

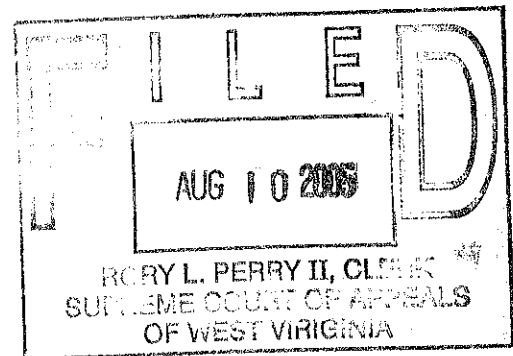
**BEFORE THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA**

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

Bar No.: 1064

Supreme Court No.: 31713

REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD



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)

TABLE OF CONTENTS

ARGUMENT	1
A. Disciplinary Proceedings	1
B. Mitigating Factors Revisited	4
C. Aggravating Factors Revisited	6
DISCUSSION	7
SANCTION	9

TABLE OF AUTHORITIES

Cases:

<i>Committee on Legal Ethics v. Theodore R. Dues, Jr.</i> , Supreme Court No. 21424, December 11, 1992 (unpublished)	7
<i>Committee on Legal Ethics v. Roark</i> , 181 W.Va. 260, 382 S.E.2d 313 (1989)	11
<i>Committee on Legal Ethics v. Tatterson</i> , 177 W.Va. 356, 352 S.E.2d 107 (1986)	7
<i>Committee on Legal Ethics v. Walker</i> , 178 W.Va. 150, 358 S.E.2d 234 (1987)	11
<i>Committee on Legal Ethics v. White</i> , 189 W.Va. 135, 428 S.E.2d 556 (1993)	11
<i>Daily Gazette v. Committee on Legal Ethics</i> , 174 W.Va. 359, 326 S.E.2d 705 (1984)	10
<i>Lawyer Disciplinary Board v. Friend</i> , 200 W.Va. 368, 489 S.E.2d 750 (1997)	11
<i>Lawyer Disciplinary Board v. Hardison</i> , 205 W.Va. 344, 518 S.E.2d 101 (1999)	10
<i>Lawyer Disciplinary Board v. Keenan</i> , 208 W.Va. 645, 542 S.E.2d 466 (2000)	11
<i>Lawyer Disciplinary Board v. Scott</i> , 213 W.Va. 209, 579 S.E.2d 550, 555 (2003)	5,7,8,10
<i>Lawyer Disciplinary Board v. Wheaton</i> , 216 W.Va. 673, 610 S.E.2d 8, 16-17 (2004)	5,6

ARGUMENT

A. DISCIPLINARY PROCEEDINGS

Respondent cannot contest his own willful admissions and his actions in the disciplinary process, simply because he does not like the outcome and the sound recommendation of the Hearing Panel Subcommittee.

Respondent was repeatedly requested to provide documentation and explanations, first by ODC and then by the Hearing Panel Subcommittee. The record is replete with evidence that ODC and the Hearing Panel Subcommittee gave Respondent every conceivable opportunity to provide a scintilla of evidence and to fully represent himself at every stage of these proceedings. Respondent failed to do so on several occasions.

Prior to the issuance of the Statement of Charges, ODC attempted to communicate with Respondent about the ever-worsening situation. All of these attempts by Disciplinary Counsel were either rejected or blatantly ignored by Respondent. ODC was required to issue a subpoena for Respondent to appear at the Office of Disciplinary Counsel to discuss the pending, unanswered complaints and Respondent's health-related issues. *See* ODC Exhibit 51. The day before his sworn statement, Respondent advised Disciplinary Counsel that he needed to reschedule the deposition due to health related issues. Disciplinary Counsel acquiesced without requiring any documentation from his treating physicians. *See* ODC Exhibit 52. However, despite his assurances and his stated willingness to address these issues, Respondent later failed to appear for the October 8, 2003, sworn statement.

Inexplicably, Respondent, a lawyer of twenty-six years, failed to honor a subpoena *duces tecum* issued by the Clerk of this Honorable Court.

