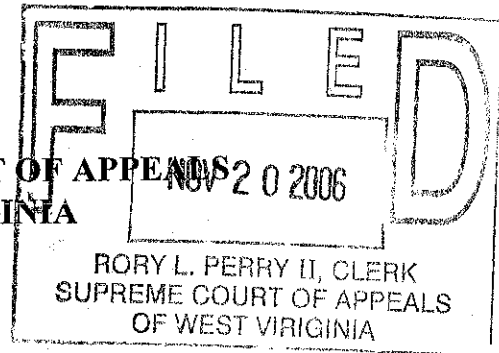


**BEFORE THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA**



**LAWYER DISCIPLINARY BOARD,
Complainant,**

vs.

No. 32974

**A. WAYNE KING, a member of
The West Virginia State Bar,
Respondent.**

BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. PROCEDURAL BACKGROUND

Formal charges were filed against Respondent A. Wayne King (hereinafter "Respondent") with the Clerk of the Supreme Court of Appeals on or about January 20, 2006. Respondent provided his initial answer to said charges to Disciplinary Counsel via letter dated February 21, 2006. The matter proceeded to hearing on June 6, 2006. The Hearing Panel Subcommittee comprised of David A. Jividen, Esquire, Chairperson; John R. Lukens, Esquire; and Dr. Bonnie Ritz, lay member, presided over this matter. Respondent appeared pro se; Charles A. Jones, III, Esquire and Rachael L. Fletcher, Esquire, appeared on behalf of the Office of Disciplinary Counsel.

The Hearing Panel Subcommittee received into evidence the testimony of Complainant Brent Boggs and Respondent A. Wayne King. In addition thereto, the Panel received into evidence Exhibits 1 through 16B from the Office of Disciplinary Counsel.

Soon after said hearing had concluded the Hearing Panel Subcommittee found Mr. King had violated Rule 1.8(a) (conflict of interest) of the West Virginia Rules of Professional Conduct and recommended sanctions of:

- (1) Suspension of Respondent's law license for a period to be not less than six (6) months;
- (2) Completion of twelve (12) additional hours of CLE in the area of ethics before Respondent petitions for reinstatement;
- (3) Respondent shall make immediate restitution to Complainant Brent Boggs by payment of the outstanding loan balance due of \$4,575.00, plus 10% interest thereon from the date of the loan;

- (4) Undergo supervised practice for a period of one (1) year after reinstatement; and
- (5) Payment of costs of these proceedings.

On October 5, 2006, Respondent King filed an objection with the West Virginia Supreme Court of Appeals against said recommendations.

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*, 201 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*, 452 S.E.2d at 381.

Substantial deference is 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*, 452 S.E.2d at 381; *Lawyer Disciplinary Board v. Cunningham*, 195 W. Va. 27, 464 S.E.2d 181 (1995). 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 Lawyer Disciplinary Board v. McGraw*, Syllabus Point 1, 194 W. Va. 788, 461 S.E.2d 850 (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*, 452 S.E.2d at 381.

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

III. STATEMENT OF FACTS AND CONCLUSIONS OF LAW

The aforesaid Hearing Panel Subcommittee found upon the conclusion of the June 6, 2006 hearing as follows:

1. A. Wayne King, Respondent herein, is a lawyer who practices in Clay, Clay County, West Virginia. Respondent was admitted to The West Virginia State Bar on May 24, 1971, and is an active member of the West Virginia State Bar. As such, he is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and it's properly constituted Lawyer Disciplinary Board.
2. In or about June 2003, Respondent was representing Complainant on a fire loss claim. Moreover, Respondent had represented Complainant on a variety of matters over the years.
3. In or about June 2003, when Complainant was his client, Respondent solicited a loan from him in the amount of \$15,000.00.

4. On or about June 4, 2003, Respondent prepared a promissory note which provided he would make monthly payments to Complainant beginning August 1, 2003 at the rate of 10% per annum. However, the note failed to set forth the amount of the required monthly payments, nor did it establish a date when the entire note, principal and interest, must be paid.
5. On or about June 4, 2003, Respondent executed the promissory note and Complainant provided him a personal check made out to Respondent in the amount of \$15,000.00.
6. Respondent did not suggest Complainant seek the advice of independent counsel with respect to the loan agreement and note.
7. Complainant was not given reasonable opportunity to seek advice of independent counsel with respect to the loan agreement and note.
8. Respondent did not prepare and otherwise Complainant did not sign any written documents which waived any conflict of interest of Respondent or otherwise consent in writing to the loan agreement and note as required by Rule 1.8(a) of the Rules of Professional Conduct.
9. Because the terms of the note for the loan agreement fail to specify the amount of the required monthly payment or otherwise set a date when the entire principal and interest must be paid in full, it does not fully disclose the terms of the agreement in writing to Complainant and is not fair and reasonable to him.
10. Since execution of the note of June 4, 2003, Respondent has made the following payments:

