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

LAWYER DISCIPLINARY BOARD,

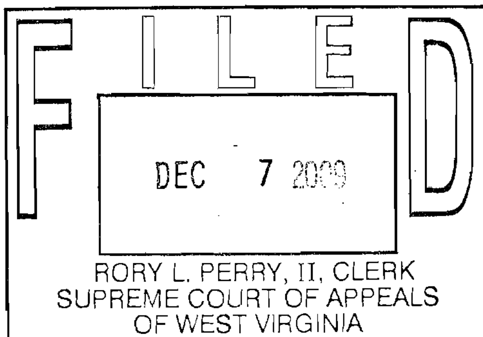
Complainant,

v. **No. 34259**

JOHN M. CAVENDISH,

Respondent.

BRIEF OF THE LAWYER DISCIPLINARY BOARD



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I. NATURE OF PROCEEDINGS AND RECOMMENDED DECISION OF THE HEARING PANEL SUBCOMMITTEE

Formal charges in this matter were filed against Respondent, John M. Cavendish, with the Clerk of the Supreme Court of Appeals on or about August 15, 2008, and served upon him by certified mail on or about August 21, 2008. Respondent filed his answer to the Statement of Charges on or about September 19, 2008. Respondent did not provide his mandatory discovery, which was due on October 10, 2008. On November 3, 2008, Disciplinary Counsel filed a motion to exclude witness testimony or documentary evidence not already in the possession of the Office of Disciplinary Counsel.

A telephonic prehearing was held on November 14, 2008. Pending before the Hearing Panel Subcommittee were Disciplinary Counsel's "Motion to Exclude Testimony of Witnesses and/or Documentary Evidence" and "Respondent's Objection to Motion to Exclude Testimony of Witnesses and/or Documentary Evidence". The Hearing Panel Subcommittee denied Disciplinary Counsel's motion and ordered Respondent to provide Disciplinary Counsel the credentials of Dr. Wilbur M. Sine, and a summary of his testimony, on or before November 19, 2008.

A telephonic hearing was held on November 26, 2008. Pursuant to the directive given by the Hearing Panel Subcommittee at the November 14, 2008 prehearing, "Respondent's Disclosure of Medical Testimony" was provided to Disciplinary Counsel on November 19, 2008. Disciplinary Counsel filed a response thereto on November 20, 2008. Pending before the Hearing Panel Subcommittee were the following: (1) Disciplinary Counsel's "Reply to

Respondent's Medical Disclosure and Renewed Motion to Exclude Documentary Evidence And/or Testimony of Respondent's Witness"; and (2) "Respondent's Objection to Renewed Motion to Exclude Testimony of Witnesses and/or Documentary Evidence". Based upon the information presented, the Hearing Panel Subcommittee determined that the hearing scheduled for December 5, 2008, should be continued and that Disciplinary Counsel be given opportunity to depose Dr. Sine. Disciplinary Counsel was given 60 days to conduct the deposition, and the hearing was continued generally at that time.

On March 3, 2009, another telephonic hearing was held. Pending before the Hearing Panel Subcommittee were the following: (1) Motion of Office of Disciplinary Counsel to Exclude or Limit Testimony of Witness and Documentary Evidence or Testimony of Mitigating Factors and/or Motion for More Definite Statement of Mitigating Factors; and (2) Respondent's Answer to the Motion of the Office of Disciplinary Counsel to Exclude or Limit Testimony of Witness and/or Documentary Evidence or Testimony of Mitigating Factors and/or Motion for More Definite Statement of Mitigating Factors. The Panel ordered Disciplinary Counsel to provide a copy of Dr. Sine's deposition, under seal, to the Hearing Panel Subcommittee; that Respondent shall deliver to Disciplinary Counsel, on or before March 11, 2009, the medical records requested from Dr. Sine in her letter of February 12, 2009; that all exhibits submitted for this hearing shall be provided to all parties on or before April 30, 2009; and that the evidentiary hearing for this matter shall be held at 9:00 a.m. on Thursday, May 7, 2009, in Morgantown, West Virginia.

Thereafter, this matter proceeded to hearing in Morgantown, West Virginia, on May 7, 2009. The Hearing Panel Subcommittee was composed of David A. Jividen, Esquire, Chairperson; Charlene A. Vaughan, Esquire; and Mr. Larry A. Stricker, layperson. Respondent appeared *pro se*; and Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. The Hearing Panel Subcommittee heard testimony from Deborah A. Lawson, Esquire; D. Benjamin Traylor, Esquire; and Respondent. In addition, ODC Exhibits 1-22 and Joint Exhibit 1 were admitted into evidence.

On or about September 29, 2009, the Hearing Panel Subcommittee issued its decision in this matter and filed with the Supreme Court of Appeals of West Virginia its "Report of the Hearing Panel Subcommittee" (hereinafter "Report"). The Hearing Panel Subcommittee properly found that the evidence established that Respondent violated Rules 1.15(a), 1.15(b), 1.15(c) and 8.4(c) of the Rules of Professional Conduct.

