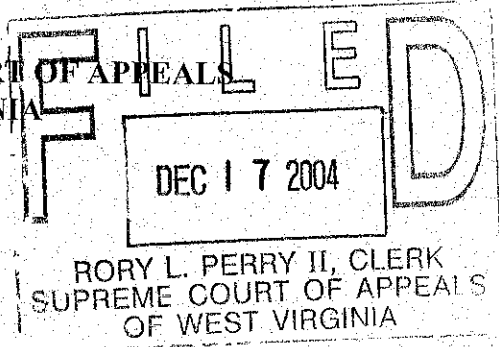


BEFORE THE SUPREME COURT OF APPEALS  
STATE OF WEST VIRGINIA



**LAWYER DISCIPLINARY BOARD,**

**Complainant,**

vs.

**No. 30559**

**L. THOMAS LAKIN, not licensed with  
the West Virginia State Bar,**

**Respondent.**

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**BRIEF OF THE LAWYER DISCIPLINARY BOARD**

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## I. INTRODUCTION AND NATURE OF PROCEEDINGS

This is a disciplinary proceeding against L. Thomas Lakin ("Respondent") instituted pursuant to the Rules of Lawyer Disciplinary Procedure. It arises as the result of a three count Statement of Charges issued by the Investigative Panel of the Lawyer Disciplinary Board on or about March 14, 2002. The Statement of Charges includes allegations of improper solicitation and improper compensation for individuals soliciting on behalf of the Respondent.

The matter proceeded to full hearing on the Statement of Charges on June 15-16, 2004 in Charleston, West Virginia. Presiding over the matter were Hearing Panel Subcommittee of the Lawyer Disciplinary Board Chairperson Joyce H. Morton, Esq. and Subcommittee members Mike Benninger, Esq. and Lawrence Crimmins. Appearing for the Office of Disciplinary Counsel was W. Henry Jernigan, Jr., Esq. and Brace R. Mullett, Esq. Respondent appeared in person and by and through counsel, James McQueen, Esq.

Upon the near completion of the presentation of the Office of Disciplinary Counsel's case in chief the Hearing Panel Subcommittee requested that the Office of Disciplinary Counsel ("ODC") and the Respondent engage in a discussion regarding a joint stipulation and recommended discipline. The parties were able to reach an agreement and on October 13, 2004 the Hearing Panel Subcommittee submitted to this Court the Joint Stipulated and Recommended Discipline in this matter. Thereafter, both the ODC and Respondent presented to this Court consent to the recommended disposition.

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

- (1) the respondent not practice before the bar of any court of the State of West Virginia, on a *pro hac vice* basis or otherwise, for a period of twelve months from the date of the adoption of these recommendations by the West Virginia Supreme Court of Appeals,

excluding therefrom only those cases in which he has already been admitted *pro hac vice* and is actively representing the interests of a party to such case; (2) the respondent not in any way, whether on an advisory basis or otherwise, involve himself with any case now pending or which may hereafter be brought before any court of the State of West Virginia for a period of twelve months from the date of the adoption of these recommendations by the West Virginia Supreme Court of Appeals, excluding therefrom only those cases in which he has already been admitted *pro hac vice* and is actively representing the interests of a party to such case; and (3) the respondent and his law firm shall not, either directly or through the services of third parties, engage in or permit his employees or agents to engage in the following conduct within the State of West Virginia: (a) Make false or misleading communications about a lawyer or his services; (b) Provide anything of value to a person for recommending respondent's services; (c) Solicit for pecuniary gain, either in-person or by telephone professional employment from a prospective client with whom the respondent has no family or prior professional relationship; (d) Solicit professional employment for or on behalf of the respondent when the prospective client has made known to the respondent or his employees or agents a desire not to be solicited, or the solicitation involves coercion, duress or harassment; and (e) Otherwise violate the West Virginia 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*, 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, 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*, 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, Lawyer Disciplinary Board v. McGraw*, Syl. Pt. 1, 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. *Committee on Legal Ethics v. Blair*, Syl. Pt. 3, 174 W. Va. 494, 327 S.E.2d 671 (1984); *Committee on Legal Ethics v. Karl*, Syl. Pt. 7, 192 W. Va. 23, 449 S.E.2d 277 (1994).

### III. STATEMENT OF FACTS

Respondent is an attorney licensed by the State of Illinois since 1970 with offices in Wood River, Illinois. Respondent is not now and has never been a licensed member of the West Virginia State Bar, although he has regularly been admitted to practice law in individual cases pending within this state on a *pro hac vice* basis and, as a consequence, is subject to the jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.

