

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

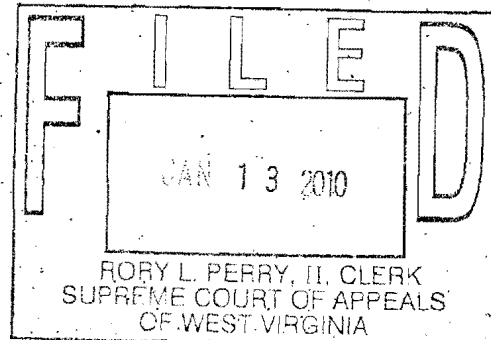
**LAWYER DISCIPLINARY BOARD,
Complainant,**

v.

No. 34259

**JOHN M. CAVENDISH,
Respondent,**

RESPONDENT'S BRIEF



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I. NATURE OF THE PROCEEDINGS AND RECOMMENDATIONS OF THE HEARING PANEL SUBCOMMITTEE

The Respondent does not disagree with the Lawyer Disciplinary Board's recitation of the facts related to the history of this matter. However, he believes there are omissions that should be brought before the Court. These are:

1. The Respondent requested a subpoena on April 20, 2009 for his personal physician, Dr. Wilber Sine, for whom he requested a subpoena in the previously scheduled hearing. No subpoena was issued.
2. The Respondent renewed his motion for a continuance at the outset of the hearing on May 7, 2009, which was again denied.
3. The Respondent filed a motion to augment the record, with proof that he was appointed counsel on every case, prior to October 10, 2006 submitted for payment to DCC that his former employer, Deborah Lawson, testified that the Respondent had not represented the client in question. Exhibit 1

II. RESPONDENT'S EXCEPTIONS

Exception 1. The Panel's refusal to continue the proceedings to allow the Respondent's physician to testify after the Respondent had requested a subpoena violated his Due Process rights

Exception 2. The Panel's interpretation of the nature of the Respondent's stipulations, does not comport with those of the Respondent.

Exception 3. The Panel was arbitrary in its interpretation of the Respondent's medical records and the prior testimony of the Respondent's physician, particularly in light of their recommended sanctions.

III. STANDARD OF REVIEW

The Respondent agrees that the standard of review is *de novo*.

IV. FINDINGS OF FACT

The Respondent does not disagree with Findings of Fact 1-7. With respect to finding of Fact 8, it should be noted that Ms. Lawson testified that all of the Respondent's case files on the disputed clients, prior to October 10, 2006 were examined. Furthermore, the Respondent believes that given the proof presented to the Panel in his Motion to Augment the Record that he is entitled to have a finding of fact that 100 percent of the clients associated with the cases submitted to DCC for payment prior to October 10, 2006 were the Respondent's clients. Finally, it should be noted the Respondent testified that he was unaware the he was to send requests for reimbursement to the various circuit courts for reimbursement, and assumed that DCC was submitting them.

With respect to Finding, of Fact 9B and 9C, the Respondent that the evidence clearly supports prefacing each finding with "Subsequent to October 10, 2006". With respect to finding 9(D) the Respondent submits that no evidence exists to support the finding. The ODC counsel did not call a single witness from the Respondent's former law firm, nor produce one shred of evidence to support the finding. The stipulation with regard to this finding was that at least on one occasion CMZ staff attended a client hearing for one of the Respondent's clients who were court-appointed. With respect to finding 9(F)-9(G), the Respondent never made a knowingly false representation to DCC. The Respondent stipulated that inaccurate representations were made to DCC after October 10, 2006. With respect to finding 9(H), the testimony of Mr. Traylor indicated that DCC had revoked the agreement. He also testified that in all likelihood DCC

would enter into a new agreement with the Respondent. There is a new agreement and the complaint has been dismissed by consent.