The Hearing Panel Subcommittee issued the following recommendation as the appropriate sanction:

1. That Respondent's law license be suspended for a period of three (3) years;
2. That Respondent make full restitution to the Daniels Capital in the amount of $62,589.31 prior to applying for reinstatement;
3. That prior to petitioning for reinstatement, Respondent pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure;

4. That prior to petitioning for reinstatement Respondent must undergo a psychological and/or medical examination by a doctor and/or psychologist to be agreed upon by the Office of Disciplinary Counsel; said doctor must certify that Respondent is fit to practice law, both physically and mentally; and

5. That upon successful petition for reinstatement, Respondent must undergo supervised practice for a period of one (1) year.

II. 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, 192 W. Va. at 290, 452 S.E.2d at 381.

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. McCorkle, Id.; Lawyer Disciplinary Board v. Cunningham, 195 W. Va. 27, 464 S.E.2d 181 (1995). 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." Cunningham, 464 S.E.2d at 189; McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381.

The charges against an attorney must be proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. *See*, Syl. Pt. 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995).

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. Syl. Pt. 3, Committee on Legal Ethics v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984); Syl. Pt. 7, Committee on Legal Ethics v. Karl, 192 W.Va. 23, 449 S.E.2d 277 (1994).

III. FINDINGS OF FACT[1]

1. John Michael "Mack" Cavendish (hereinafter "Respondent") is a lawyer practicing in Morgantown, Monongalia County, West Virginia, and, in Charles Town, Jefferson County, West Virginia, and as such, is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. Respondent was admitted to the West Virginia State Bar on January 11, 2006.

[1]ODC's Proposed Findings of Fact are Joint Exhibit 1, Stipulated Findings of Fact.

2. Respondent was employed at the Public Defender Corporation in Martinsburg, West Virginia, from on or about August 21, 2006, until on or about February 2, 2007. By statute, he had ninety (90) days to close his private practice.[2]

3. On or about February 1, 2007, without the permission of his supervisor, Deborah A. Lawson, Chief Public Defender for the Public Defender Corporation in Martinsburg, West Virginia, Respondent attended a hearing for an individual who was not a client of the Public Defender Corporation.

4. Daniels Capital Corporation is a company which advances payment to an attorney upon receipt of an assignment for monies to which a court appointed attorney would be entitled to receive from Public Defender Services.

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[2] West Virginia Code § 29-21-17 provides:
(a) No full-time public defender or full-time assistant public defender may engage in any private practice of law except as provided in this section.
(b) A board of directors may permit a newly employed full-time public defender or full-time assistant public defender to engage in the private practice of law for compensation for the sole purpose of expeditiously closing and withdrawing from existing private cases from a prior private practice. In no event shall any person employed for more than ninety days as a full-time public defender or full-time assistant public defender be engaged in any other practice of law for compensation: . . . .
(c) A board of directors may permit a full-time public defender or full-time assistant public defender to engage in private practice for compensation if the defender is acting pursuant to an appointment made under a court rule or practice of equal applicability to all attorneys in the jurisdiction and if the defender remits to the public defender all compensation received.
(d) A board of directors may permit a full-time public defender or full-time assistant public-defender to engage in uncompensated private practice of law if the public defender or assistant public defender is acting:
(1) Pursuant to an appointment made under a court rule or practice of equal applicability to all attorneys in the jurisdiction; or
(2) On behalf of a close friend or family member; or
(3) On behalf of a religious, community or charitable group.
(e) Violation of the requirements of this section is sufficient grounds for immediate summary dismissal regardless of the conditions of employment established by a corporation's board of directors.

5. On February 12, 2007, Deborah A. Lawson filed a complaint and alleged that Respondent had improperly accepted payment from Daniels Capital Corporation by submitting false documents for non-existent claims.

6. While Respondent was an employee of the Public Defender Corporation, he submitted notarized Assignment Schedules to Daniels Capital Corporation listing the disposition date for each case as being on or before August 2006. Based upon the notarized Assignment Schedules and Orders Approving Payment of Appointed Counsel Fees and Expenses he completed for the dates and amounts listed below, Respondent subsequently received payment for a percentage of the amount listed on the notarized statements. Upon information and belief, the following are the amounts claimed by Respondent and date he submitted the claims to Daniels Capital Corporation:

(1)	August 23, 2006	$4,115.27
(2)	August 28, 2006	$1,491.54
(3)	August 29, 2006	$1,164.50
(4)	August 30, 2006	$1,757.50
(5)	September 5, 2006	$3,000.00
(6)	September 6, 2006	$2,236.50
(7)	September 12, 2006	$2,630.50
(8)	September 14, 2006	$3,530.50
(9)	September 15, 2006	$4,914.40
(10)	October 25, 2006	$1,367.00
(11)	October 26, 2006	$1,371.50
(12)	November 2, 2006	$1,229.50
(13)	November 3, 2006	$1,313.00
(14)	November 8, 2006	$1,527.50
(15)	November 9, 2006	$1,036.25