August 9, 2003	\$ 500.00
October 1, 2003	\$ 500.00
December 16, 2003	\$ 1,400.00
July 25, 2004	\$ 500.00
October 13, 2004	\$ 2,800.00
	<i>(credit for legal fee due Respondent)</i>
March 3, 2005	\$ 500.00
April 5, 2005	\$ 25.00
April 12, 2005	\$ 1,000.00
September 13, 2005	\$ 1,000.00
March 1, 2006	\$ 200.00
April 30, 2006	\$ 2,000.00
Total Payments as of May 2, 2006	<hr/> \$10,425.00

11. As of May 2, 2006, the remaining outstanding balance on the note was \$4,575.00, plus interest.

12. Therefore, the Hearing Panel Subcommittee found that by entering into a loan agreement and note with his client, Complainant, on written terms that do not fully disclose the terms of the agreement and are otherwise not fair and reasonable to Complainant, by not giving Complainant reasonable opportunity to seek advice of independent counsel, and by not obtaining Complainant's written consent to the transaction, Respondent has violated Rule 1.8(a) of the Rules of Professional Conduct which provides as follows:

Rule 1.8. Conflict of interest: Prohibited transactions.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully

disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

IV. DISCUSSION

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 *Lawyer Disciplinary Board v. Scott*, 213 W.Va. 209, 216, 579 S.E.2d 550, 557 (2003), quoting *ABA Model Standards for Imposing Lawyer Sanctions* 9.21 (1992).

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). In addition, discipline must serve as both instruction on the standards for ethical conduct and as a deterrence 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.

The facts in this case are not in dispute. Respondent obtained a \$15,000 loan from a current client (Complainant) on written terms that do not fully disclose the terms of the agreement and are otherwise not fair and reasonable to Complainant by not giving Complainant reasonable opportunity to seek advice of independent counsel, and by not obtaining Complainant's written consent to the transaction. This was essentially the same conduct that warranted Respondent receiving an admonishment and requirement of taking six hours of CLE ethics credit on in *Lawyer Disciplinary Board v. A. Wayne King*, No. 27742. [Ex. 13, pps. 211-216].

Respondent also violated a duty to the client pursuant to Rule 1.8 by creating a conflict of interest in representing the Complainant while also obtaining a personal loan under ambiguous terms which could otherwise cause financial hardship to, and conflict of interest with, the Complainant. Respondent's actions also reflect negatively upon the integrity of the legal profession and also reveals the possibility of future clients being subject to similar conflicts of interest.

The Respondent, in addition, failed to report the \$15,000 loan to the United States Bankruptcy Court (*In Re: Arthur Wayne King and Sandra Ann King*, Case No. 03-22872

(S.D. W.Va.) in Respondent's (and his wife's) own bankruptcy case [Ex. 14, pps. 236-279], and did not consult with his bankruptcy attorney regarding said loan until over a month after the June 6, 2006 hearing before the Hearing Panel Subcommittee.

A. Aggravating 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 Scott 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. 209, 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 has exhibited a pattern and practice of obtaining loans from clients in violation of Rule 1.8(a) of the Rules of Professional Conduct. Respondent was previously admonished by the Supreme Court of Appeals of West Virginia regarding violations of Rule 1.8(a) of the Rules of Professional Conduct, and also required to complete six hours of Continuing Legal Education in the area of ethics, by order entered March 8, 2001, in *Lawyer Disciplinary Board v. A. Wayne King*, No. 27742 [Ex. 13, pps. 211-216]. According to the Hearing Panel Subcommittee Agreed Findings of Fact, Conclusions of Law, and Recommendation in that case, on August 26, 1998 Respondent went to the home of a then current client and requested a \$5,000 loan. During

that same visit, on August 26, 1998, said client wrote a check to Respondent for \$3,500. The \$3,500 was a personal loan to Respondent, and was not payment for any legal services. Respondent only promised to repay the loan within "a few months". Pursuant to the *ABA Model Standards for Imposing Lawyer Sanctions*, 9.22 (1992), as well as *Lawyer Disciplinary Board v. Veneri*, 206 WV 384, 524 S.E. 2d 900, prior disciplinary offenses constitute an aggravating factor because it calls into question a lawyer's fitness to practice a profession imbued with the public's trust. Syl. pt. 5, *Committee on Legal Ethics v. Tatterson (Tatterson II)*, 177 W. Va. 356, 352 S.E.2d 107 (1986). Not only has Respondent been previously disciplined, but his prior discipline has been for the same kind of conduct as alleged here.

