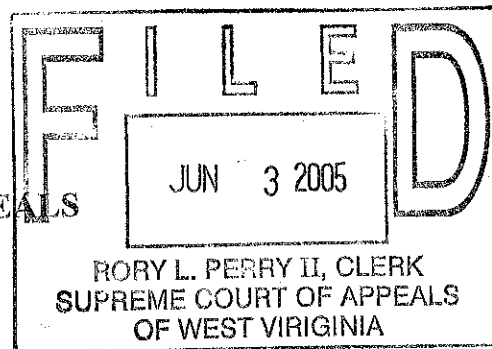


**BEFORE THE SUPREME COURT OF APPEALS  
STATE OF WEST VIRGINIA**



**In Re:** **Theodore R. Dues, Jr., Esquire**, a member of  
The West Virginia State Bar

**Supreme Court No.:** 31713

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**BRIEF OF THE LAWYER DISCIPLINARY BOARD**

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Lawrence J. Lewis  
Chief Lawyer Disciplinary Counsel  
Rachael L. Fletcher  
Lawyer Disciplinary Counsel  
Office of Disciplinary Counsel  
2008 Kanawha Boulevard East  
Charleston, West Virginia 25311  
(304) 558-7999  
(304) 558-4015 (facsimile)

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**I. NATURE OF PROCEEDINGS  
AND  
RECOMMENDED DECISION OF THE HEARING PANEL SUB-COMMITTEE**

This is a disciplinary proceeding against Respondent Theodore R. Dues, Jr., Esquire (hereinafter "Respondent") arising as the result of a Statement of Charges issued against him and filed with the Supreme Court on or about March 1, 2004. The charges arise as the result of nine complaints filed against Respondent by his various clients. Service of Process was obtained upon Respondent by personal service by a private process server on April 2, 2004. Thereafter, on or about April 8, 2004, Respondent filed his "Respondent's Reply to Statement of Charges" with the Office of Disciplinary Counsel. Respondent admitted the allegations made against him in Counts I through XI, but reserved the right to submit an offer of mitigation for his conduct. Thereafter, on July 30, 2004, this matter came on for hearing on the issue of sanctions at the Office of Disciplinary Counsel in Charleston, West Virginia. The record remained open to permit Respondent to submit medical records which were received on August 27, 2004. Respondent was then examined and evaluated by Dr. Ralph S. Smith, Jr., whose report was submitted for the record on November 4, 2004.

The matter proceeded to full hearing on July 30, 2004, commencing at 9:00 a.m. and concluding at 7:00 p.m., in Charleston, West Virginia. Presiding over the matter were Subcommittee Chairperson John Bennett, Esquire, Subcommittee Member Michael Whitt, Esquire, and Subcommittee Lay Member Susan Fisher. Appearing for the Office of Disciplinary Counsel was Lawrence J. Lewis, Chief Lawyer Disciplinary Counsel and Rachael L. Fletcher, Disciplinary Counsel. Respondent appeared in person, *pro se*.

The Office of Disciplinary Counsel presented the testimony of Complainant Lavern Ruth, Complainant Herbert McKinney, Complainant Hubert McKinney, Complainant Jeffrey Moss, Complainant Jeannettia Spencer, Complainant Raymond Smith, Complainant Lois Heath, Complainant Ruth Royale, and Complainant Nancy Cooper. Respondent testified on his own behalf. The Office of Disciplinary Counsel's Exhibits 1 through 64 were admitted. Respondent's Exhibits 1 through 3 were admitted.

On or about December 17, 2004, ODC filed its Proposed Findings of Facts, Recommendations of Law and Recommended Sanction which included all the violations known at the time of the filing of the Statement of Charges and recommended amongst other provisions that Respondent's law license be suspended for a period of three (3) years.

On or about December 16, 2004 and December 30, 2004, Respondent filed his Proposed Findings. Respondent stated that because his actions were related to medical conditions it was not in the best interests of the public to suspend or revoke his license to practice law.

On or about March 30, 2005, the Hearing Panel Subcommittee issued its decision in this matter. The Hearing Panel Subcommittee found properly that the evidence established that Respondent committed thirty-nine (39) violations of the Rules of Professional Conduct including: four violations of Rule 1.1 [Competence]; six violations of Rule 1.3 [Diligence]; nine violations of Rule 1.4(a) and 1.4(b) [Communication]; one uncontested violation of Rule 1.15(b) [Safekeeping property]; one uncontested violation of Rule 1.15(c) [Safekeeping property]; two uncontested violations of Rule 1.16(a)(2)[Declining or terminating

representation]; three violations of Rule 1.16(d) [Declining or terminating representation]; nine violations of Rule 8.1(b) [Bar Admission and Disciplinary Matters]; three violations of Rule 8.4(c) [Misconduct]; and one uncontested violation of Rule 8.4(d)[misconduct]

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

- C. The Respondent's license to practice law in West Virginia be suspended for a period of eighteen (18) months.
- D. That as a condition of reinstatement, Respondent establish by clear and convincing evidence that he is mentally and emotionally fit to engage in the practice of law.
- E. That upon reinstatement, Respondent undergo two (2) years of supervised practice. The supervisor may be nominated by Respondent and approved by ODC. The supervised practice is to be governed by a written agreement between the supervisor, Respondent and ODC.
- F. That Respondent make the following restitutions before he is reinstated:
  - A. Lavern E. Ruth \$2,000.00
  - B. Ruth E. Royal \$5,500.00
  - C. Nancy C. Cooper \$5,500.00
  - D. Reimburse the State Bar Client Protection Fund with the \$5,500.00 it paid Shelly Leah Daniels on July 30, 2004, as the result of Claim 04-07-CSF she filed against this Respondent.
- 5. That Respondent reimburse the Lawyer Disciplinary Board the costs of these proceedings in the amount of \$1,968.16.