(16)	November 17, 2006	$3,256.25
(17)	December 18, 2006	$2,387.50
(18)	December 21, 2006	$2,602.75
(19)	January 2, 2007	$2,773.55
(20)	January 5, 2007	$2,549.25
(21)	January 8, 2007	$5,452.14
(22)	January 17, 2007	$2,413.35
(23)	January 18, 2007	$1,964.00
(24)	January 22, 2007	$1,854.99
(25)	January 31, 2007	$2,932.30

7. D. Benjamin Traylor, Esquire, an attorney in Birmingham, Alabama, who represented Daniels Capital against Respondent in Daniels Capital's efforts to collect the money it had wired to Respondent based upon his false claims, testified at the May 7, 2009 hearing in the matter. Generally, Mr. Traylor stated that an attorney and Daniels Capital would enter into a contract so that the attorney would assign his claim to funds due based upon the attorney's court appointed representation of an indigent client from him to Daniels Capital. [ODC Ex. 17, Bates Nos. 0321-0331]. Mr. Traylor stated that the delay in receiving state reimbursement of appointed counsel fees is one of the reasons attorneys enter into contracts with Daniels Capital because Daniels Capital would pay an attorney immediately. [Hrg. Tr. pp. 35-37]. Mr. Traylor explained that when an attorney first becomes a client of Daniels Capital, the company "... require[s] a copy of the judge's order ... any documentation that would normally be filed with the court. And then once that's all received, Daniels will either wire or mail a check, depending on what the individual client requests." [Id. at p. 37].

Mr. Traylor testified that Respondent had requested that the money be transferred to him by wire. [Id.]

Mr. Traylor testified that typically, Daniels Capital would ". . . advance 75 percent of that fee declaration that day, then they'll hold 25 percent. Of course, there's no money to actually hold because the state hasn't paid . . . ." [Id. at p. 39]. He continued and stated that ". . . once the state pays, they will subtract out their fee based on the days it was outstanding, then send the remainder of that 25 percent back to [the attorney]. [Id.] Furthermore, he stated that "[i]f everything goes according to – if it's filed properly and it's paid in a timely manner, [the fee] is generally six to ten percent." [Id. at pp. 39-40].

8. Deborah Lawson testified that Respondent's first day of employment as an attorney for juvenile matters at the Public Defender Corporation was August 21, 2006, and that "[f]rom the – from the date he started working for us on appointed cases that qualify for public defender representation, he would not have been entitled to any additional compensation after that date." [Id. at pp. 61, 64].

Ms. Lawson testified that Respondent was advised on several occasions that under the provisions of W. Va. Code § 29-21-17 he had ninety (90) days after employment with the Public Defender Corporation to close his private practice. [Id. at pp. 61-2]. Furthermore, Ms. Lawson testified that Respondent had been given two written warnings about continuing with his private practice after the ninety (90) day deadline. [Id. at p. 67]. She also stated that the second written warning included

specific instructions that Respondent was to make no appearances outside of public defender work unless she was consulted about the matter and Respondent had received approval prior to his appearance at the hearing. [Id. at pp. 67-8].

Shortly after terminating Respondent from his employment at the Public Defender Corporation, Ms. Lawson testified that one of the secretaries brought her a January 2, 2007 notarized Assignment Schedule Respondent had prepared and faxed to Daniels Capital. [Id. at p. 70; ODC Ex. 17, Bates No. 641]. Ms. Lawson testified that she recognized one of the names, "W.B.", on the notarized Assignment Schedule as a case and client she had personally handled for the Public Defender Corporation. [Id. at p. 70-1]. She contacted Daniels Capital and asked them to fax her additional documentation. She testified that she then began to review the notarized Assignment Schedules prepared by Respondent and compare them against the Public Defender files and court files. [Id. at p. 70-1, 74-5].

Ms. Lawson testified that Respondent submitted vouchers for cases he was not appointed by the Circuit Judge, she assumed that all the time submitted to Daniels was false.

Respondent testified and his denial was so forceful that the Hearing Panel Subcommittee decided it was going to request from both of the Circuit Judges whether or not the Respondent had, in fact, been appointed to represent these indigent defendants. In over 90 percent of the cases, Chief Judge Silver indicated that, in fact, Mr. Cavendish, prior to his employment with the Public Defender's Office, had been

appointed to represent the defendants which match the vouchers mailed to the Daniels Corporation. Mr. Cavendish further testified that due to an automobile accident, to which he provided proof to this Panel, a laptop was destroyed which held his timesheets for each of these Court-appointed cases. Mr. Cavendish admitted that he then attempted to reconstruct his time in these cases and fully intended to request this money from the Public Defender Corporation. He indicated that he felt that he had spent more time that what was represented to the Daniels Corporation. He also admitted that at no time did he ever make a request to the Circuit Court Judges for reimbursement, even though he had represented to the Daniels Corporation that, in fact, he had done so.

9. By submitting these Assignment Schedules, Respondent:

   A. Received advance payments from Daniels Capital Corporation for cases to which he was appointed prior to accepting employment at the Public Defender Corporation.

