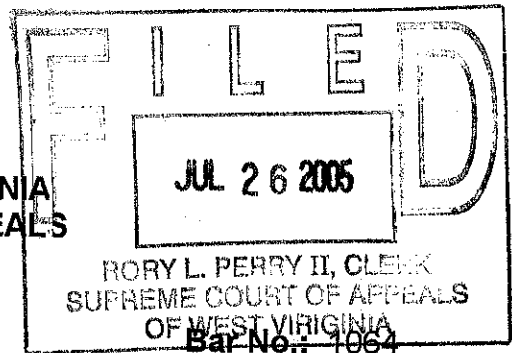


BEFORE THE WEST VIRGINIA  
SUPREME COURT OF APPEALS



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

Supreme Court No.: 31713

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**BRIEF OF RESPONDENT**

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BY COUNSEL,

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**I.  
NATURE OF PROCEEDINGS  
AND  
RECOMMENDATION DECISION OF THE HEARING PANEL SUBCOMMITTEE**

The Respondent does not disagree with the Lawyer Disciplinary Board's recitation of the facts relating to the history of this matter and actions occurring below.

**II.  
RESPONDENT'S EXCEPTIONS**

The Respondent does not oppose the imposition of any of the recommended sanctions other than the recommendation for an eighteen-month suspension of Respondent's license to practice law.

Respondent respectfully submits that, given all the facts and circumstances, suspension is inappropriate as it is unduly severe and unnecessary to protect the interest of the public and the bar.

**III.  
STANDARD OF REVIEW**

The Respondent agrees with the Lawyer Disciplinary Board's position that this Court's standard of review is de novo.

**IV.  
ADMITTED FINDINGS OF FACT**

Respondent admitted the conduct alleged in all counts (one through eleven). While standing on Respondent's admissions, counsel feels that it is critical to note that a fair review of the evidence adduced at the hearing of July 30, 2004 before the Hearing Panel differs rather markedly from the allegations which respondent admitted in ways supportive of Respondent's solely raised exception. Counsel also feels that it is

important to point out that during virtually the entire period of the complained of behavior, if not before, and during the vast majority of the time the matters underlying this action were in the Bar disciplinary process, Respondent was determined by the independent medical examiner, Ralph Smith, M.D., who was chosen by Bar Counsel, to be suffering from "Major Depression" (report of R. Smith, M.D. October 20, 2004). Unfortunately, during the periods just mentioned, Respondent was representing himself. Counsel would respectfully submit that Respondent's mental impairment is at the very heart of the complained of behavior and Respondent's dealings or lack of dealings with Bar Counsel leading up to the July 30, 2004 hearing.

The Hearing Panel Subcommittee report finds Respondent's overall misconduct to be violative of Rules of Professional Conduct 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 1.15 (Safekeeping Property), 1.16 (Declining or Terminating Representation), 8.1 (Bar Admission and Disciplinary Matters), and 8.4 (Misconduct).

Respondent acknowledges he "admitted" and accepts responsibility for the allegations in the complaints filed by his former clients. The record developed at the July 30, 2004 hearing reflects that not all of the complained of conduct was completely accurate.

Counsel for Respondent would also note that, during the entire time frame of the complained of conduct, Respondent was in steadily declining physical health which culminated in a heart attack and open heart surgery in March of 2002. Following the heart attack and surgery, it is uncontroverted that Respondent began to fall ever deeper into a depressive state.

As to the "admitted" findings of fact, Respondent acknowledged that he fell "well short of his obligation to [his] clients." That said, the examinations of the complainants at the hearing of July 30, 2004 revealed a number of significant facts inconsistent with the allegations.

Very telling is the fact that while out of the office ill, Respondent continued to pay a paralegal to be there full-time until July of 2003. The testimony of the complainants and Respondent reveals that the paralegal, although paid full-time, was working at best part-time and certainly not maintaining the office as one might reasonably expect (Tr. 100).

Ms. Ruth, the complainant in Count II, testified that Respondent had informed her of the applicable statute of limitations for her case early in the representation and she became aware of his illness some six (6) months prior to the statute running out.