## II. RESPONDENT'S EXCEPTIONS

On or about April 26, 2005, Respondent filed his objection to the recommendations of the Hearing Panel Subcommittee. Respondent disputes that suspension is the appropriate disciplinary action in this matter.

### III. 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, Syl. Pt. 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, 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).

#### IV. ADMITTED FINDINGS OF FACT

**Count I - I.D. No. 03-02-126**  
**Complaint of James C. Meeks**

In his Reply to the Statement of Charges filed April 8, 2004, Respondent admitted to the allegations made against him with respect to Mr. Meeks' case. *See* Respondent's Reply to Statement of Charges. In or about January 2001, James C. Meeks, retained Respondent to represent him in a civil action filed against him by his niece and nephew in his capacity of executor of his mother's estate. From January of 2001 through April 2003, Respondent submitted invoices for legal bills totaling over \$15,000, which Mr. Meeks paid. After completing discovery, Respondent informed Complaint that nothing more needed to be done, other than prepare a motion for summary judgment. To date, however, no such motion has been submitted or prepared.

In March 2002, Respondent advised Mr. Meeks he was to have surgery, but that other attorneys were available to handle his case while he recovered. However, during this time, no one contacted Mr. Meeks, and when Mr. Meeks called Respondent's office, Respondent's secretary could provide no information, other than Meeks' file was still in the office.

Mr. Meeks was last able to speak with Respondent in November 2002, at which time Respondent advised Mr. Meeks he was scheduling a meeting with the judge to discuss the case, and that he would contact Mr. Meeks within two weeks. However, Respondent thereafter failed to contact Mr. Meeks.

After several failed attempts to contact Respondent by telephone, on or about January 31, 2003, Mr. Meeks sent a certified letter informing Respondent he no longer wanted his

legal services and asked that his files be sent to his home with an itemization of all charges. However the certified letter was returned to Mr. Meeks unclaimed. Thereafter, on or about March 5, 2003, Mr. Meeks through regular mail sent another letter to Respondent with a copy of the certified letter, both to his office and to his home, but Respondent still did not reply to Mr. Meeks.

On or about March 15, 2003, Mr. Meeks filed an ethics complaint against Respondent with the Office of Disciplinary Counsel. By letter dated March 19, 2003, the Office of Disciplinary Counsel (hereinafter referred to as "ODC") sent the complaint to Respondent and requested that he respond to the complaint within twenty (20) days. Respondent failed to respond to ODC's request of March 19, 2003, and on or about April 15, 2003, ODC sent a letter by certified mail which requested Respondent to respond to the complaint by May 5, 2003. The April 15, 2003 certified letter was returned to ODC marked "Unclaimed" on or about May 1, 2003.

**Count II - I.D. No. 03-03-167**  
**Complaint of Lavern E. Ruth**

In his Reply to the Statement of Charges filed April 8, 2004, Respondent admitted to the allegations made against him with respect to Ms. Ruth's case. *See* Respondent's Reply to Statement of Charges. In or about February 1998, Lavern E. Ruth's son was injured in an automobile accident which necessitated surgery on his leg. Respondent represented Mrs. Ruth's son in regards to the automobile accident and settled the matter out of court. Thereafter, Mrs. Ruth's son began to experience difficulties resulting from the first of two surgeries on his leg. Respondent agreed to represent Mrs. Ruth and her son in a medical malpractice claim against the treating physician and hospital.

On or about July 24, 2001, Ms. Ruth provided Respondent a draft in the sum of \$1,058.92 for medical malpractice review by an expert. She was not pleased with the results of this review and, on or about January 14, 2002, provided to Respondent an additional \$2,000.00 for a second review by another expert.

Between January 2002 and September 2002, Mrs. Ruth attempted to contact Respondent on many occasions to learn the results of the second review. Respondent continually advised Mrs. Ruth he was waiting for the expert to contact him. Finally, on or about September 21, 2002, Mrs. Ruth called the expert herself. He advised her he could provide her no information since only Respondent was his client. On or about September 29, 2002, Mrs. Ruth sent Respondent a certified letter attempting to gain information about the review. On or about October 10, 2002, Respondent replied to Mrs. Ruth's letter and agreed to contact the expert witness about the review. Respondent has not since contacted Mrs. Ruth or her son about the results of the review, and the statute of limitations on her son's case lapsed in November 2002.

On or about April 1, 2003, Mrs. Ruth filed an ethics complaint against Respondent with ODC alleging various violations of the Rules of Professional Conduct as the result of Respondent's conduct. By letter dated April 7, 2003, ODC requested Respondent respond to the complaint within twenty (20) days. However, Respondent failed to respond to the letter of April 7, 2003 and, on or about May 8, 2003, ODC sent a letter by certified mail requesting Respondent to respond to the complaint by May 19, 2003. The certified letter of May 8, 2003 was returned to ODC marked "Unclaimed" on or about May 25, 2003. The April 7, 2003 letter from ODC to Respondent was returned to ODC on or about November 17, 2003 marked "Box Closed - Unable to Forward - Return to Sender".