   B. Received advance payments from Daniels Capital Corporation for work he had not performed by misrepresenting the amount due him.

   C. Received advance payments from Daniels Capital Corporation for work he had performed for his privately retained clients.

D. Received advance payments from Daniels Capital Corporation for funds due a former employer.[3] Respondent was not entitled to receive the payment for these cases and any payment received for these cases should be made payable to Respondent's former employer.

E. The Respondent adamantly testified that he had been appointed by either Judge Silver or Judge Steptoe to each of the above-listed cases. This Panel then took it upon themselves to ask Judges Silver and Steptoe if, in fact, the Respondent had been appointed to the above cases.[4]

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[3]Respondent was employed at the Charles Town, West Virginia, office of Campbell, Miller & Zimmerman, P.C., from on or about January 2006 until on or about June 2006. From June 2006 until his August 21, 2006 employment at the Public Defender Corporation in Martinsburg, West Virginia, Respondent maintained a solo practice.

[4]By letter dated May 29, 2009, the Chair of the Hearing Panel Subcommittee sent a letter to two of the Judges in the 23rd Circuit asking that if they could verify that Respondent had been appointed to represent the clients he had listed on the Assignment Schedules he had submitted to Daniels Capitol. [Submitted as Ex. 23, Under Seal]. By letter dated June 16, 2009, Judge Gray Silver, III, responded to the Chair's letter. [Submitted as Ex. 24, Under Seal]. Judge Silver confirmed Ms. Lawson's testimony that the case name and number listed by Respondent for Charles E. Hargett, III, on the August 28, 2006 Assignment Schedule was not accurate. Judge Silver also indicated that the case name and number information Respondent included on the September 6, 2006 Assignment Schedule for George W. Michael, Sr., was not accurate. The information respondent included on Assignment Schedules dated October 25, 2006, and January 5, 2007, in reference to G.S., Case No. 06-JA-100-104, was not accurate. [ODC Ex. 17, Bates Nos. 543, 656]. In addition, Judge Silver indicated that Respondent was appointed on August 30, 2006, which was after his employment at the Public Defender Corporation. Respondent would not have been entitled to receive any fees from Daniel Capital for that representation. In addition, Judge Silver indicated that the case number and name W.M. listed on Respondent's's January 2, 2007 Assignment Schedule did not correspond to court records. [ODC Ex. 17, Bates no. 641]. Furthermore, Judge Silver indicated that the Public Defender Corporation was appointed to represent W.M. and that while Respondent initially appeared, another Public Defender later appeared. Respondent would not be entitled to any fees from Daniels Capital with regard to that representation. Judge Silver also confirmed that Respondent inaccurately identified a client by two different names on more than one occasion. E.E.M., Case No. 06-JA-97, was listed by Respondent as middle name E.M. and then first name E.E.M. on October 26, 2006, and on January 5, 2007, respectively. [ODC Ex. 17, Bates Nos. 554, 656]. Respondent listed the disposition dates of both as August 18, 2006.

F. The Respondent had been appointed to the cases identified in the Complainant as being assigned to Judge Gray Silver. The Panel does not make a finding as to the appointments of retired Judge Thomas W. Steptoe, Jr. due to the fact that the Panel withdrew its request to Judge Steptoe to obtain this information, and the information was not forthcoming from either of the parties in this matter. The Panel finds that the testimony of Deborah A. Lawson, while made with good intention was incorrect in that the Respondent had been appointed by Judge Silver to represent the individuals identified in the petition and for which several reimbursements were requested. Irrespective of that fact, the Panel finds that pursuant to the stipulation of the parties that the Respondent was not entitled to this reimbursement in that the Respondent had represented to the Daniels Corporation that he had made application to the Public Defender Corporation for payment of this money when, in fact, he knew this representation to be false. On each of these applications, the Respondent made the same representation to the Daniels Corporation.

G. There are insufficient records in this file to determine whether or not the Respondent performed the work that is represented by the vouchers presented as evidence in this case. The Office of Disciplinary Counsel in its presentation was relying on the fact that Deborah Lawson was testifying that Respondent was not, in fact, appointed to any of the cases and, therefore, was not entitled to this money. This Panel, in finding that Respondent had been appointed to

these cases, does not make a specific finding one way or the other of whether or not Respondent was entitled to some of the monies requested by the Respondent from Daniels Corporation, but relies solely on the misrepresentations made to Daniels Corporation by Respondent, which is admitted to in his stipulation, and the Panel further finds that Respondent was not entitled to this money by virtue of these misrepresentations.

H. It is further a finding that Respondent testified that he entered into a Settlement Agreement with the Daniels Corporation to reimbursement the total amount plus interest owed, which is inclusive of all of the monies addressed by this Order. In support of the same, D. Benjamin Traylor, Esquire, of the Daniels Corporation testified that his client would be made whole by the Settlement Agreement, which was entered into by way of negotiations with Respondent, wherein Respondent admitted that he owed this money. Respondent stopped payment pursuant to the Settlement Agreement and the Daniels Corporation filed a lawsuit against Respondent and has filed for Summary Judgment. Respondent has admitted in that lawsuit that he owes the money to Daniels Corporation.