The McKinney twins, complainants in Count III, under examination acknowledged that the age discrimination case of Herbert was not, as alleged, dismissed for failure to prosecute; it was settled with his agreement. (Tr. 67). Additionally, the "whistle-blowing" case was not dismissed for failure to prosecute, it was dismissed on Summary Judgment for failure to make a prima facie case. Lastly, but importantly, the U.S. Supreme Court petition alleged by complainants to have not been filed, though "admitted" by Respondent was, in fact, timely filed. (Tr. 84). One of the McKinney twins also acknowledged on cross-examination Respondent had told him as early as November of 2000 that he was ill (Tr. 90).

Jeffery Moss, the complainant in Count VII, testified that he never paid the costs necessary to process his appeal and that he had approached another attorney, Ellen

Golden, Esq., who telephonically consulted with Respondent while Mr. Moss was present in her office that she would not take his case unless such costs were paid. Mr. Moss also stated he had been made aware of Respondent's health problems (Tr. 105).

Jeannettia Spencer, the complainant in matter #03-03-270, whose complaint was again admitted in toto, testified that there was counsel who preceded Mr. Dues and that attorney had filed medical malpractice action in question without designating an expert, and had not designated an expert for eighteen (18) months after the filing of the action; that attorney had been "fired" by Ms. Spencer (Tr. 184). It also appears that the prior attorney's representation was terminated, in part, for not using Dr. Seldona as an expert. Additionally, another attorney had been in the case prior to Respondent (Tr. 155, 158). Ms. Spencer also admitted that Respondent persistently spoke to her about the need for an expert (Tr. 165) and offered to get out of the case and obtain other counsel for her (Tr. 161).

Ms. Spencer also acknowledged that a discussion of what appeared to be the possibility of Rule 11 sanctions, for a "frivolous lawsuit," did occur (Tr. 173, 174, 181, 182) and she stated she had not wanted to be exposed to paying costs (Tr. 174, 175). Both such admissions are consistent with Respondent's voluntarily dismissing the action to avoid a motion for Rule 11 sanctions by the Defendant.

Raymond Smith (Count V) testified that he had retained Respondent in October 2001 (Tr. 191) and that his first payment of \$3,500 toward the \$5,500 retainer was paid in late March of 2002 (Tr. 192); subsequent to that, Respondent told him he was too ill to represent him and obtained substitute counsel. He further testified that there was confusion about the substitute counsel's fee, but post-filing he determined that there

was, as represented, an agreement between Respondent and substitute counsel and that he had attempted to withdraw the complaint but was not allowed to do so (Tr. 200). At least one member of the Hearing Panel expressed an opinion that no violation had occurred (Tr. 203).

Lois Heath, Count VI, testified that, while Respondent had missed the statute of limitations in her case, he wrote her and informed her of his omission (Tr. 213, 214).

The hearing record reveals that with regard to Ruth Royal (Count VIII), although ill, Respondent attempted through substitute counsel to continue to provide her with representation (Tr. 229-231).

Nancy Melton, Count IX, noted that she knew of Respondent being ill in the spring of 2001 (Tr. 251) and that Respondent attempted to have other counsel continue with representation (Tr. 253, 254).

Lastly, in the context of admitted conduct and the hearing below, it is apparent that the record is decidedly less clear than it might be due to the fact that Respondent was precluded from introducing evidence or witnesses because of his failure to comply with time frame orders. Counsel for Respondent would respectfully submit that such self-injurious conduct is an excellent example of the degree of impairment Respondent was suffering during the discovery phase of the disciplinary proceeding. There were clearly witnesses who could have shed light on some issues who could not be called. (Tr. 118, 129, 136, 164, 184, 194, 231, 252) As the record also reflects, given the panel's ruling excluding Respondent's evidence, it was only through the good offices of Chief Disciplinary Counsel that the Subcommittee and this court were able to have

Respondent's treating psychiatrist's records and consequently an independent examination report from Dr. Smith (Tr. 18, 19).

## V. DISCUSSION

Respondent respectfully submits that this court has long distinguished in Bar discipline matters between intentional wrongdoing and errors or omissions caused by impairment. Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344 518 S.E.2d 101 (1999). Hardison dealt with impairment brought on by addiction to alcohol and controlled substances. The court, in that case, noted that addiction is an illness and stated quite succinctly that "an alcoholic does not want to suffer from alcoholism any more than a cancer patient wants to suffer from cancer." *supra* at 351. Respondent would submit that the reference to cancer is apt in this case. While addiction has a volitional component, albeit a de minimus one, depression, such as that suffered by Respondent, is no more volitional than cancer.