**Count III - I.D. No. 03-02-228**  
**Complaint of Herbert & Hubert McKinney**

In his Reply to the Statement of Charges filed April 8, 2004, Respondent admitted to the allegations made against him with respect to the McKinneys' case. *See* Respondent's Reply to Statement of Charges. Herbert and Hubert McKinney retained Respondent to represent them in three separate legal matters. One involved an estate, another involved a right-of-way question, and a third involved a labor case. Over the course of several months, Respondent failed to communicate with the McKinneys or respond to their requests for information.

Finally, on or about January 13, 2003, the McKinneys were advised by Respondent's secretary that he would set up a conference call with them at 10:30 a.m. on January 21, 2003. The McKinneys waited on that day until 2:30 p.m., but received no call from Respondent. Upon calling Respondent's office, the McKinneys were advised he was "tied up with the judge", but would call on January 22, 2003. However, Respondent failed to call on January 22. Since that time, the McKinneys made several telephone calls to Respondent's office, but none were returned.

On or about April 8, 2003, the McKinneys sent a certified letter to Respondent requesting return of all their file material. The letter was returned to the McKinneys marked "Unclaimed" on or about May 1, 2003. Thereafter, on or about May 7, 2003, the McKinneys filed an ethics complaint against Respondent alleging various violations of the Rules of Professional Conduct. By letter dated May 16, 2003, ODC requested Respondent to respond to the complaint within twenty (20) days. However, ODC's letter of May 16, 2003 was

returned to ODC on or about November 13, 2005 marked "Box Closed - Unable to Forward - Return to Sender."

**Count IV - I.D. No. 03-03-270**  
**Complaint of Jeannettia D. Spencer**

In his Reply to the Statement of Charges filed April 8, 2004, Respondent admitted to the allegations made against him with respect to Ms. Spencer's case. See Respondent's Reply to Statement of Charges. In or about the year 2000, Respondent instituted a medical malpractice action on behalf of Jeannettia D. Spencer, in the Circuit Court of Kanawha County, West Virginia. During the course of the civil action, Respondent failed to designate an expert witness, failed to take discovery depositions, failed to meet the discovery deadlines, ignored orders of the court, and otherwise failed to pursue the civil action. Ms. Spencer's civil action was terminated with prejudice by stipulation and order of dismissal without her knowledge.

Respondent, during the course of said civil action, failed to keep Ms. Spencer advised of the status of said matter and failed to advise her that her civil action had been dismissed with prejudice. Respondent failed to meet with Ms. Spencer on several occasions and failed to return her telephone calls. Ms. Spencer sent Respondent a certified letter expressing her concerns, but Respondent failed to respond to it.

On or about May 13, 2003, Ms. Spencer hand-delivered a note to Respondent terminating his services as his counsel and requesting all her file documents in his possession. However, Respondent failed to comply with this request.

On or about June 9, 2003, Ms. Spencer filed an ethics complaint against Respondent with ODC alleging various violations of the Rules of Professional Conduct. By letter dated

June 9, 2003, ODC provided Respondent a copy of the complaint and requested that he respond within twenty (20) days. However, the June 9, 2003 letter from ODC was returned to the office on or about November 17, 2003 marked "Box Closed - Unable to Forward - Return to Sender".

**Count V - I.D. No. 03-03-308**  
**Complaint of Raymond J. Smith**

In his Reply to the Statement of Charges filed April 8, 2004, Respondent admitted to the allegations made against him with respect to Mr. Smith's case. [See Respondent's Reply to Statement of Charges. In or about September or October 2001, Raymond J. Smith conferred with Respondent regarding an EEO case against the VA Medical Center in Huntington, West Virginia. Respondent agreed to accept the case for a retainer fee of \$5,500.00. On or about March 26, 2002, Mr. Smith sent Respondent a check in the sum of \$3,500.00 as partial payment on the \$5,500.00 fee. Respondent accepted Mr. Smith's case.

Before Mr. Smith's case went to trial, Respondent referred Complainant to another attorney. Respondent agreed to forward a portion of the retainer to the attorney for her fee and to send the remainder of the retainer to Mr. Smith. It was agreed that \$2,700.00 would be sent to the new attorney, and Respondent would return the remaining \$800.00 to Mr. Smith. However, Respondent has failed to return the \$800.00 to Mr. Smith.

Prior to filing the ethics complaint, Mr. Smith called Respondent on numerous occasions and left messages with his secretary to contact him, but Respondent never returned any of the calls. On or about May 30, 2003, Mr. Smith mailed Respondent a certified letter requesting payment of the money he agreed to return. However, the letter was returned marked "Unclaimed".

On or about July 7, 2003, Mr. Smith filed an ethics complaint against Respondent with ODC alleging various allegations of the Rules of Professional Conduct. On or about July 8, 2003, ODC mailed a copy of the complaint to Respondent and requested that he respond within twenty (20) days. On or about November 17, 2003, ODC's letter of July 8, 2003 was returned marked "Box Closed - Unable to Forward - Return to Sender".