After the Statement of Charges was filed and in a continued attempt to discern Respondent's position, ODC filed a Motion to Permit a Discovery Deposition of Respondent which was granted and subsequently set for April 17, 2004. *See* Motion to Permit Discovery Deposition of Respondent. Despite being duly noticed for this hearing and sending a facsimile to ODC on April 6, 2004, indicating he would be present at his deposition, Respondent failed to appear. *See* Order for the April 7, 2004 Hearing On Motion to Permit Discovery Deposition of Respondent. In the interests of justice, although already ordered, on April 21, 2004, a second hearing was held on the motion. Respondent appeared for this hearing and agreed to give a sworn statement of April 28, 2004. *See* Order for the April 21, 2004 Scheduling Conference and Hearing on Motion to Permit Discovery Deposition of Respondent.

At this sworn statement, Respondent stated under oath that he would provide medical records of his treating physicians. However, after not receiving the same or receiving any indication from Respondent that the same was forthcoming, ODC finally filed a motion to exclude Respondent's medical records and witnesses on May 26, 2004. *See* Disciplinary Counsel's Motion to Exclude Respondent's Medical Records and Witnesses from Hearing. This motion was duly noticed for the previously scheduled pre-hearing in this matter for July 1, 2004. Again, Respondent failed to appear for this duly noticed hearing. *See* Order for the July 1, 2004 Prehearing.

However, on or about July 21, 2004, nine days prior to the evidentiary hearing in this matter, Respondent filed a motion to reconsider the Hearing Panel Subcommittee's decision to exclude his medical evidence. *See Respondent's Motion to Reconsider.* The same was heard the morning of the July 30, 2004 evidentiary hearing. As the record reflects, ODC and Respondent jointly proposed that the hearing be conducted and that Respondent be granted 30 days from the date of the hearing to submit medical evidence. The members of the Hearing Panel Subcommittee, in the interests of justice and fairness, granted this proposal. *See Order for the July 30, 2004 Hearing.*

Additionally, in the interest of justice and fundamental fairness, the Hearing Panel Subcommittee chose not to make a decision based solely on the filed pleadings wherein Respondent admitted to these allegations, instead based its decision entirety in the evidence presented to it. The Hearing Panel Subcommittee, despite his prior admissions, listened to evidence adduced by Respondent through his cross-examination of Complainants that was contrary to these admissions. Finally, although under no legal obligation to do so, ODC requested that the evidentiary record remain open for a psychological evaluation and for submission of Respondent's medical records. It is clear that at every juncture of these proceedings, Respondent was given an opportunity to represent himself to the full extent available to him.

Respondent has practiced law for over twenty-six (26) years. He has been involved before in the disciplinary process at the level of the Supreme Court of Appeals and the Investigative Panel of the Lawyer Disciplinary Board. Respondent, an experienced attorney,

appeared at the hearing and despite previously admitting to all of the allegations in the Statement of Charges, was still permitted to thoroughly cross-examine each witness put forward by ODC. Respondent was a zealous advocate for himself and was properly afforded due process in these proceedings.

B. MITIGATING FACTORS REVISITED

Respondent contends that his pattern of misconduct and neglect of his clients is solely attributable to his mental/physical condition. Respondent essentially contends that he should now be insulated from appropriate discipline because his condition is under control. However, inexplicably, in the same breath, Respondent also contends that his *pro se* representation of himself throughout these disciplinary proceedings was inadequate due to his mental/physical condition. Respondent appears to refute his position that his mental/physical conditions are under control and that any misconduct has been arrested, if he was still under the same disability that plagued him until July 5, 2005. Apparently, Respondent suffered from a disability that hindered his ability to practice and his ability to fully represent himself in these proceedings, but no longer suffers from a disability now that it is time to impose sanction. It would appear that Respondent holds simultaneous, self-serving positions that are nonetheless diametrically opposed.