V. DISCUSSION

Exception 1. The Panel's refusal to continue the proceedings to allow the Respondent's physician to testify after the Respondent had requested a subpoena violated his Due Process rights

From the outset of these proceedings, the Respondent has made it clear that his only defense is his medical condition during the period when his alleged violations of the *West Virginia Rules of Professional Conduct*. As he pointed out in his March 1, 2009,

"RESPONDENT'S ANSWER TO THE MOTION OF THE OFFICE OF DISCIPLINARY COUNSEL TO EXCLUDE OR LIMIT TESTIMONY OF WITNESSES AND/OR DOCUMENTARY EVIDENCE OR TESTIMONY OF MITIGATING FACTORS AND OR MOTION FOR A MORE DERFINITESTATEMENT OF MITIGATING FACTORS',

the issue of the Respondent's mental impairment had been raised with ODC and the Panel consistently since he was initially made aware of the complaint. Consequently, the Respondent believes that he was denied Due Process when his request for a continuance to allow his physician an opportunity to testify before the Panel was denied.

This Court has stated that "[a]side from all else, due process means fundamental fairness." *Pinkerton v. Farr*, 159 W.Va. 223, 230, 220 S.E.2d 682, 687 (1975). It seems to the Respondent that the Panel was fundamentally unfair in denying his request to allow his physician to testify on his medical/mental condition given that: the respondent was a fairly inexperienced lawyer, who of necessity represented himself in an area of the law with which he was totally unfamiliar; the Respondent represented to the Panel that he was cognitively impaired, and supported it with medical evidence, in addition to the fact the he was unable to meet almost all procedural deadlines.

The Panel agreed to admit the deposition of Dr. Sine in its entirety, making it the only medical opinion in evidence. During his opening statement at his hearing, the Respondent asserted that he should be entitled to the most favorable inferences that could be drawn from the transcript of the deposition and supporting evidence. The Panel failed to draw any favorable inference that could easily have been drawn from the transcript.

Exception 2. The Panel's interpretation of the nature of the Respondent's stipulations, does not comport with those of the Respondent.

The only errors that the Respondent stipulating to having made on claims submitted to DCC before October 10, 2006, were two mistaken case numbers. The record clearly shows that every client for whom the Respondent submitted claims, including those submitted under an incorrect case number, were, in fact, court-appointed clients. Furthermore, to the extent that these stipulations were used as a basis to support Conclusions of Law to the effect that the Respondent had violated *West Virginia Rules of Professional Conduct*, does not comport with the Respondent's intentions, or memory of that to which he was stipulating. If any other interpretation can be drawn, the Respondent asserts that they lend support to his claim that he was not capable of adequately defending himself.

Exception 3. The Panel was arbitrary in their interpretation of the Respondent's medical records and the prior testimony of the Respondent's physician, particularly in light of their recommended sanctions.

The primary thrust of the Respondent's exceptions to the Panel's report is their recommended sanctions. His personal physician and psychiatrist testified that he should not have been practicing law during the period that led to the instant charges. The Respondent's level of impairment, was such that in his physician's opinion he should not have been practicing law during the relevant timeframe of the present charges, and should not have

been practicing law at the time of deposition, which occurred in January of 2009. (See Joint Exhibit 19, *Sine Transcript*, Bates Nos. 1318-1319, 1325-1348).

The Respondent believes that the evidence supports giving greatest weight to his mental impairment, in determining what sanctions, if any, should be imposed on him. The Respondent submits that his circumstances were somewhat analogous to those considered by this Court in *Lawyer Disciplinary Bd. v. Dues*, 218 W.Va. 104, 624 S.E.2d 125 (2005). In refusing to adopt the sanctions proposed by the Lawyer Disciplinary Board, the Court sat down a four-prong test for determining whether a mental impairment should be a mitigating factor:

“In a lawyer disciplinary proceeding, a mental disability is considered mitigating when: (1) there is medical 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.”
Syllabus Point 3, *Dues, Supra*.