**Count VI - I.D. No. 03-03-356**  
**Complaint of Lois E. Heath**

In his Reply to the Statement of Charges filed April 8, 2004, Respondent admitted to the allegations made against him with respect to Ms. Heath's case. *See* Respondent's Reply to Statement of Charges. Lois E. Heath retained Respondent to represent her interests in an employment matter. Respondent acknowledged in a letter to Ms. Heath that the Human Rights Commission had given her the right to sue. He advised her that the suit had been filed in March 2000. Respondent further advised Ms. Heath that she would receive a letter from him verifying the institution of her suit, but she never received such letter. Since Ms. Heath did not hear from Respondent, she called his office, was advised that he was on medical leave, and that another attorney could contact her. She never heard from other counsel.

On or about July 30, 2003, Ms. Heath filed her ethics complaint against Respondent with ODC alleging various violations of the Rules of Professional Conduct. By letter dated July 30, 2003, ODC forwarded the complaint to Respondent and requested that he respond within twenty (20) days. Respondent failed to respond to ODC's letter of July 30, 2003, and on or about August 27, 2003, ODC sent a second letter by certified mail, again requesting Respondent to respond to the complaint by September 8, 2003. ODC's certified letter of

August 27, 2003 was returned marked "Unclaimed" on or about September 13, 2003. On or about November 13, 2003, ODC's letter of July 30, 2003, was returned marked "Box Closed - Unable to Forward - Return to Sender".

**Count VII - I.D. No. 03-01-490  
Complaint of Jeffrey L. Moss**

In his Reply to the Statement of Charges filed April 8, 2004, Respondent admitted to the allegations made against him with respect to Mr. Moss's case. *See* Respondent's Reply to Statement of Charges. On or about June or July 2000, Jeffrey L. Moss retained Respondent to represent him in a civil action regarding an employment discharge. Respondent repeatedly canceled appointments with Mr. Moss, failed to keep him advised of the status of his case, and failed to return his telephone calls. Moreover, Respondent failed to meet the discovery deadlines, failed to conduct discovery and failed to properly brief the matter for the court.

After an adverse ruling, Respondent promised to file an appeal. Mr. Moss paid Respondent a fee for this appeal, but Respondent allowed the appeal time to expire without informing Mr. Moss. Mr. Moss had paid Respondent over \$6,000.00 to represent him.

On or about February 14, 2003, Complainant filed an ethics complaint against Respondent with ODC alleging various violations of the Rules of Professional Conduct by Respondent. By letter dated October 21, 2003, ODC requested Respondent respond to the complaint within twenty (20) days. However, Respondent failed to respond to ODC's letter of October 21, 2003, and on or about December 1, 2003, ODC sent a second letter by certified mail to his home requesting Respondent respond to the complaint by December 12, 2003. On or about November 13, 2003, ODC's letter of October 21, 2003 was returned

marked "Box Closed - Unable to Forward - Return to Sender". On or about December 29, 2003, ODC's certified letter to respondent was returned marked "Unclaimed".

**Count VIII - I.D. No. 03-03-516**  
**Complaint of Ruth E. Royal**

In his Reply to the Statement of Charges filed April 8, 2004, Respondent admitted to the allegations made against him with respect to Ms. Royal's case. See Respondent's Reply to Statement of Charges. Ruth E. Royal retained Respondent on or about April 30, 1997, to represent her regarding an employment dispute and paid him a retainer of \$5,500.00. However, Respondent failed to keep Ms. Royal advised of the status of her case, failed to return her calls, failed to respond to her requests for information, referred her file to another attorney without her knowledge or consent, and failed to return her file to her upon request.

Respondent further failed to respond to a motion for summary judgment by the opposing party in her civil action, even though the court granted him additional time to respond, and failed to file Ms. Royal's portion of the pretrial order. On or about May 30, 2003, summary judgment was granted against Ms. Royal on behalf of the opposing party. The court found that Respondent had failed to meaningfully participate in the final pretrial conference and cited this failure as additional grounds for dismissing the action.

On or about October 23, 2003, Ms. Royal filed an ethics complaint against Respondent with ODC alleging various violations of the Rules of Professional Conduct. By letter dated October 27, 2003, ODC requested Respondent respond to the complaint within twenty (20) days. However, Respondent failed to respond to the letter of October 27, 2003,

and on November 19, 2003, ODC sent a second letter by certified mail requesting Respondent's response to the complaint by December 9, 2003.

**Count IX - I.D. No. 03-02-548**  
**Complaint of Nancy C. Cooper**

In his Reply to the Statement of Charges filed April 8, 2004, Respondent admitted to the allegations made against him with respect to Ms. Cooper's case. *See* Respondent's Reply to Statement of Charges. On or about May 10, 2000, Nancy C. Cooper retained Respondent to represent her in regard to a wrongful discharge case. Ms. Cooper paid Respondent a retainer of \$5,500.00. Approximately one year into this case, Respondent allegedly became ill, but assured Ms. Cooper on various occasions that he would be well enough to represent her when the matter came to trial.

On or about February 7, 2003, a pretrial conference was scheduled by the court, but Respondent failed to advise Ms. Cooper of the matter. Upon learning of the pretrial conference from another party, Ms. Cooper called Respondent, but he did not return the call. Ms. Cooper attended the February 7, 2003 pretrial conference and attorney Dwayne Tinsley appeared on behalf of Respondent. Mr. Tinsley advised the court that he had been contacted by Respondent the day before at 4:00 p.m., and that he was required to return to his doctor that day for additional tests following heart surgery. The court noted that despite its orders on at least two occasions, Respondent had not disclosed his witnesses or provided discovery. The court left the matter set for trial on February 24, 2003.

