

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

LAWYER DISCIPLINARY BOARD,

Complainant,

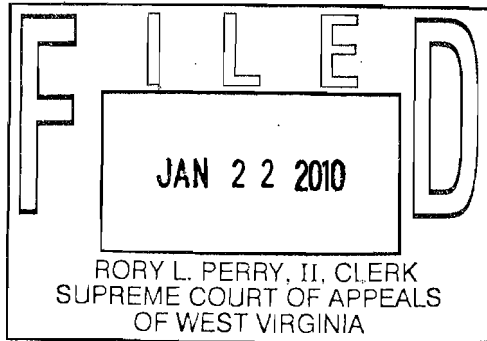
v.

No. 34734

WILLIAM C. MARTIN,

Respondent.

REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD



Renée N. Frymyer [Bar No. 9253]
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RESPONDENT'S CONDUCT

This matter is before the Court pursuant to the "Report of the Hearing Panel Subcommittee" issued on September 28, 2009 wherein the Hearing Panel Subcommittee properly found that the evidence established that Respondent violated Rules 1.3, 1.5(a), 1.5(b), 1.16(d), 3.4(c), and 8.4(d) of the Rules of Professional Conduct. Respondent correctly points out that the Hearing Panel Subcommittee was not of the opinion that Respondent violated Rule 8.4(c) in that they did not find that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. Respondent concedes he failed to diligently represent the interests of the Estate of Anna Lee Davis Hornor in violation of Rule 1.3 and possibly violated Rule 1.16(d) in failing to tender his file immediately upon being removed as Executor, but denies any other Rule violation.

Respondent continues to deny he wrongfully misappropriated and converted funds belonging to the Estate of Ms. Hornor to his own personal use, despite writing himself checks from Ms. Hornor's bank account totaling \$11,000.00. Respondent also disputes the finding of the Hearing Panel Subcommittee that there was no evidence of any work that Respondent did to further along the probating of Ms. Hornor's Estate, and asserts that he did perform the appropriate services by making several trips to Harrison County to inventory and dispose of household items and spending "many hours" organizing and distributing stocks and bonds.

Respondent does not dispute, however, that while holding the position of Executor from April 8, 2002 to June 9, 2005, he failed to deposit numerous dividend checks paid to the Estate into appropriate accounts, failed to file any tax returns for the Estate, failed to

timely deliver assets and property to beneficiaries, and failed to close the Estate. Respondent also does not dispute that the Harrison County Commission removed him from his position of Executor after finding that he did not properly administer the Estate, nor that it took Respondent almost nine (9) months to comply with the order of the Harrison County Commission to provide Complainant with the Estate's file and funds.

At this stage in the proceedings, this Court has previously stated that “[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board.” Lawyer Disciplinary Board v. Cunningham, 195 W.Va. 27, 34, 464 S.E.2d 181, 189 (1995); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 290, 452 S.E.2d 377, 381 (1994).

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Committee on Legal Ethics v. Keenan, 189 W.Va.37, 40, 427 S.E.2d 471, 473 (1993) (*per curiam*); *quoting* Syl. Pt. 3, in part, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984). Furthermore, the Preamble to the Rules of Professional Conduct provides that “[i]n all professional functions a lawyer should be competent, prompt and diligent.” It cannot be said that Respondent's conduct in this case conforms to the expectations of the profession as stated in the Rules of Professional Conduct.

There is no credible evidence establishing that Respondent's actions were the result of simple negligence or for that matter, isolated instances of occasional neglect. In fact, Respondent does not dispute the Hearing Panel Subcommittee's finding that Respondent

exhibited gross negligence in this matter. The evidence establishes that Respondent acted in a manner wherein any reasonable attorney, let alone one with Respondent's considerable experience, would expect the particular consequences that were certain to result. Additionally, Respondent continues to lack remorse for the damages he caused to Ms. Hornor's Estate and the losses its beneficiaries have suffered.

SANCTION

The principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. For the public to have confidence in our disciplinary and legal systems, lawyers such as Respondent must swiftly be removed from the practice of law for a period of time. Severe sanctions are also necessary to deter other potentially less-than-honest lawyers who may be considering or who are engaging in similar conduct.

The fiduciary relationship between an attorney and his client is one founded upon trust, loyalty and the tacit understanding that an attorney will act in the best interests of his client. The Hearing Panel Subcommittee found that when Ms. Hornor made Respondent Executor of her Estate, it was with the full knowledge that Respondent was a practicing attorney and it was with this knowledge that she intended for him to execute her Last Will and Testament. Instead, Respondent misappropriated funds entrusted in his care to his own personal use.

