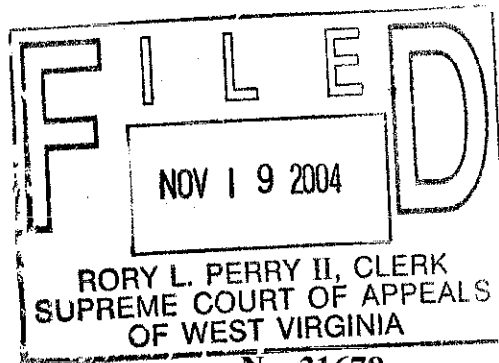


**BEFORE THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA**

**LAWYER DISCIPLINARY BOARD,
Complainant,**

vs.

**J. THOMAS HARDIN, a member of
The West Virginia State Bar,
Respondent.**



No. 31678

BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. KIND OF PROCEEDING AND PROCEDURAL BACKGROUND

This is a disciplinary proceeding against Respondent J. Thomas Hardin (hereinafter "Respondent") arising as the result of a Statement of Charges issued against him and filed with the West Virginia Supreme Court of Appeals on February 2, 2004. Respondent obtained counsel and, in an effort to resolve all matters at issue, entered into a stipulated findings of fact and proposed discipline with the Office of Disciplinary Counsel (hereinafter "ODC"). It was acknowledged by the parties that if the Hearing Panel Subcommittee did not wholly adopt the stipulations, both had thirty (30) days to file objections with the Supreme Court.

Thereafter, the matter proceeded to hearing on June 2, 2004, for the presentation of evidence on the issue of sanctions, including evidence on aggravating or mitigating factors. Presiding and present in person was Hearing Panel Subcommittee (hereinafter "HPS") Chairperson Charlene A. Vaughan, Esquire. Subcommittee members Michael R. Whitt, Esquire and Ms. M. Victoria Weisiger participated by telephone. ODC was represented by Lawrence J. Lewis, Chief Lawyer Disciplinary Counsel. Respondent appeared in person and by his counsel, Sherri D. Goodman, Esquire. The HPS heard the testimony of the Respondent and received into evidence ODC's Exhibits 1 - 26 and Respondent's Exhibits 1 - 13. Thereafter, on October 8, 2004, a "Report of the Hearing Panel Subcommittee" was filed with the Clerk of the Supreme Court of Appeals. The HPS report included an additional recommended sanction not stipulated by ODC and Respondent.

II. RECOMMENDATION OF HEARING PANEL SUBCOMMITTEE

Pursuant to the parties' stipulation, the HPS found that Respondent's conduct violated the following *Rules of Professional Conduct*: (a) Rule 1.3 - not acting with diligence in responding to discovery; (b) Rule 3.2 - failure to make reasonable efforts to expedite litigation; (c) Rule 3.4(c) - knowingly disobey a obligation under the rules of a tribunal; (d) Rule 3.4(d) - failure to make a reasonably diligent effort to comply with discovery requests; (e) Rule 8.4(d) - conduct prejudicial to the administration of justice by not appearing at seven (7) hearings and by not paying the fines and attorney fees ordered by the Circuit Court of Cabell County.

Moreover, the HPS recommended the following sanctions which were stipulated and agreed to by the parties: (a) reprimand pursuant to Rule 3.15(7) of the *Rules of Lawyer Disciplinary Procedure*; (b) prompt payment of the fines and attorney fees imposed by the Circuit Court of Cabell County, totaling \$1,750 in the following manner: Circuit Clerk - \$1,000; Farrell, Farrell & Farrell - \$450; and Flaherty, Sensabaugh & Bonasso - \$300; (c) three (3) hours of continuing legal education during the 2004-2006 reporting period, specifically in office management, in addition to the three (3) hour requirement in ethics, office management, substance abuse, elimination of bias in the legal profession; and (d) the costs incurred in this disciplinary proceeding. *As an additional sanction, not stipulated by the parties, the HPS recommended that Respondent's practice of law in the State of West*

Virginia shall permanently exclude acceptance of medical malpractice lawsuits. Respondent objects to this limitation on his practice.