Moreover, one of the stated purposes of the disciplinary process is to serve as a deterrent to other attorneys. Although the factual circumstances are distinguishable as evidenced above, it is clear that these prior disciplinary sanctions and the realized effects of Respondent's 1998 misconduct were not an effective deterrent to Respondent. There is no reason to believe that any sanction less than Respondent being stripped of his law license by suspension would deter Respondent from engaging in similar morally reprehensible, nefarious conduct. Moreover, his current misconduct occurred within 27 months or so of the Supreme Court's prior disciplinary action against him in *Lawyer Disciplinary Board v. A. Wayne King*, No. 27742.

Respondent's actions also reflect a pattern of misconduct committed for his own selfish motive, given the similarity of Respondent's conduct in this matter to that in *Lawyer Disciplinary Board v. A. Wayne King, No. 27742*.

The Hearing Panel Subcommittee also viewed as an aggravating factor Respondent's pattern of conduct regarding his bankruptcy case, as Respondent had not disclosed by the June 6, 2006 hearing in this matter the \$15,000 debt to the United States Bankruptcy Court for the Southern District of West Virginia (petition filed on December 10, 2003), in which Respondent and his spouse were named as debtors and otherwise verified their bankruptcy petition and all attachments. Respondent also did not disclose to said Court any payments made to Complainant thereto throughout the course of the bankruptcy proceedings. In addition, during the hearing before the Hearing Panel Subcommittee of the Lawyer Disciplinary Board the Respondent (an attorney licensed to practice law for about 35 years) pled ignorance of needing to report to the United States Bankruptcy Court said debt and repayments.

Respondent was also advised by the chair of the Hearing Panel Subcommittee to advise his bankruptcy attorney regarding the \$15,000 note to the Complainant. Respondent replied he would contact said attorney later on that day after the hearing. However, Respondent did not notify said attorney of the note until late June/early July.

Furthermore, this pattern of Respondent's misconduct is not only clear from the current Statement of Charges, but is made clear from Respondent's record of prior discipline.

Respondent has exhibited a pattern of violating multiple duties to his clients, his duty to the public, his duty to the legal system and to the profession.

B. Mitigating Factors

In addition to adopting aggravating factors in *Scott*, the *Scott* court also adopted mitigating factors in a lawyer disciplinary proceedings and stated that said factors “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) quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.31 (1992).¹ It should be clear that mitigating factors were not envisioned to insulate a violating lawyer from discipline.

Respondent asserted during the course of the present disciplinary matter he had intended on paying the Complainant back in full the \$15,000.00. Respondent also said he solicited said loan due to his financial hardship, and pled ignorance of the bankruptcy laws in not reporting said fifteen thousand dollar loan in his bankruptcy case. Respondent’s explanation that this loan involved a friend/close relative and he intended to pay the loans back, and not reporting said loan in his bankruptcy case due to his alleged lack of knowledge, do not rise to the necessary level of clear and convincing evidence to mitigate his unethical

¹ 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.

conduct in this case. As the evidence moreover reflects, the aggravating factors pertaining to Respondent's repeated violations of Rule 1.8 and his lack of candor with the bankruptcy court regarding his own bankruptcy petition clearly outweigh any mitigation demonstrated.

As there is nothing of a clear and convincing nature to form the basis of mitigating circumstances in this matter, there are aggravating circumstances this Board has considered worth noting in the form of previous discipline involving similar conduct, a selfish motive, a pattern of misconduct, and failure to report to the United States Bankruptcy Court during his pending bankruptcy case he filed as a debtor a \$15,000 personal loan (including any repayments of said loan) Respondent received. In addition, all of these aggravating circumstances arose from the conduct of an attorney who has practiced law in West Virginia for thirty-five years. Not only did he injure and damage his own reputation, but his conduct adversely reflected on the integrity of the Bar as a whole, and upon our legal system in general. His intentional and knowing acts bring into question the integrity of the Bar and of our system of justice.