Moreover, it is clear from the recommended Eighteen (18) month suspension that the Hearing Panel Subcommittee properly considered Respondent's disability as a mitigating factor but not as an insulator from discipline. The Hearing Panel Subcommittee made a finding of fact that Respondent suffered from a disability that contributed to his pattern of

serious transgressions against his clients. However, Respondent now wants this Court to also determine that he has recovered and that his “interim rehabilitation” should also be viewed as mitigating.

However, the Scott court noted that to establish interim rehabilitation as a mitigating factor “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. The Scott Court found that Mr. Scott was diagnosed and began treatment in March of 2001. The Court agreed with ODC that Mr. Scott engaged in improper conduct after his treatment for bi-polar II began and therefore his claim of interim rehabilitation was not accepted by this Court. *Id* at 215-216. Also see Lawyer Disciplinary Board v. Wheaton, 216 W.Va. 673, 610 S.E.2d 8, 16-17 (2004).

In the instant case, Mr. Dues was diagnosed with depression at least by 2002 wherein he began treatment with his psychiatrist. It is noted that Respondent’s inattention to Court orders, to his clients and to the Office of Disciplinary Counsel has spanned several years and continued even after the instant Statement of Charges was issued in this matter. Finally, again, his position of interim recovery, is refuted by his own assertions that his disability continued until he obtained counsel who stated on his behalf that Respondent was a “very sick man with a very sick man for a client”. See R. Brief at 13.

Respondent also contends that he has acknowledged responsibility for any financial losses to his clients. He further notes that “if financially able” he will compensate those persons for their losses. See Respondent’s Brief at 12. It is noted that Respondent’s clients suffered more than just calculated financial loss. In many cases, due to Respondent’s

misconduct, his clients lost their right to sue and their right to meaningful access to the legal system to address their perceived wrongs. Moreover, by his conduct, his clients lost respect for the legal system and for lawyers. Additionally, it is noted that although, as early as April 2004, Respondent admitted to the misconduct, he has not taken any steps to refund any of the unearned fees he collected to any of his clients. Regardless, this Court has noted that the eventual refunding of unearned fee is not mitigating on the issue of sanctions.

Kupec I provides that:

Where the restitution has been made after the commencement of disciplinary proceedings, or when made as a matter of expediency under the pressure of the threat of disciplinary proceedings, some courts have refused to consider it a mitigating factor.

[Kupec I, 515 S.E.2d at 570, citations omitted.]

Also See Lawyer Disciplinary Board v. Wheaton, 216 W.Va. 673, 610 S.E.2d 8, 17 (2004).

Therefore, Respondent's future offer to compensate his clients for money that is rightfully owed to them can in no way be viewed as mitigating now. The instant case Hearing Panel Subcommittee addressed this issue and recommended that compensation to his clients to be a condition to Respondent's reinstatement to the practice of law.

C. AGGRAVATING FACTORS REVISITED

Respondent also contends that his prior disciplinary record should not be viewed in aggravation of any sanction imposed. Again, inexplicably, Respondent wants this Honorable Court to take into account his twenty-six (26) year legal career and his reputation, but to turn a blind eye to his prior instances of misconduct that establish a pattern of unacceptable behaviors. However, it is well settled law that this 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). The proposed recommendation of a three (3) month suspension, was modified by the Court. It is noted that at the time of that disciplinary matter, Respondent 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 and for a Rule 1.16(d) violation of failing to timely refund an unearned retainer, Charles McGraw v. Theodore Dues, I.D. No. 97-03-013, July 8, 1999.

DISCUSSION

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). Mitigation has been also defined as “[t]o make less severe. Alleviation, reduction, abatement or diminution of a penalty or punishment imposed by law.” Black’s Law Dictionary, 6th Edition. (1990). The sanction proposed by Respondent amounts to an empty sanction. Chief among the proposed sanction, Respondent has proposed to limit his practice to administrative matters. However, Respondent is already limiting his practice, albeit without notice to and at the expense of his private practice clients, to administrative matters and the same should not now be considered a sanction. It appears as though Respondent improperly views mitigation of a sanction as insulation from sanction.

