

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LAWYER DISCIPLINARY BOARD,

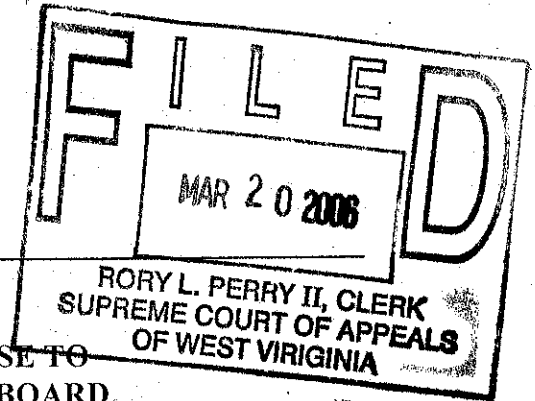
Complainant,

v.

Supreme Court No. 32554

LARRY E. LOSCH, a member of
The West Virginia State Bar,

Respondent.



BRIEF OF LARRY E. LOSCH IN RESPONSE TO
BRIEF OF THE LAWYER DISCIPLINARY BOARD

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IV. NATURE OF PROCEEDING AND BRIEF PROCEDURAL HISTORY

The West Virginia State Bar Office of Disciplinary Counsel (“Office of Disciplinary Counsel”) filed with the Clerk of the West Virginia Supreme Court of Appeals formal charges against the Respondent, Larry E. Losch, Esquire, on or about March 7, 2005. *See* “**Statement of Charges,**” attached hereto as **Exhibit 1**. The charges against the Respondent were based upon his typewritten addition of an alias to a *Suggestion* issued by the Nicholas County Clerk of Court, which allegedly violated Rules 8.4(c) and 8.4(d) of the *Rules of Professional Conduct*. *See Exhibit 1*. Rule 8.4 of the Rules of Professional Conduct states, in pertinent part:

It is professional misconduct for a lawyer to:

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice[.]¹

The Respondent served his *Answer* to the formal charges on or about April 7, 2005. *See* “**Respondent’s Answer to Statement of Charges,**” attached hereto as **Exhibit 2**.

The matter proceeded to hearing at the Nicholas County Courthouse in Summersville, West Virginia on July 11, 2005 before the Lawyer Disciplinary Board Hearing Panel Subcommittee (“Hearing Panel Subcommittee”). *See* “**Transcript of July 11, 2005 Hearing,**” attached hereto as **Exhibit 3**. The Respondent appeared in person and by his counsel, Robert P. Martin, Esquire. Lawrence J. Lewis, Esquire appeared on behalf of the Office of Disciplinary Counsel. Admitted into evidence were documents identified as Exhibits 1 and 2 by the Office of Disciplinary Counsel, and

¹ The “Comment” to Rule 8.4 states:

Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate a lack of those characteristics relevant to practice law. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.

R1-R4 by the Respondent. **See Exhibit 3.** Testimony was given by June Gower, Alice Bennett, Gregory Tucker, Harley Stollings, and the Respondent. **See Exhibit 3.**

In its *Report of the Hearing Panel Subcommittee* ("Report"), the Hearing Panel Subcommittee found that the Respondent violated Rule 8.4 of the *Rules of Professional Conduct*.

See "Report of the Hearing Panel Subcommittee," attached hereto as Exhibit 4. The Hearing Panel Subcommittee recommended that Mr. Losch's law license be suspended for thirty (30) days, that he complete twelve (12) credit hours of ethics-related continuing legal education beyond that required for his next reporting period, that he be supervised for one (1) year after reinstatement, and that he pay costs in the amount of Six Hundred Ninety-Two Dollars and Seven Cents (\$692.07). **See Exhibit 4: Recommended Discipline.**

V. STANDARD OF REVIEW

The Supreme Court of Appeals of West Virginia is "the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law". Committee on Legal Ethics of the West Virginia State Bar v. Blair, 174 W.Va. 494, 327 S.E.2d 671, Syllabus Point 3 (1984). In Committee on Legal Ethics v. McCorkle, 192 W.Va. 286, 452 S.E.2d 377, Syllabus Point 3 (1994), the Supreme Court of Appeals of West Virginia stated:

A de novo standard applies to a review of the adjudicatory record made before the [Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the [Board's] recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the [Board's] findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.

As explained herein, the Hearing Panel Subcommittee's findings of fact are not supported by reliable, probative and substantial evidence on the whole record and, as such, should not be afforded deference by this Honorable Court.

