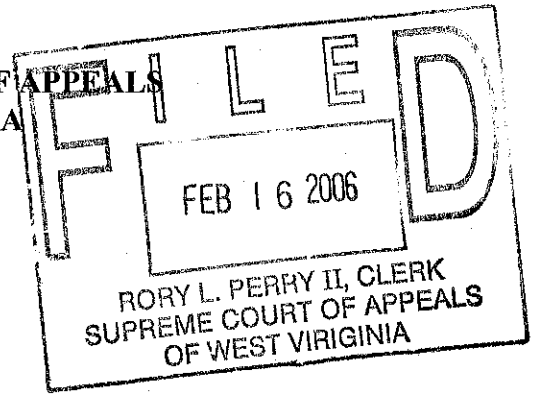


BEFORE THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA



LAWYER DISCIPLINARY BOARD,

Complainant,

vs.

No. 31734

**DANIEL J. POST, a member of
The West Virginia State Bar,**

Respondent.

BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. NATURE OF PROCEEDINGS

This is a Reciprocal Disciplinary action pursuant to Rule 3.20 of the Rules of Lawyer Disciplinary Procedure. Respondent, Daniel J. Post, a member of the West Virginia State Bar, was disbarred in the State of Colorado, effective June 15, 2001, by Order of the Supreme Court, State of Colorado, entered on July 10, 2001. Thereafter, on April 28, 2003, the West Virginia Office of Disciplinary Counsel filed its "Notice of Reciprocal Disciplinary Action Pursuant to Rule 3.20 of the Rules of Lawyer Disciplinary Procedure", and by letter dated August 27, 2003, Respondent requested that reciprocal discipline not be imposed in West Virginia.

Accordingly, this matter was scheduled for hearing on July 19, 2004, before a Hearing Panel Subcommittee of the Lawyer Disciplinary Board at the Office of Disciplinary Counsel. However, upon Respondent's "Motion for Psychiatric Examination and Finding of Mental Competence", the Hearing Panel Subcommittee ordered that Respondent be evaluated by a psychiatrist designated by Office of Disciplinary Counsel. On or about September 21, 2004, Respondent underwent evaluation by Dr. Ralph S. Smith, Jr. of Charleston Psychiatric Group, Inc. Dr. Smith's reports of November 1, 2004, and November 7, 2004, appear under seal as ODC Exhibit 21. Dr. Smith opined that Respondent had no mental disorder which rendered him incompetent to continue in the proceedings.

Accordingly, the matter was then rescheduled for hearing on February 17, 2005. Appearing were Office of Disciplinary Counsel by Lawrence J. Lewis, Chief Lawyer Disciplinary Counsel, and the Respondent, Daniel J. Post, *pro se*. The Hearing Panel Subcommittee received into evidence Office of Disciplinary Counsel's Exhibits 1 through 21, the sworn testimony of Respondent, and Respondent's Exhibit 1, Tabs A through N. Having considered the testimony, all exhibits and arguments, the Hearing Panel Subcommittee recommended that Respondent's West Virginia law

license be annulled and that he pay the costs of these proceedings in the amount of Seven Hundred Ninety Dollars and Eighty Cents (\$790.80).

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*, 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*, 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). 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." *Lawyer Disciplinary Board v. Cunningham*, 195 W.Va. 27, 464 S.E.2d 181, at 189 (1995); *McCorkle*, 452 S.E.2d at 381.

III. FACTS

Respondent was disbarred in Colorado as the result of five separate multi-count complaints brought against him by Colorado disciplinary authorities between July 31, 1998, and August 17, 2000. (ODC Ex.s 1,3,5,9 and 12). He was duly noticed of the complaints and either he or his

counsel filed responses to each complaint. (ODC Ex.s 2,4,6,11 and 13). The complaints alleged violations of Colorado's Rules of Professional Conduct 1.1 (competence); 1.3 (diligence); 1.4(a) (communication); 1.5(a) (unreasonable fees); 1.15(b) and 1.16(d) (failure to refund unearned fees after termination); 8.4(c) (misrepresentation to clients and others); 8.4(d) (conduct prejudicial to administration of justice); and 8.4(h) (other conduct adversely reflecting on his fitness to practice law).