Thereafter, on February 12, 2003, Ms. Cooper met with Respondent at the Ramada Inn in South Charleston and discussed the case. Respondent indicated that he would be able to go to trial. There was a settlement on the table negotiated by Ms. Cooper's friend who had

contacted the union. At the meeting Respondent agreed to finalize the suit and complete the necessary paperwork and return Ms. Cooper's retainer of \$5,500.00.

Because of Respondent's representations regarding his illness, Ms. Cooper settled her case although she did not desire to do so. Respondent failed to finalize matters for her as he had represented he would do, and Ms. Cooper was required to go to another attorney who finalized the settlement for her. Respondent failed to return Ms. Cooper's retainer despite his promises to do so.

On or about November 13, 2003, Ms. Cooper filed an ethics complaint against Respondent with ODC alleging various violations of the Rules of Professional Conduct. By letter dated October 18, 2003, ODC requested that Respondent respond to the complaint within twenty (20) days. The October 18, 2003 letter was returned to ODC on November 20, 2003 marked "Box Closed - Unable to Forward - Return to Sender".

**Count X and Count XI - I.D. No. 03-02-617**  
**Complaint of the Office of Disciplinary Counsel**

In his Reply to the Statement of Charges filed April 8, 2004, Respondent admitted to the allegations made against him with respect to the complaint of ODC. *See* Respondent's Reply to Statement of Charges. In the majority of the above-referenced complaints, Respondent continued to represent the Complainants and failed to withdraw as their counsel when his alleged physical and/or mental condition materially impaired his ability to represent them. Therefore, it is not disputed that he violated Rule 1.16(a)(2) of the Rules of Professional Conduct.

Ms. Ruth, aware of Respondent's issues with his health, testified that she specifically asked Respondent if he could continue to handle her son's potential malpractice case.

Respondent did not recommend to her that she seek alternate counsel, instead she stated that he advised that although he was distributing some of his cases he intended to continue working on her son's. *See* Transcript at 34. She further stated that had Respondent advised her that he was unable to continue working on her son's case that she would have sought alternate counsel prior to the statute of limitations lapsing. *See* Transcript at 37.

Mr. Moss testified that he asked Respondent if he was able to proceed with his case and Respondent advised that he was able to continue. *See* Transcript at 106-107. Mr. Moss also testified that had Respondent advised him that he was unable to pursue his appeal that he would have obtained alternate counsel. *Id* at 108.

Additionally, Respondent failed to respond to any of the requests for responses to the complaints then filed against him. ODC subsequently requested a Subpoena Duces Tecum be issued for him on August 29, 2003, requiring him to testify in a sworn statement before disciplinary counsel at 10:00 a.m. on October 1, 2003, and to produce and permit inspection of all documents pertaining to the then existing complaints. *See* ODC Exhibit 50.

Respondent's wife accepted service of the Subpoena Duces Tecum at Respondent's home address on September 16, 2003. *See* Exhibit 51. On or about September 30, 2003, after many attempts to speak with Respondent, Disciplinary Counsel Rachael Fletcher spoke to Respondent by telephone wherein he assured her he would file the responses to the outstanding complaints within the week and requested that the date of his sworn statement be changed from October 1, 2003 to October 8, 2003.

By letter dated September 30, 2003, ODC confirmed the rescheduling of Respondent's October 1, 2003 sworn statement to October 8, 2003, and again requested Respondent to

provide the responses to the then existing complaints. See Exhibit 52. Respondent failed to appear for his sworn statement on October 8, 2003 as agreed with ODC and failed to produce any documents as required by the Subpoena Duces Tecum.

#### IV. DISCUSSION

Syl. Point 4 of Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998) holds: Rule 3.16 of the Rules of Lawyer Disciplinary Procedure provides that when imposing a sanction after a finding of lawyer misconduct, the Court shall consider: (1) whether 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. A review of the extensive record in this matter indicates that Respondent has transgressed all three factors set forth in Jordan and the aggravating factors outweigh the mitigating factors in this case.

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. Respondent accepted \$2,000.00 from Lavern Ruth to obtain a second opinion regarding a potential medical malpractice claim for her son. However, he never produced an opinion, allowed the statute of limitations to lapse on the claim, and failed to provide Ms. Ruth any accounting for or offer to refund the \$2,000.00 she paid. Instead, he admits that Ms. Ruth's funds were "probably misinterpreted or misused and consumed by expenses at the offices" as the account was closed and Ms. Ruth's money was no longer in the account. See Transcript at 281.

Moreover, in a medical malpractice action for Jeannettia D. Spencer, Respondent never retained an expert, took any depositions, or complied with discovery deadlines. Ms. Spencer was left without any means of communication with Respondent and he ultimately entered into a stipulation to dismiss the claim with prejudice without Ms. Spencer's knowledge. Ms. Spencer testified that she discovered that her case had been dismissed from speaking with the presiding judge's secretary. *See* Transcript at 145.