VI. STATEMENT OF FACTS

The Respondent is an active member of the West Virginia State Bar. His practice is located in Summersville, Nicholas County, West Virginia. James O. "Jamie" Woods is a contractor based in Nicholas County, West Virginia. At various times, Mr. Woods has given different names to his contracting operation, including "Jamie Woods," "Woods Construction Company," and, most importantly, "AJM Corporation." In June 2001, Respondent instituted a civil action in the Circuit Court of Nicholas County on behalf of Thomas Bailes Contracting Company, Inc., against Jamie Woods, individually and Jamie Woods d/b/a Woods Construction Company, Defendants. *See* **"Complaint," attached hereto as Exhibit 5.** A default judgment against the Defendants was entered on March 26, 2002. *See* **"Order of Default Judgment," attached hereto as Exhibit 6.**

On March 2, 2000, prior to the time period relevant to his matter, Mr. Woods established a corporation under West Virginia law named "AJM Corporation" *See* **"Certificate of Incorporation" and "Articles of Incorporation," attached hereto collectively as Exhibit 7.** Importantly, during the period that the default judgment was obtained, AJM Corporation's charter had been revoked for nonpayment of taxes and for failure to file a return. *See* **"Letter from the Office of the Secretary of State," attached hereto as Exhibit 8.** Upon revocation of its corporate charter, AJM Corporation ceased to be an entity separate from Jamie Woods, notwithstanding any representations by the Petitioner to the contrary. As a consequence of the revocation of AJM Corporation's charter, Mr. Woods' representation of himself as said corporation was tantamount to giving an alias. Notwithstanding revocation of AJM Corporation's charter, Mr. Woods continued to operate a contracting business and was doing work for Mid-State Pre-Owned Autos, LLC in Summersville, West Virginia during the time period that the default judgement was entered.

As a result of the default judgment, the Respondent secured a judgment for his client against Mr. Woods, and subsequently obtained a *Suggestion* from the Nicholas County Clerk of Court against "Mid-State Pre-Owned Autos, LLC., Gregory A. Tucker, Summersville, West Virginia." **See "Suggestion," attached hereto as Exhibit 9.** In order to make sure that his client would be paid, the Respondent had styled the suit to include the name "Woods Construction Company," despite the non-existence of a corporate entity or a partnership in West Virginia possessing such a name.

Based on the judgment he secured against Mr. Woods and his knowledge that Mr. Woods represented himself as "AJM Corporation," the Respondent added the language "and dba AJM Corporation" to a copy of the *Suggestion* directed to "Mid-State Pre-Owned Autos, LLC., Gregory A. Tucker, Summersville, West Virginia." **See "Suggestion with 'dba AJM Corporation'," attached hereto as Exhibit 10.** The Respondent proceeded to have this copy served. The Respondent added this language to his copy of the *Suggestion* with the knowledge that AJM Corporation's charter had been revoked for nonpayment of taxes. The Respondent actions were conducted in good faith, with no knowledge or belief that his addition of Mr. Woods' alias to the *Suggestion* would potentially be the subject of a disciplinary action. Indeed, the Respondent believed it was his affirmative duty to identify any potential aliases of Jamie Woods.

A *Motion to Quash Suggestion* was eventually filed by AJM Corporation, and a hearing on the same was held on the April 28, 2003. **See "Transcript of April 28, 2003 Hearing," attached hereto as Exhibit 11.** During said hearing, the Respondent explained his actions to the Honorable Gary L. Johnson, and noted his belief that his addition of Mr. Woods' alias did not legally change the force and effect of the *Suggestion*. In short, the Respondent did not commit an act of dishonesty, fraud, deceit or misrepresentation, and certainly had no intention of engaging in conduct that could be remotely construed as prejudicial to the administration of justice

VII. LAW AND ARGUMENT

- A. The Hearing Panel Subcommittee erred in finding that the original, Clerk-issued *Suggestion* was provided to Mid-State Pre-Owned Autos, LLC., Gregory A. Tucker, Summersville, West Virginia.**

In its *Report*, the Hearing Panel Subcommittee determined that Mid-State Pre-Owned Autos, LLC., Gregory A. Tucker, Summersville, West Virginia received an altered version of the original, Clerk-issued *Suggestion*. **See Page 5, Exhibit 4.** To the contrary, however, Mid-State Pre-Owned Autos, LLC., Gregory A. Tucker, Summersville, West Virginia did not receive the actual issued *Suggestion* itself; he/it received a copy of said document. The phrase "dba AJM Corporation" was added to the copy, not the original *Suggestion*. **See Exhibits 9 & 10.** The original *Suggestion* remained in the Clerk's office, unaltered. Accordingly, the Hearing Panel Subcommittee's finding that the Clerk-issued *Suggestion* was altered and subsequently served upon Mid-State Pre-Owned Autos, LLC., Gregory A. Tucker, Summersville, West Virginia is not supported by reliable, probative, and substantial evidence on the whole record.