This Court has consistently held that a breach of the fiduciary relationship as heinous as theft of funds held in trust should result in severe sanction. "There is never a valid excuse for stealing client trust funds. 'Misappropriation of funds by an attorney involves moral turpitude; it is an act infected with deceit and dishonesty,'" Lawyer Disciplinary Board v.

Coleman, 219 W.Va. 790, 797, 639 S.E.2d 882, 889 (2006) *quoting* Lawyer Disciplinary Board v. Kupec, 202 W.Va. 556, 571, 505 S.E.2d 619, 634 (1998) (*additional quotations and citation omitted*). An attorney who misappropriates client funds not only harms his clients but also undermines the confidence of the public in the legal profession. Lawyer Disciplinary Board v. Brown, 223 W.Va. 554, 678 S.E.2d 60 (2009).

Misappropriation of funds belonging to an Estate and/or to third parties is a serious charge. This Honorable Court, like most courts, follow “[t]he general rule (is) that absent compelling extenuating circumstances, misappropriation or conversion by a lawyer of funds entrusted to his/her care warrants disbarment.” Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998); and Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 561, 505 S.E.2d 619, 631 (1998), *remanded with directions*, see Lawyer Disciplinary Board v. Kupec (Kupec II), 204 W.Va. 643, 515 S.E.2d 600 (1999). Respondent continues to deny he misappropriated Estate funds when he issued himself three (3) separate payments from the Estate account totaling \$11,000.00. The Hearing Panel Subcommittee disagreed and found that Respondent indeed misappropriated funds but was not of the opinion that the misappropriation was intentional. Clearly, the Hearing Panel Subcommittee took this into consideration, in addition to Respondent’s lack of disciplinary history, in recommending a suspension as opposed to an annulment in this case.

In Committee on Legal Ethics v. Mullins, this Court stated that “[m]isconduct or malpractice consisting of negligence or inattention, in order to justify a suspension or annulment, must be such as to show the attorney to be unworthy of public confidence and an unfit or unsafe person to be entrusted with the duties of a member of the legal profession or

to exercise its privileges.” Mullins, 159 W.Va. 647, 652, 226, S.E.2d 427, 430 (1976), quoting Syl. No. 1, In Re Damron, 131 W.Va. 66, 45 S.E.2d 741 (1947). Respondent’s actions in this case, and notably Respondent’s continued failure to acknowledge the severity of this situation, clearly rises to such a level to show Respondent unworthy of public confidence.

Section 4.42 of the ABA Standards for Imposing Lawyer Sanctions provides that absent aggravating or mitigating circumstances, suspension is generally appropriate when (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. A fair and careful balancing of the factors in this case demonstrates that the overwhelming evidence establishes that Respondent’s conduct falls within the proscribed conduct which warrants suspension. Respondent offers no explanation for his pattern of gross neglect which involved a lack of diligence in administering Ms. Hornor’s Estate and failing to properly distribute the funds from the Estate to its beneficiaries.

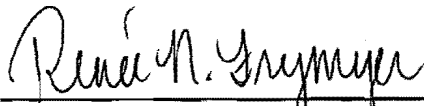
CONCLUSION

Therefore, a review of the record clearly indicates that the Hearing Panel Subcommittee properly considered this matter and made a proper recommendation to the Court. Wherefore, based upon the forgoing, the Office of Disciplinary Counsel respectfully requests that this Court accept and uphold the following recommended sanctions of the Hearing Panel Subcommittee:

1. That Respondent be suspended from the practice of law for a period of six (6) months;

2. That, upon reinstatement, Respondent's practice be supervised for a period of one (1) year;
3. That Respondent complete twelve (12) hours of CLE in ethics in addition to such ethics hours he is otherwise required to complete to maintain his active license to practice, said additional twelve (12) hours to be completed before he is reinstated;
4. That Respondent fully comply with the orders of the Circuit Court of Harrison County regarding damages awarded to Complainant in Civil Action No. 05-C-628-1; and
5. That Respondent be ordered to reimburse the Lawyer Disciplinary Board the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel

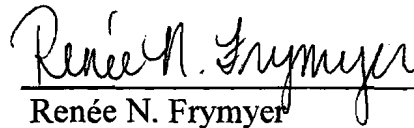


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CERTIFICATE OF SERVICE

This is to certify that I, Renée N. Frymyer, 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 William C. Martin, Esquire, by mailing the same via United States Mail, both certified and regular, with sufficient postage, to the following address:

William C. Martin, Esquire
Post Office Box 72
Sutton, West Virginia 26601



Renée N. Frymyer