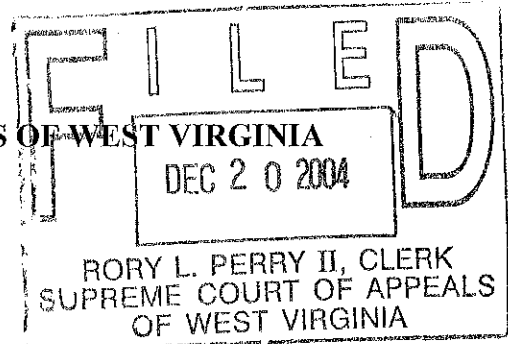


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

Case No. 31678

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

Respondent.

BRIEF OF THE RESPONDENT, J. THOMAS HARDIN

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I. KIND OF PROCEEDING AND PROCEDURAL BACKGROUND

The Respondent, J. Thomas Hardin, wishes to clarify and amply on certain issues of fact. The Office of Disciplinary Counsel and Mr. Hardin, desiring to resolve this matter, entered into stipulations as to findings of fact, conclusions of law and recommended discipline. In discussing what type of sanction would best meet the goals of the disciplinary system, the Chief Lawyer Disciplinary Counsel, Lawrence J. Lewis, suggested that Mr. Hardin agree to use local counsel, that is a lawyer licensed in West Virginia whose principal office is in West Virginia, when handling legal matters in West Virginia or in several designated counties where his primary West Virginia practice is located. Mr. Hardin was agreeable to this sanction, but Mr. Lewis changed his mind and did not request such a limitation on Mr. Hardin's practice.

The final stipulations along with a notebook of exhibits were presented to the Hearing Panel Subcommittee on June 2, 2004. Two of the Subcommittee members were present by telephone. Mr. Hardin was present to answer any questions the Subcommittee members had. Complainant's Brief on page 1 suggests that evidence on aggravating factors was presented at the hearing. This is incorrect. The parties acknowledged the existence of mitigating factors on page 10 of the Stipulations, but there is no reference to any aggravating factors; nor did the Hearing Panel Subcommittee make any findings as to the existence of aggravating factors.

At the June 2, 2004 hearing, the Subcommittee did not wish to adopt the Stipulations without first reviewing the exhibits and consulting among themselves. Thereafter, the Hearing Panel Subcommittee issued a document entitled "Hearing Panel Sub-Committee Recommended Disposition" dated June 29, 2004 which reflected that the Subcommittee had met telephonically on June 23, 2004 and that the Subcommittee accepted the Stipulations with the addition of the sanction that "Respondent's practice of law in the State of West Virginia shall permanently exclude acceptance of medical malpractice suits."

The Subcommittee later issued a more formal "Report of the Hearing Panel Subcommittee" which Mr. Hardin received on October 11, 2004.

II. RECOMMENDATION OF HEARING PANEL SUBCOMMITTEE

The Complainant's Brief omits three matters. First, by adopting the parties' Stipulations, the Hearing Panel Subcommittee found the existence of certain mitigating factors: Mr. Hardin had never been formally disciplined in Kentucky or West Virginia; his conduct flowed from poor office practices and poor judgment rather than selfish or dishonest motive; he expressed remorse [Page 10 of Report]. He was admitted to practice in West Virginia in 1986.

Second, the Hearing Panel acknowledged that Standard 6.23 of the ABA Model Standards for Imposing Lawyer Sanctions provides that a reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule which causes injury or potential injury to a client or other party or causes interference or potential interference with a legal proceeding. Yet it chose to prohibit him from handling medical malpractice cases in West Virginia permanently.

Third, the Hearing Panel made a finding on page one of its "Hearing Panel Sub-Committee Recommended Disposition" that it had considered Mr. Hardin to have violated his duty owed to his client and the public, as well as a duty to the legal system and the profession. The Report, however, incorporated language from the Stipulations that Mr. Hardin violated a duty owed to the Court,

opposing counsel and the defendants by wasting the Court's time, causing lawyers to travel to hearings unnecessarily and causing the defendants to incur unnecessary legal fees.