Applying this test to the Respondent's mental disability shows a similar fact pattern. As to the first prong Respondent Dues was diagnosed with severe depression prior to his misconduct. This respondent has been diagnosed with severe depression, a sleep disorder, ADHD, PTSD, and cognitive impairment prior to his misconduct. [Joint Exhibits 19-22]

With respect to prong two, Respondent Dues', exhibited the conduct that formed the basis for the ethical complaint occurred after the respondent was diagnosed with severe depression. This Respondent believes the evidence before the panel clearly shows that the alleged misconduct in this case occurred after the October 10th, 2006 incidence that resulted in the Respondent being diagnosed with severe depression, a cognitive deficit, and a severe sleep disorder. Moreover, the alleged misconduct occurred after the Respondent was heavily

medicated, and had his medication changed on almost a weekly basis. Although the Respondent had been practicing for a little over a year when this complaint was filed, there was only one complaint related to failure to communicate appropriately with a client, which was dismissed by OCD. The Respondent quit taking all of the drugs prescribed for him in early March, 2007, and gradually introduced new drug regimens beginning in the fall of 2007. No complaints or malpractice actions have been filed against him in the three years that have expired since the present complaint was submitted. The Respondent would also note that prior to his admission to the bar he spent thirty-one years in the service of our country with an impeccable record. Further, because of the need to maintain an active security clearance, the Respondent underwent numerous background investigations during this period, with no adverse findings ever being recorded.

Related to this area, the Court distinguished *Dues* from *Disciplinary Board v. Scott*, 213 W. Va. 209, 579 S.E.2d 550 (2003), which ODC counsel would have this panel adopt. In distinguishing these cases the Court pointed out:

"A critical factor distinguishes *Scott* from the facts in the instant case. The attorney in *Scott* could not connect all of his legal deficiencies, i.e., lying to clients, judges, and officers of the court, and falsifying documents, to his Bipolar II Disorder. Contrariwise, Mr. Dues has presented unchallenged medical evidence that his legal deficiencies were *directly* connected to the serious depression that flowed from his physical problems. It is only because of this direct connection that we are compelled to accord the "greatest weight" to Mr. Dues' mental disability." *Dues, supra*.

The Respondent believes that the sworn testimony of his physician, Dr. Wilbur Sine, particularly when coupled with fact that there was no misconduct prior to October 10th, directly links his unethical behavior to his mental impairment. This is evidenced by Dr. Sine's answers to a number of questions from Ms. Hinerman's where he made it clear that the Respondent was

mentally impaired and that his misconduct was completely consistent with the mental impairment. (Joint Exhibit 19, *Sine Transcript, supra* Bates Nos. 1333-1340)

Prong three of the *Dues* test looks at whether the attorney's recovery from the mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation. The Respondent's rehabilitation began in early March of 2007 and will, in all likelihood, be ongoing throughout the remainder of his life. During this time, the Respondent was untreated for a period of about six months due to lack of insurance. He returned to treatment with Dr. Sine in September of 2007 and has remained in Dr. Sine's care. During this time, various drug combinations have been used to treat his depression, ADHD, and sleep disorder. While not all of the Respondent's symptoms have improved, particularly in the areas of short-term memory and concentration, he has only experienced one episode of the blackout type symptoms he was experiencing in late 2006 and early 2007. The Respondent is currently taking Adderal for his ADHD, Tofranil (imipramine) for his sleep disorder and depression, and drugs to treat his arthritis and high blood pressure.

The forth prong of the *Dues* test focuses on whether or not the recovery arrested the misconduct and recurrence of that misconduct is unlikely. In this regard, the Respondent points to the fact that there has been no reoccurrence during the nearly three years that he has been practicing law since this complaint was filed. However, during this time the Respondent has carried a relatively small caseload, currently has only two active cases. The Respondent made this choice because his recovery has not progressed to the point that he has confidence that his mental impairment would not affect his ability to give his clients the level of representation they deserve, and the profession demands.

