clearly supports, Respondent's misconduct did have serious impact on his clients and the public. Respondent ignores the testimony presented where his former clients expressed the financial, legal, and emotional impact his actions had on them. In addition, the whole system suffers when an officer of the Court disregards directives of the Court and violates his professional duties.

The HPS came to the appropriate conclusion that the adequate discipline that would serve the public policy interests is a one-year suspension of Respondent's law license. This Court came to a similar determination in Lawyer Disciplinary Board v. Morgan, 228 W.Va. 114, 717 S.E.2d 898 (2011), in finding the recommendation of a reprimand to be too lenient and instead imposing a one-year suspension and other sanctions due to multiple violations of the Rules of Professional Conduct including those requiring reasonable diligence and promptness in representation, reasonable communication with clients, charging reasonable fees, and responding to the requests of the Office of Lawyer Disciplinary Counsel. Further, the Court noted that Mr. Morgan had been admonished on a previous occasion for failure to communicate with clients.

In his brief, Respondent ignores the line of cases with stronger discipline, especially involving similarity with the severity and number of instances of misconduct and the existence of aggravating factors comparable to the instant case. In Lawyer Disciplinary Board v. Davis, -- W.Va. --, -- S.E.2d--, 2022 WL 421119 (2022), this Court found that a six-month suspension was justified for only one count of misconduct following a prior brief suspension, conduct much less severe than the seven counts of misconduct in the instant proceeding. This Court also held in

Lawyer Disciplinary Board v. Curnutte, 251 W.Va. 839, 916 S.E.2d 681 (2025), that a six-month suspension was appropriate for a previously suspended lawyer, but that matter primarily involved violations of Rule 8.2(b) of the Rules of Professional Conduct regarding a four-count Statement of Charges and his prior discipline did not involve similar misconduct.

This Court should dismiss Respondent's argument that his misconduct should be excused because it occurred prior to the commencement of supervised practice or in its early stages. Instead, it should be alarming and aggravating that the previous disciplinary proceedings, which included admonishments and culminated in a public reprimand and supervised practice, did not put an end to the misconduct and the resulting harm. In fact, there is insufficient evidence to demonstrate that Respondent actually made any progress reforming his practice while under supervision. Respondent's pattern of misconduct demonstrates that he either cannot or will not conform to the required ethical standards.

In addition, Respondent's attempts to repay the funds to his disgruntled former clients also does not negate his misconduct. "Where 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." Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 570, 505 S.E.2d 619, 633 (1998) (internal citations omitted), *remanded with directions*, *see* Lawyer Disciplinary Board v. Kupec (Kupec II), 204 W.Va. 643, 515 S.E.2d 600 (1999). Indeed, "[t]he repayment of funds wrongfully held by an attorney does not negate a violation of a disciplinary rule. Any rule regarding mitigation of the disciplinary punishment because of restitution must be governed by the facts of the particular case." Syl. Pt. 4, Committee on Legal Ethics v. Hess, 186 W.Va. 514, 413 S.E.2d 169 (1991).

This Honorable Court has stated consistently that the "primary purpose of the ethics committee is not punishment but rather the protection of the public and the reassurance of the

public as to the reliability and integrity of attorneys." Office of Lawyer Disciplinary Counsel v. Albers, 214 W.Va. 11, 13, 585 S.E.2d 11, 13 (2003) *citing* Committee on Legal Ethics v. Ikner, 190 W.Va. 433, 436, 438 S.E.2d 613, 616 (1993) (internal citations omitted). Discipline must serve as both instruction on the standards for ethical conduct and as a deterrent against similar misconduct to other attorneys. Syl. Pt. 3, Committee of Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987). For the public to have confidence in our disciplinary and legal systems, lawyers who engage in the type of conduct exhibited by Respondent must receive discipline that is effective in preserving the goals of these proceedings. The Board asserts that past minimal sanctions have not appeared effective in correcting Respondent's ability to comply with the Rules of Professional Conduct, and it is not clear from the record that recurrence of similar misconduct on the part of Respondent is unlikely. This is not a case of negligence or oversight in which a reprimand would be the proper form of discipline. The Board's recommendation of a one-year suspension, with the additional safeguard of requiring a reinstatement proceeding pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, is adequate and necessary to address the misconduct committed by Respondent.

III. CONCLUSION

The HPS properly found that the evidence established by clear and convincing proof that Respondent committed multiple violations of the Rules of Professional Conduct, made careful analysis under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure, and made an appropriate recommendation in this matter. The recommended sanctions of the HPS are firmly supported by the evidence and applicable law. 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 HPS in full.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel

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CERTIFICATE OF SERVICE

This is to certify that I, Renée N. Frymyer, Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 29th day of September, 2025, served a true copy of the foregoing **"REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD"** upon Respondent's counsel Jeremy B. Cooper, by via email and electronically, through File and Serve Xpress, to the following:

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