IV. CONCLUSIONS OF LAW

10. Because Respondent wrongfully placed his own personal information and personal tax information on Assignment Schedules and Orders Approving Payment of Appointed Counsel Fees and Expenses, which he then provided to Daniels Capital

Corporation, causing fees that were due the Public Defender Corporation[5] to be made payable to him and representing that these monies had been requested of the Circuit Court Judge when he knew they had not; because he failed to advise the Public Defender Corporation and his former employer of its receipt, failed to promptly deliver the fees to the Public Defender Corporation and/or his former employer, and failed to keep the fees separate from his own personal property, but instead co-mingled the fees with his own personal property and wrongfully converted the same to his own personal use, Respondent violated Rules 1.15(a), (b), (c) and Rule 8.4(c) of the West Virginia Rules of Professional Conduct, which provide in pertinent part:

> **Rule 1.15. Safekeeping property.**
> (a) A lawyer shall hold property of . . . or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. . . .
> (b) Upon receiving funds or other property in which a . . . third person has an interest, a lawyer shall promptly notify the . . . third person. . . .
> (c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

and

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[5]ODC acknowledged that based upon the evidence presented at the May 7, 2009 hearing, it does not appear that any of the fees Respondent received from Daniels Capital based upon his submission of the fraudulent vouchers and Assignment Schedules were due the Public Defender Corporation. Respondent did not submit any of these documents with any Court for approval or to the Public Defender Services for processing.

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

11. Because Respondent represented to Daniels Capital Corporation that he was entitled to receive advance payments for fees generated by court appointed work and provided Daniels Capital Corporation with documents that Respondent had certified as being true and correct, when he knew they were not correct, Respondent violated Rule 8.4(c) of the Rules of Professional Conduct as set forth above.

12. Because Respondent continued to represent privately retained clients and his court appointed clients while employed as an Assistant Public Defender, in violation of West Virginia Code § 29-21-17, Respondent violated Rule 8.4(c) of the Rules of Professional Conduct which is previously set out herein.

V. AGGRAVATING FACTORS

13. Respondent's actions as alleged herein arose as the result of a selfish motive, constituted a pattern of misconduct involving multiple offenses continuing for a six (6) month period until discovered and totaling in excess of Sixty Thousand Dollars ($60,000.00), and constituted illegal conduct on the part of Respondent.

VI. DISCUSSION

The Supreme Court of Appeals of West Virginia 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).

In this case, the evidence clearly establishes that between August 26, 2006, and January 31, 2007, Respondent submitted twenty-six (26) vouchers and notarized Assignment Schedules to Daniels Capital Corporation ("Daniels Capital") which included false information so that he received funds he was not entitled to receive from Daniels Capital.

Nonetheless, the Panel noted that there was insufficient evidence to determine what work, if any, Respondent performed on each of these cases and to what amount of money, if any, Respondent was entitled to receive in any of the specific cases. Additionally, Respondent testified, and there is no evidence to the contrary, that he did not request from Daniels Corporation any monies for work done after he began work at the Public Defenders Corporation. Since the Office of Disciplinary Counsel was operating on the premise that Mr. Cavendish was not, in fact, appointed to any of the cases, it did not prove if any of the timesheets provided to Daniels Corporation would have been for work performed after he

began work with the Public Defender Corporation. While Respondent's violations in this case are egregious, the Panel was of the opinion that Respondent was appointed to represent the criminal defendants in criminal actions, that he did some of the work for these criminal defendants, but it was impossible for the Hearing Panel Subcommittee, or anyone, to know how much work was done by Respondent on behalf of these criminal defendants. Nonetheless, the Panel found that Respondent was extremely negligent and careless in the handling of the billing records in these cases and it is believed that whatever records Respondent had were destroyed when his laptop was destroyed in the automobile collision that occurred in October of 2006.

Respondent has been reckless in his practice over this time period in submitting the vouchers to Daniels Capital Corporation and misrepresented the facts to Daniels Capital Corporation, causing them to advance monies on behalf of the work done by Respondent. Specifically, the Panel finds that Respondent represented to Daniels Capital Corporation that these vouchers had been submitted to the Circuit Court Judge when, in fact, he knew that they had not been submitted to any Court or to the Public Defenders Corporation.[6]

A. Respondent violated duties to his clients, to the public, to the legal system and to the legal profession.

Respondent's misconduct in not complying with the statutory ninety (90) day time frame for him to close his private practice after accepting employment at the Public Defender Corporation violated duties he owed to his clients. Respondent should have recognized that

[6]For example, *see* Hrg. Tr. p. 179.

his failure to take the steps necessary to close his practice in a timely manner put both his privately retained clients and his Public Defender Corporation clients in a precarious situation after the expiration of the ninety (90) day time period. Respondent also violated his duties to the members of the public. Members of the public are entitled to be able to trust lawyers and they should be able to expect that lawyers exhibit the highest standards of honesty and integrity. By placing false information on notarized documents in order to obtain money under false pretenses, Respondent violated his duties to the legal profession and to the legal system.