- B. The Hearing Panel Subcommittee erred in finding that AJM Corporation was working for Mid-State Pre-Owned Auto, LLC.**

In its *Report*, the Hearing Panel Subcommittee found as fact that AJM Corporation was working for Mid-State Pre-Owned Auto, LLC. **See Exhibit 4: Page 2.** AJM Corporation could not have been working for Mid-State Pre-Owned Auto, LLC., as its charter had been revoked for nonpayment of taxes and for failure to file a return. **See Exhibit 5.** It was Mr. Woods, the individual and sole incorporator of AJM Corporation, doing business as AJM Corporation and working for Mid-State Pre-Owned Auto, LLC. The finding that AJM Corporation was working for Mid-State Pre-Owned Auto, LLC is not supported by reliable, probative, and substantial evidence on the whole record.

C. The Hearing Panel Subcommittee erred in finding that AJM Corporation's charter had been "suspended."

AJM Corporation's charter had not been "suspended," it had been revoked for failure to pay corporate license taxes and failure to file a corporation annual return, as stated in correspondence from the West Virginia Secretary of State's Office. **See Exhibit 8.** Respondent contends that this statement is a misrepresentation to the Court, as the relevant statute, *West Virginia Code* § 11-12C-8(c), does not provide for "suspension" of a corporate charter, only revocation for nonpayment of corporate license taxes and, upon receipt of payment for the same, reinstatement.² The finding that AJM Corporation's charter had been "suspended" is not supported by reliable, probative, and substantial evidence on the whole record.

D. The Hearing Panel Subcommittee erred in stating that AJM Corporation had been reinstated and was in good standing.

Implied in its finding of fact that AJM Corporation's charter had been "suspended" was the Hearing Panel Subcommittee's contention that AJM Corporation was in good standing at the time Respondent added "dba AJM Corporation" to his copy of the *Suggestion* in question. The Subcommittee stated in Footnote 1 of its *Report*, "As of an April 28, 2003, court hearing in the underlying matter, AJM Corporation was in good standing." **Exhibit 2: Page 3, Footnote 1.** The Subcommittee referenced the transcript of said hearing as its only support for this contention. A

²*West Virginia Code* § 11-12C-8 states:

Revocation of certificate of incorporation or certificate of authority.— Upon the establishment of a finalized liability for corporate license taxes, not subject to further administrative or judicial review under article ten of this chapter, the certificate of incorporation in the case of a domestic corporation, or the certificate of authority in the case of a foreign corporation, shall be revoked. Any corporation whose certificate of incorporation or certificate of authority has been revoked due to nonpayment of its corporate license taxes shall be reinstated to its former rights as if it had not been delinquent upon payment to the tax commissioner of all delinquent license taxes, plus any interest, additions or penalties accruing thereon.

review of that transcript reveals that the only evidence for AJM Corporation's alleged good standing status is the claim made by Harley Stollings, counsel for James Woods, who represented to the court that AJM Corporation was in good standing based on his receipt of a business registration certificate from his client. **Exhibit 11: Page 6.** This "business registration certificate" has never been entered into evidence in this matter and cannot, therefore, be considered as support for the claim that AJM Corporation was in good standing during the relevant time period.

To be sure, any claim that AJM Corporation was in good standing is false. It is a matter of public record that the State's tax lien for nonpayment of corporate charter taxes against AJM Corporation was recorded June 17, 2002 and the release of said lien was not recorded until almost a year later, June 12, 2003. **See "Notice of Tax Lien," attached hereto collectively as Exhibit 12.** AJM Corporation was not, therefore, in good standing when Mr. Stollings misrepresented as much to the court on April 28, 2003. Any finding based on the claim that AJM Corporation was in good standing is not supported by reliable, probative, and substantial evidence on the whole record.