III. STATEMENT OF FACTS

The Statement of Facts as set forth in Complainant's Brief omits certain details from the Stipulations and Exhibits that support the finding in the Stipulations that Mr. Hardin acted as a result of poor office practices and poor judgment.

Mr. Hardin is a lawyer licensed in Kentucky who has an office in Inez, Kentucky. The plaintiff in the underlying medical malpractice action, Deborah Webb, was a co-worker of Mr. Hardin, and he considered her a friend. He was not optimistic about recovering damages. [Stipulations at 2]. Ms. Webb had voluntarily entered River Park Hospital to be treated for post-partum depression as a condition for Bobby Miller, M.D. treating her. However, she contended her admission was under the express condition that she could leave the hospital anytime. Once she got to the locked ward unit, she decided she wanted to leave, but was prevented from doing so until she was able to contact her husband. She was released later the same after being subjected to verbally abusive behavior. [ODC Exhibit 7, Bates No. 431-32].

The sequence of events demonstrates what was stipulated to by the parties: Mr. Hardin showed poor judgment and poor office practices which caused him to miss hearings. He also acted in a manner most customary to his local Kentucky courts than to Cabell County West Virginia Circuit Court.

For example, a hearing on a motion to compel discovery responses was scheduled for August 17, 2001. Before the hearing, Mr. Hardin had telephonically promised to provide the responses. He thought a hearing would not be held, but opposing counsel attended the hearing, anyway.

When a September 14, 2001 hearing on the motions to compel was scheduled, Mr. Hardin served his discovery responses on opposing counsel on September 12, 2001. Again he thought this

would resolve the matter, but on September 13, 2001, opposing counsel faxed a letter stating that they intended to appear at the hearing the next day, because they weren't satisfied with the responses. Mr. Hardin did not attend the hearing, but filed supplemental responses within the time frame ordered by the Court. Because he was having trouble obtaining some medical records, he filed a Motion for Enlargement of Time to Supplement Discovery Answers. He did not, however, file a notice of motion as required by Judge Cummings. [Stipulations pp. 3-4]

A hearing was scheduled in September, 2001 for a February 21, 2002 hearing date to determine whether the plaintiff would need an expert witness. Although this appears to be absent from the Stipulations, Mr. Hardin did not attend because the February date did not get calendared. At the hearing, some discovery issues were discussed in his absence, and the Court ordered Mr. Hardin to provide a medical records release to counsel for Dr. Miller. The hearing on the expert was rescheduled for March 8, 2002.

Mr. Hardin did not attend the March 8, 2002 hearing because he assumed that the Court would find that an expert witness would be required. The Court also denied his Motion for Enlargement of Time, although Mr. Hardin had not noticed his motion. Mr. Hardin also did not separately send an authorization to counsel for Dr. Miller, because he assumed that the release he already sent to counsel for River Park Hospital would suffice. [Stipulations pp. 4-5].

Mr. Hardin missed the next hearing, held on April 12, 2002, because he was unaware of it. He missed an April 26, 2002 scheduling conference that had been set by the Court's July 11, 2001 scheduling order. His office had failed to transfer the date to his 2002 calendar. [Stipulations p. 5].

When the defendants filed a motion to dismiss in May, 2002 and scheduled it to be heard for May 24, 2002, Mr. Hardin filed his response by fax the night before the hearing. He also filed a motion for a continuance because of a scheduling conflict between this case and a Kentucky case.

He asked a Huntington lawyer to appear at the hearing to obtain a continuance. He did not appear himself because of the scheduling conflict. [Stipulations pp. 5-6].

