

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

**LAWYER DISCIPLINARY BOARD,**

**Complainant,**

**v.**

**No. 34259**

**JOHN M. CAVENDISH,**

**Respondent.**

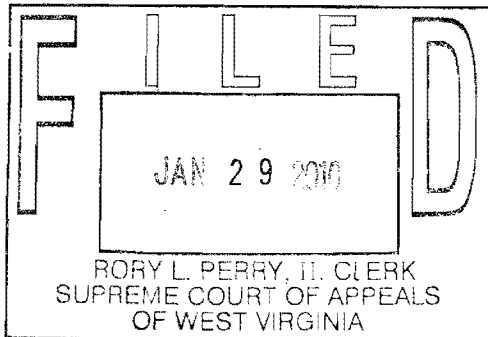
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**REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD**

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This matter is before the Court pursuant to the "Report of the Hearing Panel Subcommittee" issued on or about September 29, 2009 wherein 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 of the Rules of Professional Conduct.

## 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. DISCUSSION

Respondent concedes that he submitted 25 notarized Assignment Schedules to Daniels Capital Corporation between August 23, 2006, and January 25, 2007. The evidence presented in this case demonstrates that these 25 notarized Assignment Schedules included false information so that Respondent received from Daniels Corporation funds to which he was not entitled to receive. Respondent asserts that he that he was entitled to receive those funds due for cases submitted to Daniels Capital Corporation prior to October 26, 2006, because the cases involved his clients and he was unaware that he had to send requests for payment to the court for reimbursement, and assumed that Daniels Capital Corporation was submitting the same. This assertion is without merit. The 25 Assignment Schedules that Respondent signed before a notary public contained language which stated that Respondent agreed that “. . . all previously advanced fee declarations have been completed and filed with the appropriate court/clerk. By signing below, I further declare and certify that I have read,

understand, accept, agree, and am bound by the terms and conditions of the fee agreement/contract . . . .” The Hearing Panel correctly found that Respondent knew he had submitted false affidavits to Daniels Capital Corporation which lead Daniels Capital Corporation to issue funds to Respondent upon the belief that Respondent had properly submitted the payment vouchers to the Circuit Court.

Respondent also asserts that all of the Assignment Schedules submitted prior October 6, 2006, were accurate and thus he is entitled to a Finding of Fact that “100% of the clients associated with the cases submitted prior to October 10, 2006 [sic] were Respondent’s clients.” However, the Hearing Panel noted that there was insufficient evidence to determine what work, if any, Respondent performed on any of these cases and to what amount of money, if any, Respondent was entitled to receive. Moreover, one of the Judges of the 23<sup>rd</sup> Circuit Court identified inaccuracies in the information submitted on a number of the Assignment Schedules Respondent submitted to Daniels Capital Corporation prior to October 6, 2006. Respondent also has no client files and thus he has absolutely no evidence to substantiate that the Assignment Schedules he submitted to Daniels Capital Corporation either before or after October 6, 2006 accurately reflect the work he performed on behalf of his appointed clients. The Hearing Panel correctly found that Respondent violated Rules 1.15(a), 1.15(b), Rule 1.15(c) and 8.4(c) with regard to his misconduct in submitting 25 notarized Assignment Schedules, totaling more than \$60,000.00, and which contained false information.

Respondent's assertion that the Stipulations he entered into do not comport with his "intentions, or memory of that to which he was stipulating" or support the Hearing Panel's conclusions that he violated any of the Rules of Professional Conduct is, likewise, without merit. Respondent was provided with ample time to review the Stipulations prior to signing the same. As the Hearing Transcript reflects, the Hearing Panel Subcommittee Chairperson read the Stipulations into the record and inquired of Respondent after each paragraph whether he agreed to the stipulated language contained therein. In fact, revisions to the Stipulations were agreed to by Disciplinary Counsel after discussion with Respondent. Moreover, an evidentiary hearing ensued providing Respondent with opportunity to present evidence.

Respondent argues that the Hearing Panel Subcommittee's refusal to continue the proceedings to allow his physician to testify violated his due process rights. The hearing in this matter was held on May 7, 2009, after it had been continued from December 5, 2008, in order to develop the very medical evidence Respondent references. There were multiple hearings on Respondent's medical evidence dating back to November 14, 2008 and continuing through March 3, 2008.