As Respondent points out in his brief, he is not the only lawyer who has been diagnosed with and suffered from a psychological disorder that has affected his ability to practice law. John A. Scott, who was diagnosed with bi-polar II disorder, committed twenty-two (22) violations of the Rules of Professional Conduct in his position as Prosecuting Attorney and was ultimately suspended for a period of three (3) years. Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E. 2d 550 (2003). It is also noted that in addition to the bi-polar disorder, Mr. Scott had never received any prior discipline and was an inexperienced attorney both of which are considered mitigating factors. Moreover, Mr. Scott self-reported his instances of misconduct, fully cooperated through all stages of the proceedings and voluntarily removed himself from the office of prosecutor for Harrison County. Again, Mr. Scott’s bi-polar disorder was properly recognized and the same acted in **mitigation**, but not **insulation**, of sanctions.

Respondent's condition of depression is no more volitional than Mr. Scott's bi-polar II disorder. The fact that he suffers from depression is clearly not a choice that was made by Respondent. However, it was Respondent's choice not to employ the 2002 directives of his psychiatrist to limit his practice in a responsible manner. Again, Respondent continued to act as the Mental Hygiene Commissioner of Kanawha County, West Virginia from 2002 until present. In 2002, Respondent billed \$13,227.50, in 2003, he billed \$47,571.50 and for the first six months of 2004, Respondent billed \$44,921.50. *See* ODC Exhibits 57, 58, and 59.

It was Respondent's choice not to refund the unearned fees when he was unable or unwilling to perform the legal services. It was Respondent's choice not to return the files of his clients so they could seek other representation. It was Respondent's choice to knowingly advise his clients, that despite any condition, he would continue working on their cases. His clients testified that upon becoming aware of Respondent's conditions, they asked if he could continue as their counsel and that Respondent told them that could. Therefore, when given the opportunity to protect his clients and their claims, Respondent chose not to do so. Instead, Respondent chose to abandon his responsibilities to his clients, the Courts, and the Office of Disciplinary Counsel.

SANCTION

The Hearing Panel Subcommittee properly found that the evidence established that Respondent committed thirty-nine (39) serious 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].


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) 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.]

Respondent's proposed sanction fails to address the stated goals of the disciplinary process. 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, his ongoing pattern of misconduct and his prior disciplinary

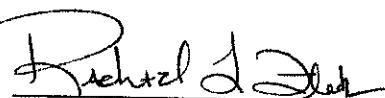
record, the only way to protect the public in this case is to remove Respondent from the practice of law for a stated period of time.

“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). The recommended sanction from the Hearing Panel Subcommittee is well-reasoned and accomplishes the stated goals of the disciplinary process. It is unlikely that the empty sanction proposed by Respondent would reassure the public confidence in the integrity of the practice of law or deter other lawyers from similar misconduct.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel



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

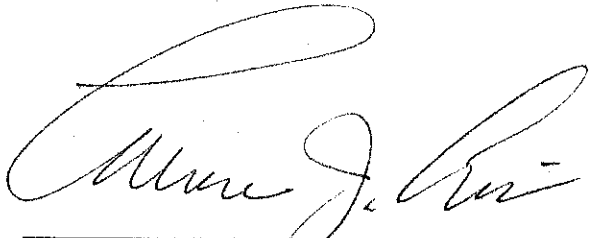


Rachael L. Fletcher [WVSB No. 8806]
Disciplinary Counsel
Office of Disciplinary Counsel
2008 Kanawha Boulevard, East
Charleston, West Virginia 25311
(304) 558-7999
(304) 558-4015 facsimile


CERTIFICATE OF SERVICE

This is to certify that I, **Lawrence J. Lewis**, Chief Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel and **Rachael L. Fletcher**, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 10th day of August, 2005, served a true copy of the foregoing "**REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD**" upon Thomas W. Smith, counsel for Respondent Theodore R. Dues, Jr., by mailing the same, United States Mail with sufficient postage, to the following address:

Thomas W. Smith, Esquire
2008 Quarrier Street
Charleston, West Virginia 25311



Lawrence J. Lewis, Esquire



Rachael L. Fletcher, Esquire