III. STATEMENT OF FACTS

The facts upon which the HPS imposed sanctions are stipulated and undisputed.¹ Respondent, a member of the West Virginia State Bar, maintains his office in Inez, Kentucky and practices in various counties throughout southern West Virginia. In March 2001, he instituted a medical malpractice action on behalf of a client in the Circuit Court of Cabell County, West Virginia.

The defendants in the civil action served discovery requests upon Respondent which he failed to timely answer. Accordingly, defendants filed motions to compel and noticed them for hearing. Respondent did not appear at the hearing but called defense counsel before the hearing and promised responses by the end of August 2001. Accordingly, the matter was continued to a later date.

Respondent provided his discovery answers a day before the motion to compel was reset. Defendants were not satisfied with the information provided, and advised Respondent they would proceed to hearing the following day. Respondent failed to appear for the hearing and the court granted the motion to compel and gave Respondent thirty (30) days to answer the discovery or show cause why he should not answer.

¹The complete "Stipulations and Recommended Discipline" is attached as Exhibit A to the Report of the Hearing Panel Subcommittee filed with the Court on October 8, 2004.

Thereafter, counsel for one of the defendants filed notice of hearing in February 2002, to determine necessity of expert witnesses. In November 2001, Respondent filed a motion for enlargement of time to supplement his discovery answers, to which the defendants objected.

Respondent then failed to appear at the February 2002 hearing. The court imposed sanctions in the form of \$150 attorney fees to be paid in thirty (30) days. Respondent was also directed to provide a medical records release to a defendant (he had previously provided one to the other defendant). The matter was then reset for March 8, 2002.

Respondent failed to appear for the March 8, 2002 hearing. The court again held him in contempt, fined him \$500 and imposed attorney fees of \$150 to each defense counsel. Subsequently, Respondent failed to appear for an April 12, 2002 hearing and the court again fined him \$500 and directed him to answer the discovery requests of one of the defendants within ten (10) days. Respondent then failed to appear for an April 26, 2002 scheduling conference.

Thereafter, in May 2002, the defendants filed motions to dismiss the complaint and served notice for a May 24, 2002 hearing. On May 23, 2002, at about 10:00 p.m. the court clerk received a facsimile entitled "Response to Motion to Dismiss". It was ordered to be struck from the court's docket as a fugitive document which had not been filed in compliance with the Rules of Civil Procedure.

Respondent failed to appear at the May 24 hearing, but another attorney appeared on his behalf to request a continuance based on a schedule conflict of Respondent. The court denied the request, noted Respondent had failed to appear on at least seven (7) scheduled occasions, failed to respond to discovery, disobeyed previous discovery orders, failed to obey orders regarding contempt and sanctions, and failed to participate in the discovery process. The case was dismissed with prejudice.

Respondent neither appealed nor satisfied the court imposed sanctions and fines, but asserted he had forwarded a check to the circuit clerk for the fines and attorney fees on February 27, 2003. He did not realize it had never been negotiated until he reviewed the Statement of Charges. The Court's final order, dated April 24, 2002, had required payment in ten (10) days.

IV. STANDARD OF REVIEW

In lawyer disciplinary matters, a *de novo* standard of review applies to questions of law, questions of application of the law to the facts, and questions of appropriate sanction to be imposed. *Roark v. Lawyer Disciplinary Board*, 207 W. Va. 181, 495 S.E.2d 552 (1997); *Committee on Legal Ethics v. McCorkle*, 192 W. Va. 286, 452 S.E.2d 377 (1994). The Supreme Court of Appeals gives respectful consideration to the Lawyer Disciplinary Board's recommendations as to questions of law and the appropriate sanction, while ultimately exercising its own independent judgment. *McCorkle*, 452 S.E.2d at 381.