E. The Hearing Panel Subcommittee erred in concluding that Respondent violated Rule 8.4(c) of the *Rules of Professional Conduct*.

The Hearing Panel Subcommittee found that when Respondent caused the addition of "dba AJM Corporation" to the *Suggestion*, he violated Rule 8.4 of the *Rules of Professional Conduct*, particularly subsection (c) of said Rule. **Exhibit 4: Page 5.** Rule 8.4(c) of the *Rules of Professional Conduct* states, "It is professional misconduct for a lawyer to. . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]" The Hearing Panel Subcommittee failed to state precisely how Respondent had violated Rule 8.4(c) (i.e., dishonesty, fraud, deceit, or misrepresentation). Furthermore, the Hearing Panel Subcommittee based its conclusion on its understanding that AJM Corporation was legally permitted to conduct business at the time the

altered document was served. As has been noted, this is false. AJM Corporation was not in good standing at that time, its charter had been revoked for nonpayment of corporate license taxes. Thus, the work performed for Mid-State Pre-Owned Autos, LLC was performed by James Woods, not by a licensed corporate entity. The determination that the Respondent violated Rule 8.4(c) of the *Rules of Professional Conduct* is not supported by reliable, probative, and substantial evidence on the whole record.

F. The Hearing Panel Subcommittee erred in concluding that Respondent violated Rule 8.4(d) of the *Rules of Professional Conduct*.

In addition, to its finding of a violation of Rule 8.4(c) of the *Rules of Professional Conduct*, the Hearing Panel Subcommittee also found that Respondent violated Rule 8.4(d) when he caused the addition of “dba AJM Corporation” to the *Suggestion*. **Exhibit 4: Page 5.** Rule 8.4(d) of the *Rules of Professional Conduct* states, “It is professional misconduct for a lawyer to. . . engage in conduct that is prejudicial to the administration of justice.

In Lawyer Disciplinary Board v. Ansell, 210 W.Va. 139, 556 S.E.2d 106 (2001), which was cited as authority by the Hearing Panel Subcommittee in its *Report*, the Respondent unsuccessfully attempted to use altered orders to obtain payment from the Public Defender Services (“PDS”). While the Respondent was, in fact, due the payment sought, he altered certified copies of previously entered orders from another case, as opposed to presenting proposed orders to the court. Specifically, he altered the name of the Defendant, the criminal number, and the amount of money approved on the previously entered order, but preserved the Judge’s Signature. He then submitted the altered order to PDS, which returned them to him unpaid.

The Court, in Ansell, concluded that by fraudulently creating new orders out of previously-issued ones, and subsequently submitting them to the PDS for payment, the Respondent engaged in

conduct that was dishonest and violated Rule 8.4(c). In essence, the Respondent improperly altered previously-issued court orders in an attempt to circumvent correct procedures, and avoid proper judicial review of his vouchers. This, the Court determined, was conduct prejudicial to the administration of justice in violation of Rule 8.4(d). Ansell at 109.

In the instant case, the Respondent added language to his copy of the *Suggestion*. He did not, as in Ansell, alter an order of the Court. A court order would have followed the service of the *Suggestion*, but was not issued contemporaneously therewith. The Respondent then served the altered copy of the *Suggestion* to Mid-State Pre-Owned Auto, but did not file it with the court or with any other governmental agency. In short, he committed no act that was a “serious interference with the administration of justice.” Comment, Rule 8.4 of the *Rules of Professional Conduct*. Moreover, the fundamental difference between the acts that were the subject of Ansell and those at issue in the present matter is that in Ansell, the disciplined attorney’s actions were premised upon his desire and intent to put money in his own pocket. This is not so in the case *sub judice*.

Mr. Gregory Tucker, President of Mid-State Pre-Owned Auto, testified that after he was served with a copy of the *Suggestion*, he prepared an *Answer* and filed it, expecting a court Order to be issued as to the legality of the *Suggestion*, which is, as he testified, what would normally occur. **See Exhibit 4: Page 44.** Moreover, Mid-State Pre-Owned Auto/Mr. Tucker—the parties upon whom Mr. Losch had the *Suggestion* served—were aware that Mr. Woods and AJM Corporation were one and the same! Mr. Tucker testified to that effect during the hearing on the *Motion to Quash Suggestion*. **See Exhibit 3: Page 42.** Thus, it cannot be said that the Respondent engaged in any act that mislead Mid-State Pre-Owned Auto/Mr. Tucker. In sum, there is no injury to the administration of justice here.