Lois Heath gave Respondent \$200.00 for a filing fee to institute a civil action for wrongful termination of employment after receiving a right to sue letter, but Respondent allowed the time to file suit in the matter to lapse. Although she provided him the money in March 2000, he never advised her of the lapse in time until July 2003. Ms. Heath stated that until receiving the July 2003 letter she was under the impression the case had been filed. *See* Transcript at 214. Ms. Heath testified that she has yet to receive any refund from Respondent. *Id.* at 215.

Ruth E. Royal paid Respondent a retainer fee of \$5,500.00 to pursue an employment discrimination case in 1997. Suit was filed in 2001, but Respondent failed to file his required portion of the pretrial order and failed to respond to a motion for summary judgment. In its ruling granting summary judgment, the Court noted that Respondent had failed to meaningfully participate in the final pretrial conference and cited this failure as additional grounds for dismissing the action. He did not advise Ms. Royal of the dismissal.

Nancy C. Cooper paid Respondent a retainer fee of \$5,500.00 to represent her in 2000. Respondent assured client Nancy Cooper he was well enough to represent her when her matter would be tried. However, he was unable to properly prepare for trial and failed to

communicate with Ms. Cooper. Instead, Ms. Cooper attended her pretrial conference without the benefit of counsel and attorney Dwayne Tinsley appeared on behalf of Respondent attempting to secure a continuance. The request was denied. Respondent then promised Ms. Cooper he would complete paperwork for a settlement she reached on her own and return her \$5,500.00. Nevertheless, he failed to either complete the paperwork or return the retainer fee.

The record also reflects that Respondent failed to respond to inquiries of his clients. Clients James C. Meeks, Herbert and Hubert McKinney, and Raymond J. Smith, all sent him letters by certified mail, but they were all returned to the clients marked "Unclaimed." Respondent set a conference call with the McKinneys, but then failed to call them.

Respondent's pattern of violating his duties to his clients is clear and pervasive. In many cases Respondent promised his clients that he would take action on their behalf and then failed to do so. All of Respondent's clients who testified complained he would not respond to telephone calls or written inquiries. Clients James Meeks, Hubert and Herbert McKinney and Jeannettia D. Spencer all requested that Respondent surrender their files to them, but he failed to do so.

The record further reflects that Respondent violated his duties to the profession and to the legal system by failing to respond to any of the nine complaints sent to him by the ODC which comprise Counts I through IX of the formal charges against him. Second notices that were sent to Respondent by ODC were returned marked "Unclaimed" or "Box Closed - Unable to Forward - Return to Sender."

The ODC issued and served a subpoena for Respondent to appear and provide a sworn statement on October 1, 2003 at its offices. By agreement between Respondent and ODC, the statement was rescheduled to October 8, 2003. However, Respondent failed to appear as he promised.

The overwhelming evidence proves that Respondent acted both intentionally and knowingly when he committed the multiple violations described herein. These were not isolated misrepresentations or instances of occasional neglect. Rather, there was an ongoing pattern and practice of misconduct as demonstrated by Respondent's repeated conduct with numerous clients. The evidence overwhelmingly establishes that Respondent acted in a manner wherein any reasonable person would expect that particular consequences were certain to result and therefore he acted intentionally and knowingly.

Moreover, Respondent's clients have suffered immediate and actual financial damages as a direct result of his actions. As a result of his misconduct, clients' suits were dismissed and their rights prejudiced. He has allowed their statutes to run on their claims and therefore thwarted any and all efforts to recover financially from the parties they believed wrong them. This failure to allow his clients a chance to litigate their potential claims has also caused great emotional injury as these clients will never have any sense of closure on the underlying cause that brought them to Respondent in the first place.

#### **A. Mitigating Factors**

Respondent argues that there are mitigating factors present in this case that should insulate him from the imposition of discipline. The Scott court adopted mitigating factors in a lawyer disciplinary proceeding and stated that mitigating 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). It should be clear that mitigating factors were not envisioned to insulate a violating lawyer from discipline.

Respondent contends that his malfeasance and deficiencies are solely related to his health conditions. *See* Respondent’s Reply to Statement of Charges. After the hearing was held in July 2004, Respondent submitted medical records indicating he suffered heart problems and lead to a triple bypass surgery in March 2002 and has prostate surgery in or about July 2003. Regardless, he continued to have episodes of chest pain and dizziness and was referred to a psychiatrist in early June 2003. *See generally* Respondent’s Exhibits R1-R3. While Respondent contends that his 2002 treatment plan suggested by his cardiologist indicates that he was limited to “presiding over administrative proceedings” it does not explain why Respondent failed to take any actions to wind down his practice and protect his client’s interests at that or any point in the future. *See* Respondent’s Proposed Findings ¶ 22.

It is also noted that at no time during these proceedings did Respondent’s treating physicians ever submit a written expert opinion or submit testimony to establish that Respondent’s physical or psychological conditions were causally connected to his transgressions. It is not even clear which “condition” that Respondent suffers from is his claimed cause of his behavior as he presented no evidence of the same at the hearing other than his own self-serving testimony.