IV. ASSIGNMENT OF ERRORS

1. The Hearing Panel Subcommittee's recommendation that Mr. Hardin be permanently excluded from handling medical malpractice cases in West Virginia does not relate in a meaningful way to the ethical violations he committed and is unduly harsh by being permanent in nature.
2. The recommended sanction might cause Mr. Hardin to be prevented from handling medical malpractice cases in Kentucky, where the bulk of his practice lies, under reciprocal discipline.
3. Less restrictive sanctions exist, such as probation or the requirement that Mr. Hardin obtain local counsel to assist him in medical malpractice cases or in West Virginia cases in general.

V. STANDARD OF REVIEW

In this case, Mr. Hardin asks that the Supreme Court not adopt one of the sanctions recommended by the Hearing Panel Subcommittee—permanent disbarment from representing clients in medical malpractice actions. Therefore, it is important to stress 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 of the West Virginia State Bar v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984).

The Court applies a *de novo* standard when reviewing the adjudicatory record made before the Lawyer Disciplinary Board "as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions." Syllabus pt. 3, *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994). In recent years, the Court has not accepted the recommendations of a Hearing Panel Subcommittee on discipline and has imposed a less harsh sanction in these cases: *Lawyer Disciplinary Bd. v. Scott*, 213 W. Va. 209, 579 S.E.2d 550

(2003)(disbarment recommended, Court suspended license for three years); *Lawyer Disciplinary Bd. v. Sims*, 212 W. Va. 463, 574 S.E.2d 795 (2002)(ninety day suspension recommended, Court issued public reprimand); *Lawyer Disciplinary Bd. v. Barber*, 211 W. Va. 358, 566 S.E.2d 245 (2002)(six month suspension recommended, Court suspended license for sixty days); *Lawyer Disciplinary Bd. v. Ford*, 211 W. Va. 228, 564 S.E.2d 438 (2002)(forty-five day suspension recommended, Court issued an admonishment); *Lawyer Disciplinary Bd. v. Keenan*, 208 W. Va. 645, 542 S.E.2d 466 (2000)(three month suspension plus supervision recommended, Court issued public reprimand plus supervision).

VI. ARGUMENT

- 1. The Hearing Panel Subcommittee's recommendation that Mr. Hardin be permanently excluded from handling medical malpractice cases in West Virginia does not relate in a meaningful way to the ethical violations he committed and is unduly harsh by being permanent in nature.**

Mr. Hardin wishes to emphasize to the Court that he has admitted his ethical misconduct and believes that he should be sanctioned. In fact, he stipulated to certain sanctions designed to acknowledge his conduct, rectify the consequences of his behavior to the extent possible and take three additional hours of continuing legal education in office management. He was even willing to obtain local counsel for West Virginia cases when it was suggested by the Chief Lawyer Disciplinary Counsel during negotiations.

He does object to the Hearing Panel Subcommittee's recommendation that he be permanently excluded from handling medical malpractice cases in West Virginia, because the sanction is not related to the ethical violations in any meaningful way. Mr. Hardin ignored civil procedural rules, wrongly concluded his presence was unnecessary at some hearings and was unaware of other hearings through poor office practices.

The only event that occurred which was unique to medical malpractice cases was that Mr. Hardin missed a hearing to determine whether expert medical testimony would be needed under *Daniel v. Charleston Area Medical Center, Inc.*, 209 W. Va. 203, 544 S.E.2d 905 (2001). Again, Mr. Hardin's rationale for missing the hearing held on March 2, 2002 was that he assumed expert testimony would be required and it wasn't necessary for him to attend. This is comparable to his faulty thinking that if he assumed relief would be granted on motions to compel, it would be unnecessary for him to attend hearings.

This type of thinking is a product of his practice in a small town and has nothing to do with the type of case. Inez, Kentucky is the county seat of Martin County and had a population of 466 in 2000 according to the census [Webster's On-Line Dictionary]. Mr. Hardin acted in a manner more consistent with his handling of Kentucky cases. His poor judgment is reflected by the fact that after the Court expressed its ire by fining him for his nonappearance at the third hearing, he did not alter his behavior. He did not display nor was he charged with incompetence, under Rule 1.1 of the Rules of Professional Conduct.