B. Respondent acted intentionally and knowingly.

The Hearing Panel Subcommittee found that the overwhelming evidence in this case demonstrated that Respondent acted intentionally and knowingly when he committed the multiple violations of the Rules of Professional Conduct. Intent is defined in the *ABA Standards for Imposing Lawyer Sanctions*[7] (1992) as the "conscious objective or purpose to accomplish a particular result." [*Standards*, p. 01:807]. While Respondent repeatedly stated that his memory was deficient during the time period of the conduct charged in the Statement of Charges, Respondent, nonetheless, admitted that he submitted the vouchers and assignments to Daniels Capital between August 2006 and January 2007. [Hrg. Tr. at pp. 12, 27-8, 157, 158, 166, 172, 176, 182, Joint Exhibit 1]. Respondent also admitted that his signature was on the false vouchers and fraudulent Assignment Schedules submitted between August 2006 and January 2007. [Hrg. Tr. at p. 25]. While Respondent testified that he

[7] Reprinted in the *ABA/BNA Lawyer's Manual on Professional Conduct*, pp. 01:801 - 844 (1992).

believed the vouchers and assignments he submitted prior to the October 10, 2006 were "probably accurate", the evidence demonstrated that the information Respondent had included on notarized Assignment Schedules submitted prior to October 10, 2006, was, in fact, inaccurate.

Respondent testified that the computer program he used to prepare the vouchers and notarized Assignment Schedules was overwriting the information he had previously entered into the computer program. [Hrg. Tr. p. 180-1]. Yet, Respondent also testified that while he had discovered the error in the computer program sometime prior to October 10, 2006, he continued to use the same computer program to prepare the vouchers and assignments until January 31, 2007, when his activities with regard to Daniels Capital were discovered by Ms. Lawson and he ceased submitting the Assignment Schedules to Daniels Capital. [*Id.* at p. 180-2].

C. The amount of potential and real injury is great.

"Potential injury" is defined in the *ABA Standards for Imposing Lawyer Sanctions* as "the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." [*Id.*] "Injury" is defined as "harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct." [*Id.*] While it does not appear that any of Respondent's clients were injured by Respondent's misconduct or that the West Virginia Public Defender System lost any money as a result of Respondent's misconduct in submitting false vouchers and

fraudulent notarized Assignment Schedules, Daniels Capital advanced Respondent more than $60,000.00 based upon the fraudulent representations on the twenty-six (26) notarized Assignment Schedules Respondent had sent to Daniels Capital over a six (6) month period. Respondent clearly obtained this money from Daniels Capital based upon false pretenses and converted the money to his own use. Furthermore, the clear and convincing evidence presented demonstrated that Respondent had not submitted any of the vouchers to any Court or to the Public Defender System so that Daniels Capital would be reimbursed the money it had advanced to Respondent.

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 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. 216, 579 S.E. 2d 550, 557 (2003) *quoting ABA Model Standards for Imposing Lawyer Sanctions,* 9.21 (1992).

Rule 9.22(c) of the *ABA Model Standards for Imposing Lawyer Sanctions* indicates that a pattern of misconduct constitutes an aggravating factor. Respondent exhibited a pattern and practice of placing his personal tax identification number and bank account information on notarized Assignment Schedules sent to Daniels Capital containing false information over a six (6) month period to collect over $60,000.00 from Daniels Capital.

Respondent also exhibited a dishonest or selfish motive and a refusal to acknowledge the wrongful nature of his conduct.[8]

The Supreme Court has 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." Scott, 213 W.Va. 209, 579 S.E.2d 550, 555 (2003) *quoting ABA Model Standards for Imposing Lawyer Sanctions*, Standard 9.31 (1992).[9] The mitigating factors present in this case are an absence of a prior disciplinary record and inexperience in the practice of law as Respondent was admitted to the West Virginia State Bar in 2005. In addition, on or about August 13, 2007, Respondent entered into a Settlement Agreement with Daniels Capital and agreed to repay the money Daniels Capital had wired into his bank account based upon the notarized Assignment Schedules he had submitted between August 23, 2006, and January 31, 2007. [ODC Ex. 11].[10]

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[8]Respondent characterized these proceedings to his physician in 2007 as having to "go to the State Bar examination regarding a bad episode he had while at his last job for non-completion of paperwork." [Hrg. Tr. p. 210, ODC Ex. 21, Bates No. 1374]. At his January 15, 2009 deposition, Respondent's physician acknowledged that he had no idea what disciplinary charges Respondent was facing. [ODC Ex. 19, Bates No. 1331].

[9]The Scott Court held that mitigating factors which may be considered in determining the appropriate sanction to be imposed against a lawyer for violating the Rules of Professional Conduct include: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses.