During the course of the Colorado disciplinary proceedings, Respondent retained Colorado attorney Daniel J. Schendzielos to represent him. Mr. Schendzielos appeared with Respondent "in an advisory capacity" at an October 13, 1999 hearing (ODC Ex. 7) and became counsel of record for Respondent not later than December 13, 1999. (ODC Ex. 8).

Thereafter, on or about August 25, 2000, with the counsel and assistance of his lawyer, Respondent executed a "Stipulation of Facts and Admission of Misconduct" concerning the complaints filed against him. (ODC Ex. 14). The matter was then scheduled for a sanctions hearing which was eventually conducted on March 27, 2001. The Colorado Hearing Board heard testimony at the hearing from Respondent, from one of his clients, from Dr. Gary J. Gutterman, from Dr. Robert A. Kooken and from Dr. Robert Boyle. (ODC Ex. 16, p.1)¹. The Colorado Hearing Board considered the evidence, ordered that Respondent be disbarred, and directed that he make restitution totaling Fifteen Thousand Dollars (\$15,000) to four clients and reimburse the Colorado Client

¹Because Respondent did not appeal the Hearing Board's decision to the Colorado Supreme Court, no hearing transcript was prepared. Rule 3.20(d) of the West Virginia Rules of Lawyer Disciplinary Procedure requires any lawyer challenging the disciplinary order of a foreign jurisdiction to file a full copy of the record of the proceeding resulting in the disciplinary order against him. Respondent testified in this proceeding, however, that Dr. Gutterman was a witness appointed by the court to do an evaluation of him. (Tr. 28). Drs. Kooken and Boyle were expert witnesses on Respondent's behalf called by Respondent's counsel.

Protection Fund Eighteen Thousand Five Hundred Dollars (\$18,500). Respondent, pursuant to Colorado procedure (ODC Ex. 20, Rule 251.27) had the right to appeal the Hearing Board's decision to the Colorado Supreme Court, but did not do so. Accordingly, by order dated July 10, 2001, he was disbarred effective June 15, 2001. (ODC Ex. 17).

IV. ARGUMENT

It is undisputed that the "Stipulation of Facts and Admission of Misconduct" (ODC Ex. 14) entered into by Respondent in Colorado, taken as true, constitutes misconduct warranting disbarment in Colorado. (Tr. 57) Respondent, however, seeks to avoid reciprocal disbarment in West Virginia with allegations of denial of due process by Colorado disciplinary authorities. Specifically, Respondent argues (1) that the proceedings resulting in his disbarment were in violation of Colorado's own rules; (2) that he was denied an impartial hearing because certain members of the prosecuting disciplinary authority and the Hearing Board were defendants in civil actions filed by him; and (3) that Colorado's lawyer discipline procedure violates federal constitutional notions of due process and fundamental fairness. None of these arguments have merit.

A. Colorado properly applied and followed its own rules of procedure.

The thrust of Respondent's argument that the Colorado authorities violated their own rules is grounded upon an alleged disability suffered by Respondent. At an October 13, 1999 hearing he moved for a continuance because (1) he had found counsel whom he wanted to represent him but who required additional time to prepare, and (2) because of injuries received in a September 21, 1999 automobile accident which caused Respondent to not "properly think and react to his own case." The record reflects that the presiding disciplinary judge ordered the Respondent placed on "disability inactive" status and the complaints pending against him suspended until either (1) counsel makes