In addition, the language added to the copy of the *Suggestion* did not enhance the Respondent's power to obtain payment of any monies owed his client. Moreover, because AJM Corporation was not a legal corporate entity, payment of any funds due to an entity given as an alias by Mr. Woods would be reachable by anyone with a judgment against him. The Respondent took no steps to amend his *Complaint* or *Judgment* to include AJM Corporation, and did not ask the Clerk to amend the *Suggestion*, because he knew that AJM Corporation's charter had been revoked and a judgment against a nonexistent entity would not change matters.

The Petitioner claims that the Respondent "attempted to circumvent proper procedures" with his actions. The Petitioner, however, neglects to identify any "proper" or correct procedure for bringing suit against a nonexistent entity without necessitating an additional and completely useless hearing on the matter. The Respondent did not sue AJM Corporation because AJM Corporation did not exist. His conduct, therefore, does not violate Rule 8.4(c) and 8.4(d) of the *Rules of Professional Conduct*.

Moreover, contrary to the Petitioner's arguments, the legal status of AJM Corporation has everything to do with this matter. There were absolutely no practical consequences of the Respondents's addition of "dba AJM Corporation" to his copy of the Clerk's *Suggestion*. The hearing held on the matter and the quashing of the *Suggestion* can only be viewed as proper if one accepts the false assertions of Mr. Woods and, in turn, his attorney, with respect to the legal status of AJM Corporation.

The Petitioner's citation to Office of Disciplinary Counsel v. Galford, 202 W.Va. 587, 505 S.E.2d 650 (1998) is also inappropriate. The attorney in that matter had altered a Will after the decedent's death because it failed to comply with the decedent's wishes. The Respondent had prepared the original Will but had mistakenly omitted an heir. He then tried to pass the altered Will

through the probate system. The Petitioner claims that the Respondent has “likewise, attempted to pass an altered Court document through the system.” It is unclear to what Petitioner refers to the phrase “the system.” The Respondent simply served a copy of a *Suggestion* on Mid-State Pre-Owned Auto/Mr. Tucker to which he had added an alias of the Defendant against whom he had legally obtained judgment. Petitioner obviously means to imply some intent on Respondents’ part to mislead the government. This is sheer nonsense. The Petitioner provides no testimony to support such position because in all the transcripts of all the hearings in this matter, no such testimony exists.

G. As required by the *Rules of Professional Conduct*, the Respondent was zealously advocating on behalf of his client.

The Respondent had an affirmative duty to zealously advocate on behalf of his client. Rule 1.1 of the *Rules of Professional Conduct* states:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

In this matter, the Respondent’s actions conformed with his obligation to competently represent his client. Had the Respondent failed to disclose a known alias of Mr. Woods, he would not be advocating on behalf of his client with the requisite legal knowledge, skill, thoroughness and preparation reasonably necessary for that representation. In short, any failure by the Respondent to put “dba AJM Corporation” on the *Suggestion* would actually violate Rule 1.1.

Moreover, according to Rule 4.1:

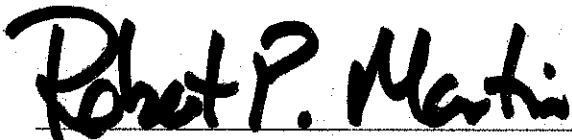
In the course of representing a client a lawyer shall not knowingly. . . make a false statement of material fact or law to a third person[.]

To put it in other words, a lawyer has an affirmative duty to tell the truth to Mid-State Pre-Owned Auto/Mr. Tucker. In this case, the Respondent adhered to such an obligation by disclosing Mr. Woods’ alias. A failure on the part of the Respondent to disclose any known aliases of Mr. Woods, upon learning of the same, would be akin to making a false statement, and would violate Rule 4.1.

VIII. CONCLUSION

The Petitioner's suggestion that the Respondent's conduct warrants the severe sanctions it has recommended is wholly without basis. While the Respondent's actions were arguably ill-advised, they were not done with malice or done in an attempt to fraudulently deceive anyone. Moreover, as explained herein, the Respondent's actions did not interfere with the administration of justice and any "facts" cited by the Petitioner in support of its argument that severe sanctions should be imposed are not supported by reliable, probative, and substantial evidence on the whole record. Accordingly, the Respondent respectfully requests that this matter be dismissed by this Court.

Respectfully submitted,
LARRY E. LOSCH, ESQUIRE,
By Counsel,



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