On September 17, 1997, Menis E. Ketchum filed a complaint with the West Virginia Disciplinary Board along with a transcript of sworn testimony by Kevin James Berry wherein

Mr. Berry stated that in or about the Spring of 1997, he was injured in a construction accident that occurred in or around Kenova, West Virginia.

In July of 1997, an individual determined to be Howard Peterson, the chief investigator for Respondent's law firm, contacted Mr. Berry for the purpose of soliciting representation of him on behalf of Mr. Lakin and his law firm, at which time he was advised by Mr. Berry that his legal interests were already being represented by Menis E. Ketchum, a West Virginia licensed attorney.

Thereafter, Mr. Berry was approached by two additional individuals, one of whom was a stepson of one of Mr. Berry's co-workers killed in the same accident in which Mr. Berry was injured. The other was later determined to be Al Richter of California, Pennsylvania. Mr. Richter was a former client of Respondent. During this subsequent meeting, Mr. Richter sought to solicit Mr. Berry on behalf of Respondent's law firm at which time Mr. Richter was also advised that Mr. Berry was already represented by Mr. Ketchum. Upon being so advised, Mr. Richter persisted in his efforts to solicit Mr. Berry and, during the course thereof, inquired how Mr. Berry knew that Mr. Ketchum would not sell him out and made other derogatory comments directed at Mr. Ketchum's representation.

Based upon the complaint filed by Mr. Ketchum, the Office of Disciplinary Counsel initiated an investigation of the allegations contained therein. As a consequence of the foregoing investigation, a Statement of Charges by a duly constituted Hearing Panel Subcommittee of Lawyer Disciplinary Counsel found the allegations against the Respondent to be sufficiently credible to warrant the issuance of a Statement of Charges on the 14 day of March, 2002, against Respondent for violations of the provisions of Rules 7.1, 7.2(c), 7.3(a), 7.3(b), 7.3(c), 8.4(a) and

8.4(c) of the West Virginia Rules of Professional Conduct and for engaging in a pattern and practice of improper solicitations of employment from residents of the State of West Virginia.

On April 1, 1999, Denver and Gladys L. Copley filed a complaint with the West Virginia Disciplinary Board wherein they alleged that in or about 1998, Denver Copley was injured while working for his employer on a railroad in West Virginia. Shortly after his injuries, Mr. Copley and his wife received various calls from Colin Kelly, a former client of Respondent's law firm. As a result of perceived pressure brought to bear by Mr. Kelly on behalf of Respondent, Mr. and Mrs. Copley agreed to a meeting with representatives from Respondent's Illinois office which meeting subsequently took place at the Copley's home. Despite the efforts of those in attendance at the foregoing meeting, Mr. and Mrs. Copley declined representation by Respondent and instead retained the services of Menis E. Ketchum to represent their interests. Subsequent to declining representation of Respondent and retaining the services of Mr. Ketchum, representatives of Respondent continued to solicit them on his behalf, urging them to switch counsel.

Based upon the complaint filed by Mr. and Mrs. Copley, the Office of Disciplinary Counsel initiated an investigation of the allegations contained therein. As a consequence of the foregoing investigation, a Statement of Charges by a duly constituted Hearing Panel Subcommittee of the Lawyer Disciplinary Counsel found the allegations against the Respondent to be sufficiently credible to warrant the issuance of a Statement of Charges on the 14th day of March, 2002, against Respondent for violations of the provisions of Rules 7.2(c), 7.3(a), 7.3(b), 7.3(c) and 8.4(a) of the West Virginia Rules of Professional Conduct and for engaging in a pattern and practice of improper solicitations of employment from residents of the State of West Virginia.

By Answer dated July 10, 2002, Respondent denied that he or any person acting on his behalf had engaged in conduct violative of the West Virginia Rules of Professional Conduct in the manner specified in the Statement of Charges or otherwise. Respondent has never been the subject of any ethical complaint, nor the subject of any disciplinary action by his own Illinois State Bar or in any other jurisdiction.

#### IV. ARGUMENT

As shown, for nearly *five* years the West Virginia Disciplinary Board, the Office of Disciplinary Counsel and the Hearing Panel Subcommittee of the Lawyer Disciplinary Board have provided the full procedure required by the Rules of Lawyer Disciplinary Procedure. An investigation was conducted, a Statement of Charges was issued, those Charges were answered and a full hearing on the Complaint was conducted. Upon completion of this litany of procedure, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board with the consent of both parties proposed a resolution of this matter in its written recommended disposition to the Court. By Order entered November 10, 2004, the Court, by 3-2 decision denied the recommendation.