Dr. Smith, acting as an independent medical examiner, found Respondent to be suffering from "recurrent episodes" of "major depression" at virtually all times relevant to the complaints underlying this matter (report of R. Smith, M.D. October 20, 2004). A review of the time frame of this case reveals that Respondent was also suffering from major depression during the time he engaged in the conduct complained of by the Disciplinary Counsel (Count XV).

The National Institute of Mental Health (NIMH) describes depression disorders as follows:

"A depressive disorder is an illness that involves the body, mood, and thoughts. It affects the way a person eats and sleeps, the way one feels about oneself, and the way one thinks about things. A depressive

disorder is not the same as a passing blue mood. It is not a sign of personal weakness or a condition that can be willed or wished away. People with a depressive illness cannot merely "pull themselves together" and get better. Without treatment, symptoms can last for weeks, months or years. Appropriate treatment, however, can help most people who suffer from depression." [www.nimh.nih.gov/publicat/depression.cfm](http://www.nimh.nih.gov/publicat/depression.cfm)

NIMH lists the following as symptoms of depression, a striking number of which are applicable to Respondent:

- "Persistent sad, anxious or "empty" mood
- Feelings of hopelessness, pessimism
- Feelings of guilt, worthlessness, helplessness
- Loss of interest or pleasure in hobbies and activities that were once enjoyed, including sex
- Decreased energy, fatigue, being "slowed down"
- Difficulty concentrating, remembering, making decisions
- Insomnia, early-morning awakening, or oversleeping
- Appetite and/or weight loss or overeating and weight gain
- Thoughts of death or suicide; suicide attempts
- Restlessness, irritability
- Persistent physical symptoms that do not respond to treatment, such as headaches, digestive disorders, and chronic pain"

[www.nimh.nih.gov/publicat/depression.cfm](http://www.nimh.nih.gov/publicat/depression.cfm)

Major depression such as that Respondent suffered is distinguished from simple depression by NIMH as follows:

"Major depression is manifested by a combination of symptoms that interfere with the ability to work, study, sleep, eat, and enjoy once pleasurable activities. Such a disabling episode of depression may occur only once but more commonly occurs several times in a lifetime." *id.*

Respondent is certainly not alone among lawyers in his illness. A Johns Hopkins University survey of twelve thousand (12,000) people in 1991 found lawyers to be most likely to suffer from major depression. [Herrmann, Andrew. Chicago Sun-Times September 13, 1991.]

*"A disproportionate number of lawyers also commit suicide during middle age.";*  
Eaton, Mordel and Garrison. *"Occupations and the Prevalence of Major Depressive Disorder,"* 32 J. Occupational Med. 1083-1132 (1990).

State Bar Associations are becoming alerted to the problem of depression among lawyers. *"Depression Among Lawyers 'The Colorado Lawyer'"* Vol. 33 No. 1 (January 2004). Jones, Don and Crowley, Michael; *"Depression and Suicide Among Lawyers"* Bar Leader (April/March 1998) (Louisiana State Bar and Missouri State Bar).

Respondent recognizes that, while giving consideration to the Lawyer Disciplinary Board's recommendations as to questions of law and the appropriateness of any proposed sanction, this Court remains the ultimate arbiter as to final resolution of Bar discipline matters. Committee on Legal Ethics v. McCorkle, 192 W.Va. 286 452 S.E.2d 377 (1994). McCorkle supra also stands for the proposition that the deference usually afforded the Board's findings should not be deferred to where such are not supported by reliable, probative and substantial evidence considering the record as a whole. *id* at 381. See also Lawyer Disciplinary Board v. Cunningham, 195 W.Va. 27 464 S.E.2d 181 (1995).

Respondent respectfully submits that the subcommittee fails to adequately consider the medical information supplied by Dr. Smith and the ODC to misconstrue the provisions of the A.B.A. Model Standards for Imposing Lawyer Sanctions (1992). The Model Standards recognize a mental condition to be 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).

When reviewing the above-stated criteria, it is clear Respondent meets all of them.

As to whether Respondent is affected by a mental disability, Dr. Smith's report, supported by the notes of Dr. Kommer, the treating psychiatrist, makes an unassailable argument that Respondent suffered from untreated major depression during the times of the complained of behavior (report of R. Smith, M.D. October 20, 2004).