However, because of Respondent’s continued vague claims of disability, after the hearing was held in this matter, Respondent was evaluated by Dr. Ralph S. Smith, Jr., who

concluded he had suffered recurrent depressive episodes under times of stress and has a personality disorder not otherwise specified with dependent and passive aggressive features. See ODC Exhibit 64. Assuming *arguendo*, that his mental condition is considered a cause but is not under control after treatment, then the condition is not mitigating. The ABA Model Standards of Imposing Lawyer Sanction, as amended in 1992, recognize that a lawyer's mental disability is mitigating when:

- (1) there is medical evidence that the respondent is affected by a . . . mental disability;
- (2) the . . . mental disability caused the misconduct;
- (3) the respondent's recovery from the . . . mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
- (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

ABA, Model Standards for Imposing Lawyer Sanctions, Stnd. 9.32(i) (reprinted in I ABA/BNA Lawyers' Manual on Professional Conduct 01:839) (emphasis added). Even assuming *arguendo* that his issues with depression is a cause, Respondent still fails the third and fourth elements of this test.

The Scott court also noted to establish interim rehabilitation as a mitigating factor that "at a minimum a lawyer must show that since the treatment was started, he or she has not engaged in improper conduct." See Scott at 215. That is not the case. It is noted that Respondent's inattention to court orders, his clients and the Office of Disciplinary Counsel has spanned several years and continued even after the Statement of Charges was issued in this matter. Moreover, Dr. Smith noted Respondent had a tendency to not keep scheduled

appointments with his treating psychiatrist and that has delayed his recovery. *See* ODC Exhibit 64.

Finally, it is further noted that despite his self-serving claim that his medical issues hindered his ability to provide representation for and/or communicate with the above-referenced clients and ODC, Respondent has continued to act as a Mental Hygiene Commissioner in Kanawha County during 2002, 2003, and 2004. In 2002, he billed \$13,227.50 in 2002, in 2003 he billed \$47,571.50, and for the first six months of 2004, he billed \$44,921.50. *See* ODC Exhibits 57, 58 and 59. It would appear that Respondent's conditions only affect his ability to address the issues related to and arising from these complaints.

**B. Aggravating Factors**

Aggravating factors in this case clearly outweigh the effect of any alleged mitigation. Aggravating factors are also 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).

Pursuant to 9.22(e) of the ABA Model Standards, the failure to participate in disciplinary proceedings should be viewed as an aggravating factor. The admitted findings of fact in Count X and Count XI outlines Respondent's repeated failure to cooperate in these proceedings leading up to the filing of the Statement of Charges. Respondent argues that he "ultimately appeared at the office of Disciplinary Counsel and made a sworn statement to the pending charges." *See* Respondent's Proposed Findings ¶ 3. However, Respondent continually refused to properly file written responses to the complaints and/or appear for the October 2003 sworn statement during the investigation of the nine complaints. It was only after the formal charges were filed that ODC filed a Motion on or about February 27, 2004, and requested an order from the Hearing Panel Subcommittee to take Respondent's sworn statement. *See* Motion to Permit Discovery Deposition of Respondent. The same was ultimately granted by the Hearing Panel Subcommittee and Respondent appeared for the deposition. *See* Order entered April 23, 2004. The Hearing Panel Subcommittee properly found that it was only after the Statement of Charges was served upon him that he attempted to cooperate in any manner. *See* Hearing Panel Subcommittee Report at 29.

Moreover, the Panel noted that Respondent not only failed to respond to ODC, but also failed to respond to his clients and ultimately abandoned his private law practice without notice to his clients. Perhaps most disturbing, even after the Statement of Charges was issued and Respondent closed his law office he took no steps to return files or refund moneys due to his clients. He essentially closed up shop and left his clients with no information and

no recourse despite urging from ODC. *See* ODC Exhibit 48. Respondent's continued indifference to make amends or financial restitution to his clients should also be viewed as an aggravating factor. Additionally, because of such actions, on July 30, 2004, the State Bar Client Protection Fund was required to reimburse one of Respondent's clients a \$5,500.00 retainer fee she had paid Respondent, *Daniels v. Dues*, I.D. No. 04-07-CSF.

The Scott Court noted that the ABA Model Standards for Imposing Lawyer Sanctions has also recognized "multiple offenses" as an aggravating factor in a lawyer disciplinary proceeding. Scott, 579 S.E.2d at 558. The Hearing Panel Subcommittee determined that Respondent has committed multiple offenses and these violations are not minor infractions. The multiple infractions committed by Respondent go to his integrity and fitness to practice law.

In the past the Court has looked to the overall history of the lawyer, including such things as prior wrongdoing and discipline, when determining what sanction to impose. Committee on Legal Ethics v. Tatterson (Tatterson II), *C.f.*, Syl. pt. 5, 177 W. Va. 356, 352 S.E.2d 107 (1986) [prior discipline aggravating because it calls into question a lawyer's fitness to practice a profession imbued with the public's trust]. Additionally, 9.22(a) of the ABA Standards for Imposing Lawyer Sanctions states that any prior discipline of an attorney should also be viewed as an aggravating factor. Aside from the instant multi-count Statement of Charges, Respondent has previously been disciplined by the Supreme Court of Appeals of West Virginia with a public reprimand in 1992 for the misdemeanor offense of willful

failure to file an income tax return, Committee on Legal Ethics v. Theodore R. Dues, Jr., Sp. Court No. 21424, December 11, 1992 (unpublished). It is noted that at the time of this disciplinary matter Respondent also attributed his misconduct to certain medical conditions and personal problems. Respondent was also admonished by the Lawyer Disciplinary Board in 1999 for a Rule 8.1(b) violation of failing to respond to disciplinary authority, Charles McGraw v. Theodore Dues, I.D. No. 97-03-013, July 8, 1999.