[10]However, Mr. Traylor testified at the May 7, 2009 hearing that Respondent was not in compliance with the Settlement Agreement and that Daniels Capital had initiated collection proceedings against

Throughout these proceedings, Respondent indicated that he had "memory issues" during the time of the misconduct asserted in the Statement of Charges. However, an examination of the medical records indicate that Respondent first went to see a physician with regard to his alleged memory loss on October 10, 2006, two months after he began submitting the false Assignment Schedules. [ODC Ex. 6, 19, 20, 21, 22]. At that medical visit, Respondent noted he had hit his head two years earlier. [ODC Ex. 6, Bates No. 25]. However, Respondent did not submit any medical records specific to that incident. On October 10, 2006, Respondent's physician, Wilbur S. Sine, M.D., referred Respondent to several doctors for a neurological evaluation, neuropsychological examination, and sleep study. [ODC Ex. 22]. A review of the results of the neurological and neuropsychological examinations indicate that Respondent was diagnosed as suffering from severe depression, not a traumatic brain injury, Alzheimer's disease, or amnesia, as Respondent had previously asserted in various times during this proceeding.[11] [*Id.*]. When Respondent went for his follow-up visit with Dr. Sine after these examinations, Dr. Sine noted in his records that these other doctors ". . . think [Respondent] is significantly depressed and that may be the etiology of this recent memory loss. . . . He saw Dr. Gutierrez who also thought this was depression and neurologically he was normal. . . ." [ODC Ex. 21, Bates No. 1391]. Furthermore, the

Respondent in Alabama as a result. [Hrg. Tr. p. 54-8.]

[11]At the hearing, Respondent testified that he was also diagnosed in 2003 with posttraumatic stress disorder (PTSD) by a doctor in Virginia. [Hrg. Tr. p. 206]. Respondent did not submit any medical evidence to establish this diagnosis. Moreover, Dr. Sine testified at his January 15, 2009 deposition that ". . . post-traumatic stress disorder is not really an issue with – in my opinion. . . ." [ODC Ex. 19, Bates No. 1342].

only other diagnosis made with regard to Respondent was that he suffered from periodic limb movements, or restless leg syndrome. [ODC Ex. 22, Bates No. 1422].

On December 1, 2006, Dr. Sine stated that "I think he is getting a lot better, and that is amazing to me." [*Id.*, Bates No. 1387]. Respondent's next appointment with Dr. Sine was on January 15, 2007, and then Respondent saw Dr. Sine against on February 2, 2007. [ODC Ex. 21, Bates Nos. 1383, 1384]. These are the only other doctor's visits during the time of the misconduct alleged in the Statement of Charges. Respondent has not submitted any other documentation of physical or mental disability. Moreover, Respondent testified at the hearing that he does not suffer from any addictions to alcohol, drugs, or gambling. [Hrg. Tr. p. 212].

Even assuming *arguendo* that Respondent suffered from a mental disability that caused him to engage in repeated instances of submitting notarized Assignment Schedules containing false information which enabled Respondent to obtain money under false pretenses, the ABA Model Standards of Imposing Lawyer Sanction, as amended in 1992, recognize that a lawyer's mental disability is only mitigating when:

> (1) there is evidence that the respondent is affected by a . . . mental disability;
> (2) the . . . mental disability caused the misconduct;
> (3) the respondent's recovery from the . . . mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
> (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

[ABA, *Model Standards for Imposing Lawyer Sanctions*, Stnd. 9.32(I) (reprinted in ABA/BNA Lawyer's Manual for Professional Conduct 01:839)(emphasis added)]. In this case, there is no clear and convincing evidence to establish any physical or mental disability and there is no evidence of causal connection between the alleged "memory issues" to the course of misconduct. It is not sufficient for Respondent to simply claim that he suffers from "memory issues" and that the "memory issues" must have caused the misconduct as Respondent suggests.

Additionally, absent any aggravating or mitigating circumstances, the ABA Model Standards for Imposing Lawyer Sanctions provide that:

> Standard 7.2. Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Moreover, the fact that Respondent agreed to repay Daniels Capital and made several payments towards restitution does not negate the conduct, is not a defense, and in this case should not mitigate any proposed sanction. Syl. pt. 8, Lawyer Disciplinary Board v. Geary M. Battistelli, 206 W.Va. 197, 523 S.E.2d 257 (1999); Syl. pt. 4, Committee on Legal Ethics v. Hess, 186 W.Va. 514, 413 S.E.2d 169 (1991); and Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 569-570, 505 S.E.2d 619, 632-633 (1998), *remanded with directions*, see Lawyer Disciplinary Board v. Kupec (Kupec II), 204 W.Va. 643, 515 S.E.2d 600 (1999). Battistelli and Hess note that mitigation of punishment because of restitution must be governed by the facts of the particular case.

Kupec I provides that:

> 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.
> Kupec I, 515 S.E.2d at 570, citations omitted.

As the evidence reflects, the aggravating factors clearly outweigh any possible mitigation.