In an Order dated May 5, 2008, the Hearing Panel Subcommittee again addressed Respondent's medical evidence and Dr. Sine's testimony when it considered Respondent's Motion to Continue which he had filed on May 1, 2009. The Hearing Panel noted that Respondent had attempted contact to the Panel on or about April 17, 2009, regarding a subpoena for Dr. Sine. However, the Hearing Panel Subcommittee found that Dr. Sine's

deposition would admitted into evidence but that Respondent would be limited to Dr. Sine's testimony given at his deposition and that he would not be prejudiced by not having Dr. Sine to testify at the hearing. Respondent was present at Dr. Sine's January 15, 2009 deposition and given an opportunity to question Dr. Sine about his testimony which he exercised. Respondent was given ample opportunity to develop whatever mitigating medical evidence he wanted the Hearing Panel Subcommittee and this Court to consider in this matter. Respondent was not denied due process by not having Dr. Sine present to testify at his May 7, 2009.

Respondent argues that the Hearing Panel Subcommittee failed to give weight to certain mitigating factors that were present in this case such as his unidentified medical condition and that the Hearing Panel was arbitrary in its interpretation and consideration of Respondent's medical records. Traditionally, the Hearing Panel Subcommittee has given wide latitude to lawyers in disciplinary proceedings to set forth evidence in mitigation of a sanction. However, the mitigating factors proposed by Respondent do not rise to the level of compelling and extenuating. The Scott Court determined that mitigating facts "are *any* considerations or factors that *may* justify a reduction in the degree of discipline to be imposed." Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E.2d 550, 555 (2003). The Hearing Panel Subcommittee considered Respondent's asserted but unidentified medical conditions, his lack of disciplinary history, and his inexperience in the practice of law but found that these factors did not rise to the level of compelling and extenuating circumstances thus reducing his sanction.

Moreover, the fact that Respondent's home and the location of his law practice are located in two different towns and that he has a long "commute" do not absolve him of his duties to his clients and to the legal profession. The fact that Respondent continued to work "pro bono" for his clients also does not obviate him of his duties to comply with the Rules of Professional Conduct.

Respondent is correct that this Court, in Lawyer Disciplinary Board v. Dues, 218 W.Va. 104, 624 S.E.2d 125 (2005), stated that "[i]n a lawyer disciplinary proceeding, a mental disability is considered mitigating when: (1) there is evidence that the attorney is affected by a mental disability; (2) the mental disability caused the misconduct; (3) the attorney'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." In this case, there is no clear and convincing evidence to establish that Respondent suffered under any mental disability and there is no evidence of causal connection between Respondent's alleged "memory issues" and to his 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.

Throughout these proceedings, Respondent asserted that he had "memory issues" during the time of the misconduct asserted in the Statement of Charges. However, an examination of the medical records submitted into evidence 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]. Respondent's medical file from Dr. Sine contains records from that time, however, there were medical records submitted specific to that alleged 2004 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.<sup>1</sup> [*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 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]. There is absolutely no evidence to establish that Respondent was in "recovery" and that the "recovery" arrested his misconduct and that recurrence of the misconduct is unlikely.

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<sup>1</sup>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].

Again, while Respondent may be disappointed in the outcome, in reaching its recommendation as to the appropriate sanctions, the Hearing Panel Subcommittee considered the evidence, the facts and recommended sanction, the mitigating factors. Accordingly, the sanctions recommended by the Hearing Panel Subcommittee should be upheld.

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).

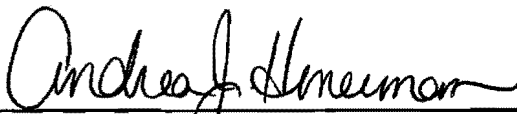
#### IV. RECOMMENDED SANCTIONS

The Hearing Panel Subcommittee properly found that Respondent violated Rules 1.15(a), 1.15(b), 1.15(c) and 8.4(c) of the Rules of Professional Conduct and issued the following recommendation as appropriate sanctions

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.

*Respectfully submitted,*  
The Lawyer Disciplinary Board  
By Counsel



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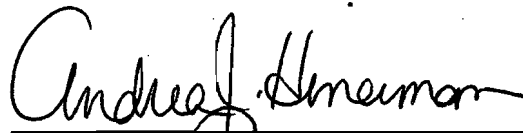
**CERTIFICATE OF SERVICE**

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This is to certify that I, **Andrea J. Hinerman**, Senior Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 28<sup>th</sup> day of January, 2010, 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