an appearance for Respondent or (2) Respondent is restored to active status pursuant to the applicable provisions of Colorado's rules. (See ODC Ex. 7). This order was appropriate in a Colorado proceeding in which the lawyer alleges a disability impairing his ability to defend himself and apparently was entered pursuant to Colorado Rule of Civil Procedure Rule 251.23(d) (4). (See ODC Ex. 20, Rule 251.23(d)). Thereafter, Colorado attorney Daniel J. Schendzielos became Respondent's counsel of record, which event satisfied the order's provision that counsel must make an appearance or Respondent be restored to active status. However, Respondent further argues that the October 13, 1999 order was later modified and concluded that he was incapable of adequately defending himself even with the assistance of counsel. He relies upon a subsequent order entered December 4, 2000 (ODC Ex. 15A) to support this argument. However, a reading of that order establishes that no such determination was made nor is the order tantamount to such a ruling. Rather, the order merely directs Respondent to cooperate in his medical treatment. Failure to do so would result in a forthwith sanctions hearing.

Respondent also says that when he signed the Colorado "Stipulation of Facts and Admission of Misconduct" in August 2000, his mental state was such that he would have admitted to anything. However, the records of treatment for post-traumatic stress disorder and depression in 2002, secondary to a motor vehicle accident in September 1999 (Respondent's Ex. 1, Tab N), do not demonstrate that Respondent was suffering such a disability as to "admit to anything," nor does Dr. Smith's most recent evaluation (ODC Ex. 21), conducted at the direction of the Hearing Panel Subcommittee, support such conclusion. In any event, it is clear Respondent acted with advice of counsel and that his mental status was considered in connection with his sanctions hearing wherein his treating physicians testified.

Moreover, it is clear that counsel of Respondent's choice continued to appear on his behalf as required by the October 13, 1999 order; that with such counsel he executed the "Stipulation of Facts and Admission of Misconduct" on August 25, 2000 (ODC Ex. 14); and that he appeared for the sanctions hearing with counsel on March 27, 2001, testified at said hearing, and his counsel presented testimony of expert medical witnesses on his behalf. (ODC Ex. 16)

B. Respondent's various collateral lawsuits against the Colorado disciplinary system did not deprive him of an impartial hearing.

As to Respondent's argument that certain members of the prosecuting disciplinary authority and the Hearing Board were defendants in civil actions brought by him, the record reflects that Respondent had filed a number of collateral lawsuits over the years against the Colorado Supreme Court and its disciplinary system. He represented Michael Varallo in disbarment proceedings in the 1990s and filed suits in the United States District Court of Colorado and in the Colorado State District Court. (See Respondent's Ex. 1, Tabs A, B, C, and D). These suits were generally dismissed for lack of jurisdiction and the United States District Court of Colorado noted that Respondent could pursue his constitutional challenges in the state disciplinary proceedings, citing *Colorado Supreme Court Grievance Committee v. District Court*, 850 P2d 150, 154 (Colo. 1993). When the Colorado authorities began investigating Respondent, he again began filing actions against them in United States District Court and State District Court alleging denial of constitutional rights. (See Respondent's Ex. 1, Tabs E, F, and H) All of these complaints were likewise dismissed by the courts. Following his disbarment, Respondent then filed a civil action in the Colorado United States District Court against the Colorado Supreme Court and its disciplinary authority, including the

individuals on the Hearing Panel and the Office of Attorney Regulation Counsel which prosecuted him. It, however, was also dismissed with prejudice. (Respondent's Ex. 1, Tab I).

All these civil actions were attempts by Respondent to collaterally attack and enjoin the disciplinary procedures against himself or his client. As noted by the United States District Court, the allegations raised in the actions were all issues to be raised and addressed in the disciplinary proceedings, something that Respondent consistently failed to do. Further, as stated by the State Court in Colorado, officials performing attorney regulatory functions should be able to do so without harassing suits. (Respondent's Ex. 1, Tab H). None of the members of the hearing board considering Respondent's case in Colorado were defendants to any action until after the hearing board had made its determination and Respondent's disbarment became final. Then he sued the members of the hearing board. (Respondent's Ex. 1, Tab I). Such subsequent action by Respondent cannot be used by him to create an after the fact lack of fairness or due process argument against the members of the Colorado hearing board.