VII. SANCTION

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syllabus Pt. 3, *in part*, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), *cited in* Committee on Legal Ethics v. Morton, 410 S.E.2d 279, 281 (1991). In addition, discipline must serve as both instruction on the standards for ethical conduct and as a deterrent against similar misconduct to other attorneys. In Syllabus Point 3 of Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987), the Court stated:

> 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.

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).

When considering sanctions, the Panel found this case not to have extenuating circumstances and this is not a case which involves the misappropriation of client funds. Respondent gave no explanation of why he committed these acts other than alleging his mental confusion and physical condition. The Panel was not swayed by Respondent's arguments.

The Panel stated that it found the decision in this case to be extremely difficult, but in looking at the totality of the circumstances, the Panel recommended that Respondent be suspended for three (3) years. The Panel stated that this recommendation takes into account the short period of time within which Respondent was practicing, the fact that he had no prior disciplinary action against him, that he has made attempts for restitution, and that he appears to be suffering from at least some mental impairment.

A sanction is to not only punish the attorney, but should also be designed to reassure the public confidence in the integrity of the legal profession and deter other lawyers from similar conduct. Syl. pt 2, Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993);. Syl. pt 3, Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Syl. pt 5, Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Syl pt. 3, Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); and Syl pt. 3, Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000).

Respondent's violations in this case are extremely egregious. This is not a case of simple negligence in communication or neglect of legal representation or as the Panel noted misappropriation of client funds. While the underlying facts appear to present a case of first impression for this Court, the most analogous cases involve instances wherein attorneys misappropriated the funds of third parties and/or money that belonged to the firm at which the attorneys worked. This Court has previously found that the Rules of Professional Conduct are applicable to an attorney's relationship with his or her firm, and if an attorney wrongfully converts firm money to his or her personal use, he or she is subject to discipline, even if no client suffers a particular loss. Committee on Legal Ethics v. Hess, 413 S.E.2d 169 (W. Va. 1991) (attorney suspended for two years). *See also,* Lawyer Disciplinary Board v. Ford, 211 W.Va. 228, 546 S.E.2d 438 (2002)(attorney admonished); Lawyer Disciplinary Board v. Coleman, 219 W.Va. 790, 639 S.E.2d 882)(attorney license annulled). In this case, while not exactly on point to the facts of Hess, Ford, and Coleman, Respondent's conduct also reflected a dishonest and deceitful nature which is in violation of the general precept that an attorney should avoid dishonesty or deceitful conduct. Id. Syl. Pt. 3. Moreover, Respondent clearly violated duties owed the public, the profession, and the legal system.

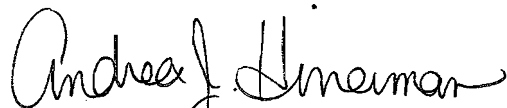
It cannot be stressed enough that even though this is Respondent's first offense, these violations are among the most serious that can be charged against an attorney. For the public and other members of the legal profession and system to have confidence in our disciplinary and legal systems, lawyers who engage in the type of conduct exhibited by Respondent must be removed from the practice of law for some period of time. A severe sanction is also

necessary to deter other lawyers from engaging in similar conduct and to restore the faith of the public in the legal profession.

The Lawyer Disciplinary Board believes that a sanction should be appropriately determined on an individual case by case basis. This Court has "repeatedly advised that '[i]n disciplinary proceedings, this Court, rather than endeavoring to establish a uniform standard of disciplinary action, will consider the facts and circumstances [in each case], . . . in determining what disciplinary action, if any, is appropriate." Lawyer Disciplinary Board v. Brown, 223 W.Va. 554, 678 S.E.2d 60, 66 (2009); *quoting* Syl. pt. 2, [in part] Committee on Legal Ethics v. Mullins, 159 W.Va. 647, 226 S.E.2d 427 (1976); Syl. Pt. 2, [in part], Committee on Legal Ethics v. Higginbotham, 176 W.Va. 186, 342 S.E.2d 152 (1986); Syl. Pt. 4, [in part], Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989).

In reaching its recommendation as to sanctions, the Hearing Panel Subcommittee properly considered the evidence presented at the hearing, the recommended stipulated facts and the aggravating factors and mitigating factors. Accordingly, the sanctions recommended by the Hearing Panel Subcommittee should be upheld.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel



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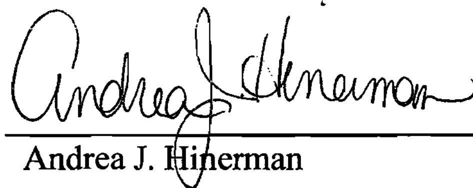
CERTIFICATE OF SERVICE

This is to certify that I, **Andrea J. Hinerman**, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 7th day of December, 2009, served a true copy of the foregoing **"Brief of the Lawyer Disciplinary Board"** upon Respondent John M. Cavendish by mailing the same via United States Mail, both certified and regular, with sufficient postage, to the following address:

John M. Cavendish, Esquire
1127 Van Voorhis Road, Suite 28
Morgantown, West Virginia 26501



Andrea J. Hinerman

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