The Supreme Court of Appeals is the final arbiter of formal legal ethic charges and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law. *Committee on Legal Ethics v. Blair*, Syl. pt. 3, 174 W.Va. 494, 327 S.E.2d 671 (1984); *Committee on Legal Ethics v. Karl*, Syl. pt. 7, 192 W.Va. 23, 449 S.E.2d 277 (1994). At the Supreme Court level, "[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, 464 S.E.2d 181, at 189 (1995); *McCorkle*, 452 S.E.2d at 381.

V. DISCUSSION

Rule 3.15 of the *Rules of Lawyer Disciplinary Procedure* indicates that the following may be imposed in a disciplinary proceeding: (1) probation; (2) restitution; (3) limitation on the nature and extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment. Based on the stipulated facts, the HPS determined that in addition to the other stipulated sanctions, the nature and extent of Respondent's future practice in West Virginia should be limited to permanently exclude the acceptance of medical malpractice lawsuits. In adding this additional sanction, the HPS considered that Respondent had violated duties owed to his client, to the public, to the legal system, and to the profession.

These were valid and legitimate considerations for the HPS. Rule 3.16 of the *Rules of Lawyer Disciplinary Procedure* provides that the following are to be considered:

Rule 3.16. Factors to be considered in imposing sanctions.

In imposing sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court or Board shall consider the following factors: (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.

Moreover, Respondent's neglect was repeated and such continued conduct in the future in medical malpractice cases has potential for significant injury to a client.

Sanctions are not imposed only to punish the attorney, but also are designed to reassure the public's confidence in the integrity of the legal profession and to deter other lawyers from similar conduct. *Committee on Legal Ethics v. White*, 189 W.Va. 135, 428 S.E.2d 556 (1993); *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987); *Committee on Legal Ethics v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989); *Lawyer Disciplinary Board v. Friend*, 200 W.Va. 368, 489 S.E.2d 750 (1997); *Lawyer Disciplinary Board v. Keenan*, 208 W.Va. 645, 542 S.E.2d 466 (2000).

Moreover, a 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). Medical malpractice is an area of the law which is often the

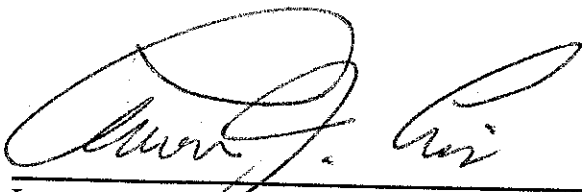
subject of public discussion and debate. Abuse by a lawyer within that particular realm of practice can have dramatic impact on the public's confidence in the integrity of the Bar. Given the Respondent's repeated misconduct and neglect in the underlying case, the HPS was justified in imposing a limitation on Respondent's practice as a sanction. His misconduct demonstrates there is significant potential for injury to his clients in the future in such matters, as well as to public confidence in the Bar and the administration of justice. The sanction further serves to deter other lawyers from engaging in such neglect and will safeguard the public's interest in the administration of justice.

IV. CONCLUSION

The HPS's decision to recommend a limitation on the nature of Respondent's future practice, in addition to the stipulated sanctions, was appropriate under the circumstances of this case and should be accepted by the Court.

Office of Disciplinary Counsel

By counsel



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CERTIFICATE OF SERVICE

This is to certify that I, **Lawrence J. Lewis**, Chief Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 19th day of November, 2004, served a true copy of the foregoing "**BRIEF OF THE LAWYER DISCIPLINARY BOARD**" upon Sherri D. Goodman, Counsel for Respondent, J. Thomas Hardin, by mailing the same, United States Mail with sufficient postage, to the following address:

Sherri D. Goodman, Esquire
P.O. Box 1149
Charleston, West Virginia 25324



Lawrence J. Lewis