C. Colorado's lawyer disciplinary procedure satisfies due process.

Regarding Respondent's claim that Colorado's lawyer disciplinary procedure violates constitutional notions of due process and fundamental fairness, it should be noted that he in fact received all the ethics complaints filed against him and made responses thereto. During the course of the proceedings, he retained counsel; he had counsel when he executed the "Stipulation of Facts and Admission of Misconduct"; he was present and attended the sanctions hearing on March 27, 2001; he testified at that hearing, his lawyer presented evidence on his behalf; his treating psychiatrist and psychologist testified; his lawyer cross-examined opposing witnesses; and his lawyer argued on his behalf. Thereafter, the Hearing Board considered the evidence and issued a written

opinion from which Respondent had the opportunity to appeal to the Colorado Supreme Court. He did not pursue his appeal rights. He did, however, institute another civil action in Federal Court in Colorado collaterally attacking the disciplinary proceedings, which suit was dismissed with prejudice. It is clear that, throughout the Colorado proceedings, he received notice of all allegations against him and that he was provided opportunity to be heard. In *Committee on Legal Ethics v. Battistelli*, 185 W.Va. 109, 405 S.E.2D 242 (1991), this Court stated:

We have recognized that in attorney disciplinary proceedings, a lawyer is entitled to due process of law. See *Committee on Legal Ethics v. Folio*, 184 W.Va. 503, 401 S.E.2d 248 (1990); *Committee on Legal Ethics v. Boettner*, 183 W.Va. 136, 394 S.E.3d 735 (1990). Generally, due process requires that the attorney be given notice of the allegations against him and an opportunity to be heard. *Rosenthal v. Justices*, 910 F.2d 561 (9th Cir. 1990), *cert denied*, 498 U.S. 1087, 111 S.Ct. 963, 112 L.Ed.2d 1050 (1991); *Standing Comm. on Discipline v. Ross*, 735 F.2d 1168 (9th Cir.), *appeal dismissed, cert. denied*, 469 U.S. 1081, 105 S.Ct. 583, 83 L.Ed.2d 694 (1984); *Louisiana State Bar Ass'n v. Keys*, 567 So.2d 588 (La. 1990); *State ex. rel. Nebraska State Bar Ass'n v. Dineen, supra*. See *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). See generally 7 Am.Jur.2d *Attorneys at Law* § 91 (1980); Annot., 98 L.Ed. 851 (1954).

Battistelli, 405 S.E.2d at 114.

Clearly, in this case, Colorado gave Respondent notice of the allegations against him and gave him an opportunity to be heard. His arguments of lack of due process are groundless. Moreover, Colorado's rules establish an Attorney Regulation Committee and an Attorney Regulations Counsel, a separate Office of Presiding Disciplinary Judge, and a Hearing Board. (ODC Ex. 20, Rules 251.2, 251.3, 251.16, and 251.17). The Hearing Panel that heard the matter consisted of a presiding disciplinary judge and two hearing board members. (ODC Ex. 20, Rule 251.18(b)). Final decisions of the Hearing Board are appealable to the Colorado Supreme Court, (ODC Ex. 20, Rule 251.27). It is submitted that this procedure meets due process requirements.

D. Respondent has waived his due process arguments by not pursuing them in the Colorado disciplinary proceeding.

As previously indicated, an attorney is permitted to raise constitutional claims in Colorado disciplinary proceedings and those claims are reviewable by the Colorado Supreme Court. *Colorado Supreme Court Grievance Committee v. District Court*, supra. Respondent could have pursued his constitutional arguments in the Colorado disciplinary proceedings, but chose not to do so, electing instead to enter into a stipulation and proceed to a sanctions hearing. He then failed to appeal the hearing board decision. By doing so, he has waived any due process argument.