As to the second criterion, causation, Respondent would respectfully submit that the behavior of Respondent underlying the violations are textbook examples of how a lawyer suffering from "major depression" acts.

A withdraw from stressful stimuli, self-imposed isolation, and an inability to cope with daily responsibilities caused virtually all of the problems that bring Respondent before this court.

While the Subcommittee found Respondent's psychiatric impairment to be mitigating, the Lawyer Disciplinary Committee, by its counsel, argues the A.B.A. Standards have not been met as to criteria 3 and 4. A review of the record fails to substantiate this position.

As to criterion (3), the record reflects that Respondent, per Dr. Smith's opinion letter of October 20, 2004, is making "good progress" (report of R. Smith, M.D. October 20, 2004) and he has continued to function well as a Mental Hygiene Commissioner.

As to criterion (4), treatment has arrested the "misconduct."

Respondent has reduced substantially his area of practice and Dr. Smith opines, that with treatment, Respondent can function adequately as a lawyer.

The gravamen of Respondent's conduct is omission: A failure to do what was required of him as counsel to the complainants and required of him in response to ODC actions. Factually and medically, the problem with viewing his actions as overt, calculated conduct is that it was not overt or calculated or, in a realistic sense, even intentional; the behavior was symptomatic of the disease. This case presents a lawyer who, due to an untreated but treatable mental disorder, was unable to perform in the ways required.

Suspension of Respondent's ability to practice for a period of time is the second most severe penalty this court can impose. Given Respondent's age, health, and medical needs, suspension is tantamount to disbarment. It is clear that, absent the ability to practice in the very limited capacity in which he has done since July 2003, he cannot afford the psychiatric treatment necessary for him to continue to improve and function as a lawyer, spouse, and father.

Since 2003, Respondent has limited his practice to administrative matters and has functioned well. Virtually the entirety of his administrative work has been as a Mental Hygiene Commissioner, a much more narrow area of law than that of his private

practice, and one in which, due to his own personal experiences, he brings a knowledge and perspective that is invaluable.

A review of the provisions of Rule 3.16 of the W.Va. Rules of Lawyer Disciplinary Procedure sets forth the factors to be considered in imposing sanctions and provides as follows:

"in imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court [West Virginia Supreme Court of Appeals] or Board [Lawyer Disciplinary Board] shall consider the following factors: (1) whether the 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." Syl. pt. 4, Office of Lawyer Disciplinary Counsel v. Jordan, 204 W.Va. 495 513 S.E.2d 722 (1998).

Analysis of the facts in this case show the unusual circumstances before the court.

Did Respondent violate a duty owed to a client, to the public, the legal system, or the profession? Yes, to the complainants and in responding to communications from the Disciplinary Counsel. Did he do so intentionally, knowingly, or negligently? No. The record reflects that Respondent was suffering from "major depression" and, until late in the process, he was not receiving treatment. The record further reflects that while absent from the office due to his depression and other medical problems, he

attempted to keep his office going by paying a full-time paralegal to manage the office. It appears from the record that the paralegal was, unknown to Respondent, working very few hours and not maintaining the office to the point where Respondent's post office box was closed due to non-payment. Respondent would respectfully submit that the nature of serious depression precludes any finding of mens rea.

As to the amount of actual or potential injury caused by Respondent's situation, "misconduct" connotes a frame of mind absent from this case, thus making it hard to determine on the facts currently available. What is clear, is that Respondent has acknowledged responsibility for any losses and, if financially able, will recompense those persons for the losses they are determined to have suffered.

Respondent would respectfully submit that there are no real aggravating factors. Respondent's 1992 public reprimand was based upon a federal tax problem that was unrelated to his ability to practice, and the admonishment in 1999 involved one client and different facts.

A review of the mitigating factors in disciplinary matters as set forth in Lawyer Disciplinary Board v. Scott, 213 W. Va. 209 579 S.E.2d 550 (2003) as a partial list of possible considerations is enlightening, but incomplete given the facts of this case.

Does Respondent have a prior disciplinary record? Yes, but the circumstances of the violations do not lend themselves to a finding that Respondent is a persistent or serious violator of the ethics rules given Respondent's twenty-six year practice history.