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 accepting legal fees for services for which he was retained and subsequently failing to perform. Respondent has exhibited a pattern and practice of failing to cooperate during the investigation of an ethical complaint. Respondent has also exhibited a pattern and practice of failing to communicate with his clients and failing to diligently pursue cases on behalf of clients.

Moreover, the record also reflects that on or about September 10, 2002, the U.S. District Court in Charleston, West Virginia dismissed the cases of Kelly v. Powell, et. al, #2:01-CV-00107 and Mollohan v. Potter, #2:00-CV-1082 for the failure of Respondent to inform the Court that he was ready to resume prosecution of the cases or to substitute other counsel. In addition, in the matter of Bannerman v. Potter, #2:01-CV-00108, the U.S. Court granted summary judgment against Respondent's client on the merits on September 30, 2002, after Respondent had failed to respond in the matter. The Hearing Panel Subcommittee also viewed this pattern of conduct as an aggravating factor.

## 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 until such time that rehabilitation is established.

"A sanction is to not only punish the attorney, but should also be designed to reassure the public confidence in the integrity of the legal profession and deter other lawyers from similar conduct." Syl. pt 2, Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993); Syl. pt 3, Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Syl. pt 5, Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Syl pt. 3, Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); and Syl pt. 3, Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000). For the public to have confidence in our disciplinary and legal systems, lawyers such as Respondent must be removed from the practice of law until such time that rehabilitation can be demonstrated to ensure the sanctioned conduct does not occur in the future. A severe sanction is also necessary to deter lawyers who may be considering or who are engaging in similar conduct.

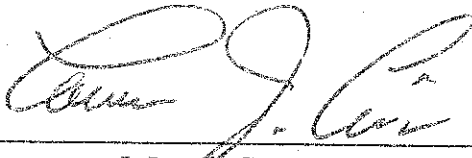
Section 4.42 of the ABA Standards for Imposing Lawyer Sanctions provides that absent aggravating or mitigating circumstances, suspension is generally appropriate when (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or (b) a lawyer engages 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 aggravating factors in this case clearly outweigh the mitigating factors and Respondent's conduct falls within the proscribed conduct which warrants suspension.

A review of the record clearly indicates that the Hearing Panel Subcommittee properly considered the evidence, made an individualized assessment of the case, and made an appropriate recommendation to this Court. The Hearing Panel Subcommittee's recommendation in this matter is consistent with those imposed by this Honorable Court in similar cases such as Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E.2d 550 (2003) [lawyer diagnosed with Bi-polar II disorder committed multiple violations was suspended from the practice of law for three years.] and Lawyer Disciplinary Board v. Miller, Supreme Court Nos. 27867 and 28885, January 23, 2002 (unpublished decision). [lawyer, amongst other personal problems, was diagnosed with diabetes committed multiple violations and had a prior history of discipline was suspended from the practice of law for two years and six months.]

In reaching its recommendation, the Hearing Panel Subcommittee considered Respondent's expression of remorse and his medical and psychological conditions as mitigating when recommending the sanctions. As it is clear that given Respondent's patterns

of misconduct, the recommended sanctions could have been much more severe. However, the Hearing Panel Subcommittee reasoned that although there is evidence of mitigation, it is also true that despite his substantial experience as a lawyer, he has engaged in a pattern of misconduct, failed to respond to disciplinary authority, been subject to prior disciplinary sanctions, and committed multiple offenses, all of which are aggravating factors. The Hearing Panel Subcommittee believes that Respondent's conditions should and have mitigated the recommended sanctions, but the same does not insulate him from a period of suspension of his law license.

*Respectfully submitted,*  
The Lawyer Disciplinary Board  
By Counsel



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Lawrence J. Lewis [WVSB No. 2199]  
Chief Lawyer Disciplinary Counsel  
Office of Disciplinary Counsel  
2008 Kanawha Boulevard, East  
Charleston, West Virginia 25311  
(304) 558-7999  
(304) 558-4015 facsimile



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Rachael L. Fletcher [WVSB No. 8806]  
Disciplinary Counsel  
Office of Disciplinary Counsel  
2008 Kanawha Boulevard, East  
Charleston, West Virginia 25311  
(304) 558-7999  
(304) 558-4015 facsimile

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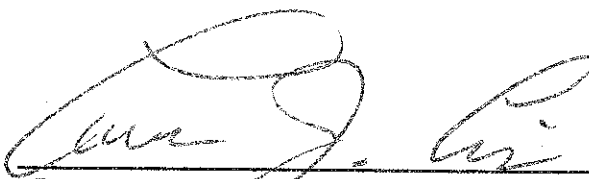
**CERTIFICATE OF SERVICE**

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This is to certify that I, **Lawrence J. Lewis**, Chief Lawyer Disciplinary Counsel and I, **Rachael L. Fletcher**, Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 3<sup>rd</sup> day of June 2005, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" upon Respondent Theodore R. Dues, Jr. by mailing the same via United States Mail, both certified and regular, with sufficient postage, to the following address:

Theodore R. Dues, Jr., Esquire  
1034 Upland Drive  
South Charleston, West Virginia 25309



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Lawrence J. Lewis



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Rachael L. Fletcher