The Court has stated before that both legal and factual findings of the Committee are entitled to "substantial consideration." *See McCorkle*, 452 S.E.2d at 380. Different standards apply when this Court reviews the Committee's conclusions of law, the application of the law to the facts, and the appropriate discipline as opposed to the Committee's factual findings. *Id.* The Court reviews *de novo* questions of law and the appropriateness of a particular sanction. However, with respect to the findings of fact, the appropriate standard of judicial review requires that we defer to the Committee unless the findings are not supported by "reliable, probative and substantial evidence on the whole record." *Id.* With regard to this standard, the Court in *In re Brown*, 166 W. Va. 226, 236, 273 S.E.2d 567, 572 (1980) stated: "[M]ost courts will give some

weight to the recommendations of the Ethics Committee that conducts the reinstatement hearing simply because the Committee, having heard the witnesses, is in a better position to evaluate their testimony. This does not mean that the court is foreclosed from making an *independent assessment of the record* but it does mean absent a showing of some mistake of law or arbitrary assessment of the facts such recommendations made by the Ethics Committee in regard to reinstatement of an attorney are to be given substantial consideration. *Tardiff v. State Bar*, 27 Cal.3d 395, 612 P.2d 919, 165 Cal.Rptr. 829 (1980); *In re Wigoda*, 77 Ill.2d 154, [32 Ill.Dec. 341] 395 N.E.2d 571 (1979); *In re Hiss*, 368 Mass. 447, 333 N.E.2d 429 (1975); *In re Freedman*, 406 Mich. 256, 277 N.W.2d 635 (1979); *Petition of Harrington*, 134 Vt. 549, 367 A.2d 161 (1976)." (Emphasis added). To ignore these recommendations and conclusions would render the Committee's important adjudicatory role a useless gesture and deprive this Court of the most important benefit of its collective and evaluative judgment. *See McCorkle*, 452 S.E.2d at 380.

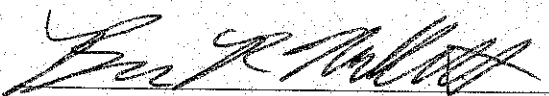
The Subcommittee heard two days of testimony, received evidence from both sides and presented to this Court a recommended disposition that received the consent of both Complainant and Respondent. In this instance we are requesting that the Court recognize the procedure that was undertaken by the Subcommittee, the Office of Disciplinary Counsel, and the Respondent in providing this Court a Joint Stipulated and Recommended Discipline. As the Court stated in *McCorkle*, to ignore these recommendations and conclusions would render the Subcommittee's "important adjudicatory role a useless gesture" and remove from the process the judgment of the administrative body that is in the "best position to evaluate" the testimony presented by both parties. *Brown*, 273 S.E.2d at 572. Respondent has never been the subject of any ethical complaint or disciplinary proceeding in any jurisdiction, including his home jurisdiction the Illinois State Bar. This prior upstanding service coupled with the circumstantial

nature of the evidence in support of the Complaint led the Complainant to consent to the Joint Stipulated and Recommended Discipline proposed to the Court by the Subcommittee with further consent of the Respondent. The Office of Disciplinary Counsel, as well as the Hearing Panel Subcommittee of the Lawyer Disciplinary Board, are of the opinion, based upon allegations and denials of allegations contained in the pleadings as well as its investigation into the underlying facts surrounding the complaints filed against Respondent, as well as the evidence received at the two day hearing, that the recommended sanctions are appropriate under the circumstances and the most appropriate resolution of this matter.

**V. CONCLUSION**

Wherefore, based upon the foregoing, the Lawyer Disciplinary Board respectfully requests that this Court accepts the recommendation of the Hearing Panel Subcommittee as consented to by the Complainant and the Respondent.

*Lawyer Disciplinary Board*  
By counsel



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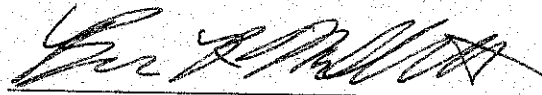
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**CERTIFICATE OF SERVICE**

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This is to certify that I, Brace R. Mullett, Special Lawyer Disciplinary Counsel, have this day, the 17th day of December, 2004, served a true copy of the foregoing "**BRIEF OF THE LAWYER DISCIPLINARY COUNSEL**" upon:

James McQueen, Esq.  
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