These circumstances are similar to those in *Committee on Legal Ethics v. Battistelli*, supra. In *Battistelli*, Respondent had opportunity to raise his procedural and due process claims before the United States Court of Appeals for the Fourth Circuit, to request a hearing, and to appeal the court's decision. He failed to do so. Accordingly, the West Virginia Supreme Court of Appeals could not say that the disciplinary procedures of the court imposing sanctions were so lacking in due process as to prevent the West Virginia Court from imposing reciprocal discipline. *Battistelli*, 405 S.E.2d at 248.

V. CONCLUSION

Rule 3.20(e) of the Rules of Lawyer Disciplinary Procedure provides as follows:

Rule 3.20. Reciprocal discipline.

(e) At the conclusion of proceedings brought under this section, the Hearing Panel Subcommittee shall refer the matter to the Supreme Court of Appeals with the recommendation that the same discipline be imposed as was imposed by the foreign jurisdiction unless it is determined by the Hearing Panel Subcommittee that (1) the procedure followed in the foreign jurisdiction did not comport with the requirements of due process of law; (2) the proof upon which the foreign jurisdiction based its determination of misconduct is so infirm

that the Supreme Court of Appeals cannot, consistent with its duty, accept as final the determination of the foreign jurisdiction; (3) the imposition by the Supreme Court of Appeals of the same discipline imposed in the foreign jurisdiction would result in grave injustice; or (4) the misconduct proved warrants that a substantially different type of discipline be imposed by the Supreme Court of Appeals. (Amended by order entered December 6, 1994, effective January 1, 1995.)

Thus, the Hearing Panel Subcommittee had a mandatory duty which required that it "shall refer" Respondent's case to the Supreme Court with the recommendation that the same discipline be imposed as was imposed in Colorado unless the Hearing Panel Subcommittee determines one of the four above listed exceptions apply. It is clear that none of the four exceptions apply. Due process requirements are met, the misconduct was stipulated, and it is admitted that the misconduct taken as true warrants disbarment. No grave injustice results nor does the misconduct warrant substantially different discipline by this Court.

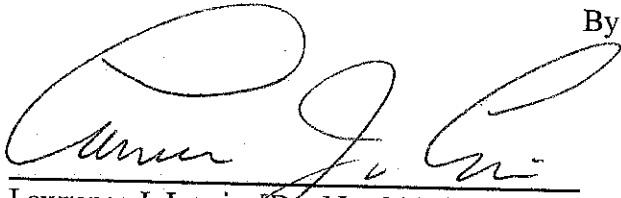
A review of the record clearly indicates that the Hearing Panel Subcommittee has properly considered and evaluated the evidence, applied the law, and made the appropriate recommendations to this Court.

Wherefore, based upon the foregoing, the Office of Disciplinary Counsel respectfully requests that the Court accept the recommendations of the Hearing Panel Subcommittee and impose its sanctions, to-wit:

1. Respondent's license be annulled;
2. That prior to filing any petition for reinstatement, Respondent pay all amounts in restitution and reimbursement as ordered by Colorado; and
3. That Respondent pay the costs of these proceedings in the amount of \$790.80.

Office of Disciplinary Counsel

By counsel


A handwritten signature in black ink, appearing to read "Lawrence J. Lewis", written over a horizontal line.

Lawrence J. Lewis [Bar No. 2199]
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CERTIFICATE OF SERVICE

This is to certify that I, **Lawrence J. Lewis**, Chief Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 16th day of February, 2006, served a true copy of the foregoing "**BRIEF OF THE LAWYER DISCIPLINARY BOARD**" upon, Respondent, Daniel J. Post, by mailing the same via first-class United States Mail, with sufficient postage, to the following address:

Daniel J. Post
17460 IH 35 North
Schertz, Texas 78154-1219



Lawrence J. Lewis