With respect to the weight to be given the Respondent's mental disability, the Court set forth the following guidelines in *Dues*

"If the offense is proven to be attributable solely to a [mental] disability . . . , it should be given the *greatest weight*. If it is principally responsible for the offense, it should be given *very great weight*; and if it is a substantial contributing cause of the offense, it should be given *great weight*. In all other cases in which the [mental] disability . . . is considered as mitigating, it should be given *little weight*." *Dues supra*

The Respondent believes that the facts in his case warrant the greatest weight be given to his mental disability. In support of this, the Respondent would point out that his misconduct was limited to a relatively short time at the height of his impairment. There were no incidents before or after this period, and although temporal contiguity does not prove a cause and effect relationship, it creates a strong assumption that a cause/effect relationship exists absent any evidence to the contrary. Moreover Dr. Sine testified that the behavior that constituted the Respondent's misconduct was entirely consistent with his mental disability. *Sine transcript, supra*

The Respondent doesn't believe that there were any aggravating circumstances. The misconduct was a result of the Respondent's mental disability, and nothing else. The respondent would point out that is a matter of public record that after being fired by the PD, he continued to represent all of his clients with felonies *pro bono*, traveling between Morgantown and Charles Town at his own expense. Moreover, at any given time over the past two and one half years, a high percentage of the Respondent's cases, including his few current clients, were undertaken on a *pro bono* basis.

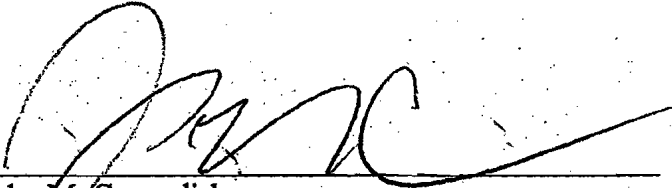
As for mitigating factors, the Respondent's mental disability is obviously the factor to which the most weight. The other factors that are most relevant are the fact that not a single

client suffered from the Respondent's misconduct, and to date the Respondent has made restitution of approximately \$32, 000 to DCC. Shortly after the hearing the Respondent and counsel for DCC agreed to reinstate the settlement agreement, which he (counsel for DCC) had terminated in June 2007. Presently the Respondent is repaying DCC at the rate of \$2,000 per month.

VI. Sanctions

A three-year suspension of the Respondent's law license is not an appropriate sanction. It would not serve as a deterrent to other lawyers, or bolster the public's confidence in the legal profession and it would likely end the Respondent's legal career, given his age. The Respondent's behavior that could otherwise be characterized to be misconduct was a result of his mental disability that he in no way brought upon himself. No sanction that can be levied upon the Respondent can keep other lawyers from experiencing his plight.

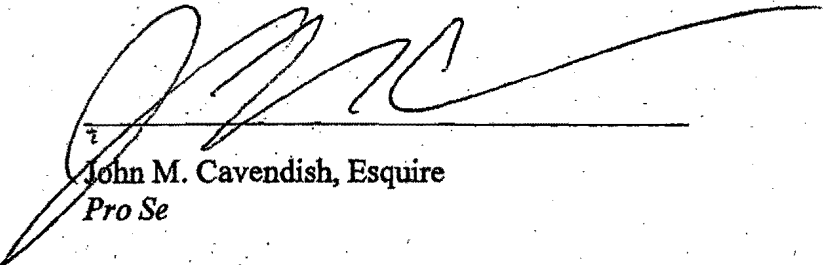
The Respondent has confidence in the wisdom of this Court to decide the sanctions, if any, that should be levied against him. He fully intends to maintain small, limited practice of law if, and when this Court allows him to do so.



John M. Cavendish
Pro se

CERTIFICATE OF SERVICE

This is to certify that I, John M. Cavendish, Respondent, have on this day, the 11th day of January, 2010 served a true copy of "RESPONDENT'S BRIEF." to Disciplinary Counsel, Andrea J. Hinerman, by Email attachment at ahinerman.wvdc@suddenlinkmail.com, and by first class U.S. Mail.



John M. Cavendish, Esquire
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