V. SANCTION

The principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Syl. pt. 3, *Daily Gazette v. Committee on Legal Ethics*, 174 W.Va. 359, 326 S.E.2d 705 (1984); and Syl. pt. 2, *Lawyer Disciplinary Board v. Hardison*, 205 W.Va. 344, 518 S.E.2d 101 (1999). Given Respondent's substantial experience in the practice of law, ongoing pattern of misconduct and prior disciplinary

record, the only way to protect the public is to remove Respondent from the practice of law for a period of time.

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 multiple aggravating factors in this case clearly outweigh any alleged mitigating factors Respondent raised. The overwhelming evidence also establishes that Respondent's conduct falls within the proscribed conduct which warrants suspension.

This Honorable Court dealt with a similar situation in *Lawyer Disciplinary Board v. Barber*, 211 W.Va. 358, 566 S.E.2d 245 (2002), whereby Mr. Barber did not assure that the arrangement of a loan transaction with one of his clients had satisfied West Virginia Rules of Professional Conduct 1.8(a).² Despite the fact the evidence did not show Mr. Barber engaged in deception or fraud toward his client, nor engaged in a pattern of misconduct or otherwise have a previous history of disciplinary sanctions, the Court believed a six-month suspension of his law license was sufficient punishment without full restitution by Mr. Barber during those six months. The Respondent however has engaged in a pattern of misconduct for his own benefit and had just recently been sanctioned for similar conduct.

² The WVSCA also found Mr. Barber had violated Rule 8.1(b) of the West Virginia Rules of Professional Conduct by not timely responding to a request by the West Virginia State Bar concerning allegations in a disciplinary complaint.

The Respondent also had not disclosed to the U. S. Bankruptcy Court the \$15,000 loan in his own bankruptcy case claiming he was unaware of his legal duty to disclose said debt although Respondent has been licensed to practice law in West Virginia for over thirty-five years. The actions engaged in by the Respondent therefore certainly warrants a six month suspension of his law license.

Respondent's position that his conduct does not warrant sanction by the Hearing Panel Subcommittee is wholly without merit and such a sanction is insulting to the public and the Bar as a whole. All people, including lawyers, suffer heartache, financial difficulties, and other personal stress that leave them exhausted, confused, and, at times, desperate. Difficulties for many people, including lawyers, are a test of integrity. The existence of Respondent's financial difficulties does not separate him from society, its laws and ethical standards, and the consequences of breaching the same. The institution of the law is noble and the privilege to practice law is reserved for those whom respect, protect, and preserve that nobility. Lawyers are in a unique position in society to preserve the sanctity of the law and the cornerstone of the legal profession is trust and honesty. Respondent repeatedly abused this privilege, and breached this trust.

VI. RECOMMENDATION OF THE HEARING PANEL SUBCOMMITTEE

Rule 3.15 of the Rules of Lawyer Disciplinary Procedure provides that the following sanctions may be imposed in a disciplinary proceeding: (1) probation; (2) restitution; (3)

limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment.

For the reasons set forth above, the Office of Disciplinary Counsel recommends the following sanctions:

- (1) Suspension of Respondent's law license for a period to be not less than six (6) months;
- (2) Completion of twelve (12) additional hours of CLE in the area of ethics before Respondent petitions for reinstatement;
- (3) Respondent shall make immediate restitution to Complainant Brent Boggs by payment of the outstanding loan balance due of \$4,575.00, plus 10% interest thereon from the date of the loan;
- (4) Undergo supervised practice for a period of one (1) year after reinstatement; and
- (5) Payment of costs of these proceedings.

VII. CONCLUSION

The Hearing Panel Subcommittee's recommendation as set forth above was appropriate under the circumstances of this case and should be accepted by the Court.

Office of Disciplinary Counsel
By counsel

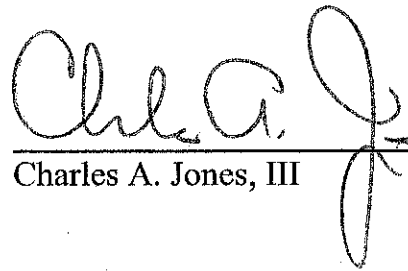


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CERTIFICATE OF SERVICE

This is to certify that I, **Charles A. Jones, III**, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 20th day of November, 2006, served a true copy of the foregoing "**BRIEF OF THE LAWYER DISCIPLINARY BOARD**" upon A. Wayne King by mailing the same, United States Mail with sufficient postage, to the following address:

A. Wayne King, Esquire
Post Office Box 356
Clay, West Virginia 25043



Charles A. Jones, III