A limitation on the type of practice usually is considered as a sanction when a lawyer has been found to have handled a matter incompetently. In *Florida Bar v. Glick*, 383 S.E.2d 642 (Fla. 1980), for example, a lawyer acted incompetently in a real estate matter. Although the Florida Bar recommended a sixty-day suspension, the Court publicly reprimanded the lawyer and placed him on a one-year conditional probation. During this one year, the lawyer could not handle real estate matters, other than drafting routine instruments, until he completed 30 hours of continuing legal education in real estate transaction. *Id.* at 643.

"In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and

at the same time restore public confidence in the ethical standards of the legal profession.” Syllabus Point 3, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987). Another common sense goal is to prevent the reoccurrence of the misconduct.

To prevent the reoccurrence of the ethical violations, the parties agreed that Mr. Hardin should take additional continuing legal education courses in legal ethics or law office management. Permanently enjoining Mr. Hardin from taking medical malpractice cases does not meet this goal other than to say that Mr. Hardin won't miss hearings or ignore scheduling orders in medical malpractice cases again, because he won't have any.

But the Hearing Panel Subcommittee acknowledged that the ABA standard for this type of conduct, 6.23, was a public reprimand:

Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

The Subcommittee's sanction of permanently excluding Mr. Hardin from accepting medical malpractice cases is a form of partial disbarment, which is inconsistent with the Hearing Panel's finding that a reprimand is the most appropriate sanction.

The Complainant's Brief argues that since medical malpractice cases are the subject of public discussion and debate, the Hearing Panel Subcommittee is justified in recommending Mr. Hardin be barred from such cases since his misconduct occurred in a medical malpractice case. Mr. Hardin strongly disputes this assertion.

The subject of public discussion and debate about medical malpractice is the filing of baseless actions. Mr. Hardin was not charged with bringing a baseless action under Rule 3.1 of the Rules of Professional Conduct; nor was he sanctioned by the Court under Rule 11 of the West Virginia Rules of Civil Procedure. The Legislature has placed its own restrictions and requirements on medical malpractice cases directed at avoiding meritless actions in amendments to the West

Virginia Medical Professional Liability Act, W. Va. Code § 55-7B-1 *et seq.*¹ Mr. Hardin's sanction should not be formulated merely to appease those who believe that plaintiffs' lawyers have created a health care professional crises, when the fact that Mr. Hardin's conduct occurred in a medical malpractice action was fortuitous.

The Hearing Panel Subcommittee may also have been persuaded to impose an additional sanction, because it found that Mr. Hardin had violated his duties towards his client. However, the disciplinary violations listed on pages 7 and 8 of the Report do not reflect any such violation.

Moreover, the Hearing Panel Subcommittee's recommended sanction does not permit Mr. Hardin to rehabilitate himself or learn from his mistakes. It is a permanent limitation on his practice, and the Subcommittee failed to articulate why it thought such a permanent limitation was necessary.

2. **The recommended sanction might cause Mr. Hardin to be prevented from handling medical malpractice cases in Kentucky, where the bulk of his practice lies, under reciprocal discipline.**

Mr. Hardin's primary practice is in Kentucky. Kentucky, like West Virginia, has a provisions in its disciplinary rules for reciprocal discipline. Rule 3.435(4)(b) of the Kentucky Rules of Supreme Court provide that "this Court shall impose the identical discipline unless a respondent proves by substantial evidence that the misconduct established warrants substantially different discipline in this State."