Absence of a dishonest or selfish motive is another factor in Respondent's favor. Consideration of all the facts in this case lead inescapably to the conclusion that Respondent's behavior, dictated by his illness, was not dishonest or selfish, but was

self-injurious and unavoidable given the, perhaps classic, symptoms found in a lawyer suffering from "major depression."

Respondent has also acknowledged that his behavior caused injury to his clients; he showed acceptance of responsibility by informing one of the complainants of his missing the statute of limitations (Tr. 213, 214) and admitted his failure, or perhaps better stated, inability to adequately represent his clients (Tr. 341). Having agreed to recompense his former clients for their losses, he is currently working out a plan to pay the restitution recommended by the Board to this Court.

As to Respondent's character and reputation, Respondent, by counsel, would submit both are excellent. Had the Respondent had the use of his full faculties, counsel would submit that this record would be replete with testimony about his good character and reputation. As Respondent, due to illness and perhaps embarrassment, sought out no representation until reaching the highest level of the disciplinary process, the record below presents a sad example of the old adage about the lawyer who represents himself. The lawyer in this case was a very sick man with a very sick man for a client, and it shows.

Delay in disciplinary proceedings is not precisely on point, but counsel would submit, that had any number of lawyers in this state known of Respondent's repeated failures to respond to the correspondence of discipline counsel, lawyers who know Respondent and the type of person and lawyer he is, would have "sounded an alarm" that something was seriously amiss and remedial action would have been taken much sooner.

As to interim rehabilitation, it, too, is a bit off the mark. Respondent needed, during the times surrounding the complained of behavior, significant psychiatric intervention in the form of medication and therapy, which he was not receiving. He is receiving it now, and hopefully, this will be considered to be mitigating.

As to Respondent being remorseful, there can be no doubt. As he stated during the hearing: "I hate the repercussions of what happened. I've been practicing twenty-six years. I don't like to see people suffering like that and I don't like to be the one that caused it." (Tr. 341)

## V. SANCTION

Imposition of other sanctions, short of suspension, opens a panoply of possibilities that can protect the interests of past clients while promoting the interests of the public and the Bar, ensure no future problems, and allow Respondent the ability to obtain necessary treatment while practicing his profession.

Respondent would respectfully submit that, in lieu of suspension, this court order:

(1) Respondent's practice to be limited to administrative matters, such as Mental Health Commissioner and guardian work. That such limitation be open-ended until other areas of practice are approved by this court upon receipt of opinions from his treating psychiatrist and on independent examiners finding Respondent fit to so practice;

(2) Respondent continue treatment per the directions of his treating physicians;

(3) Respondent be required to engage in community service, perhaps in educating fellow practitioners to the perils of depression and what to look for in ourselves and colleagues; and

(4) other conditions this court deems just.

## VII. CONCLUSION

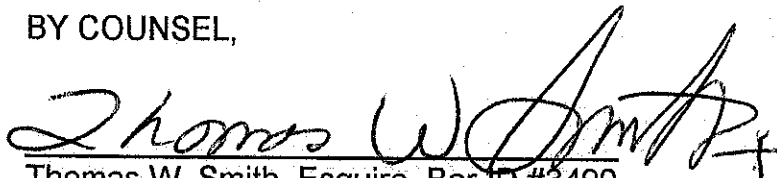
Respondent respectfully prays that this court impose a sanction less onerous than suspension.

If the court feels that suspension is necessary based on the record currently before it, Respondent prays that, in the alternative, this court remand this matter to the Subcommittee for supplementation of the record, as a review of the record below shows multiple areas in which the record could have been significantly clarified if Respondent had had the benefit of his full faculties or there had been counsel representing Respondent.

RESPECTFULLY SUBMITTED,

Theodore R. Dues, Jr.

BY COUNSEL,



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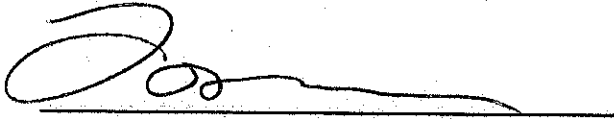
CERTIFICATE OF SERVICE

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This is to certify that I, Theodore R. Dues, Jr., by Counsel, Thomas W. Smith, Esquire, have this 26<sup>th</sup> day of July, 2005 served a true copy of the foregoing **Brief of Respondent** by hand-delivering the same to the following:

Lawrence J. Lewis  
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