It is proper for this Court to consider the impact that a sanction limiting the type of practice in West Virginia may have on the lawyer in another jurisdiction. Particularly, since the sanction does not relate to the misconduct in the first place, identical discipline in Kentucky highlights the inappropriateness and harshness of the recommended sanction. In this case, Mr. Hardin handles more

¹ In fact, the underlying medical malpractice action, although denominated as one of false imprisonment, might not have been brought if Mr. Hardin had been required to obtain a certificate of merit, as lawyers must do under the statutory amendments effective July 1, 2003.

medical malpractice cases in Kentucky than in West Virginia. While the sanction may not seem as significant here in West Virginia, if Kentucky applies the identical discipline in Kentucky, the sanction becomes much more akin to a form of disbarment.

3. **Less restrictive sanctions exist, such as probation or the requirement that Mr. Hardin obtain local counsel to assist him in medical malpractice cases or in West Virginia cases in general.**

Mr. Hardin submits that an additional sanction is unnecessary beyond what the parties stipulated to as a fair resolution of the case: a public reprimand, additional continuing legal education hours, payments of the court imposed fines and attorney's fees, and costs of this proceeding. However, should the Court consider an additional sanction necessary, Mr. Hardin suggests a sanction that relates to his ethical misconduct, considers the possibility of rehabilitation and avoids the unduly harsh impact of reciprocal discipline.

Under these guidelines, one such sanction would be probation for a one year period of time, under Rule 3.15(1) of the Rules of Lawyer Disciplinary Procedure. The terms of the probation could include a prohibition against missing court hearings or failure to comply fully with orders compelling discovery.

Another appropriate sanction would be a requirement that Mr. Hardin affiliate with "a responsible local attorney" within the meaning of Rule 8.0(c) of the West Virginia Rules for Admission to the Practice of Law in cases brought within West Virginia for a period of two years. As a member of The West Virginia State Bar, Mr. Hardin is not ordinarily required to comply with the *pro hac vice* rules.

By requiring an affiliation with a local attorney, the Court may assure itself that in all of Mr. Hardin's cases, there will be an attorney familiar with the local rules and practices in West Virginia courts. A two-year limitation anticipates that Mr. Hardin's judgment and office practices will continue to improve.

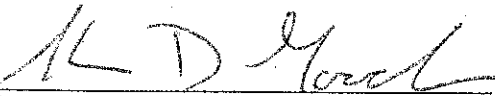
It is telling that the Chief Lawyer Disciplinary Counsel, who has more disciplinary experience than the current Subcommittee members, thought that affiliating with local counsel might be an effective sanction during negotiations. Since Mr. Lewis did not insist on such a provision in the Stipulations even though Mr. Hardin was agreeable, the Hearing Panel Subcommittee's concerns might have been allayed by this sanction. Mr. Hardin submits that the Court, in exercising its independent judgment concerning sanctions, should consider this alternative.

VII. CONCLUSION

The Respondent, Mr. Hardin, respectfully requests that this Court, in accordance with the Stipulations of the parties, find that he violated the Rules of Professional Conduct and impose a public reprimand, additional continuing legal education courses, payment of fines and attorney fees (which has already occurred) and costs of proceedings. Mr. Hardin respectfully requests that this Court not impose the additional sanction recommended by the Hearing Panel Subcommittee of a permanent exclusion of medical malpractice cases in West Virginia.

J. THOMAS HARDIN

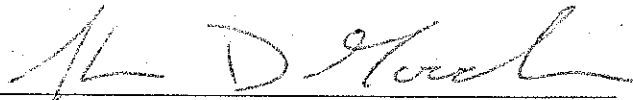
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CERTIFICATE OF SERVICE

I, Sherri D. Goodman, hereby certify that the following document "**BRIEF OF THE RESPONDENT, J. THOMAS HARDIN**" was served upon the individuals listed below on the 20th day of December, 2004 by placing a copy in the U. S. mail, first-class postage affixed thereto:

Lawrence J. Lewis, Chief Lawyer Disciplinary Counsel
2008 Kanawha Blvd. East
Charleston WV 25311



Sherri D. Goodman