

BEFORE THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

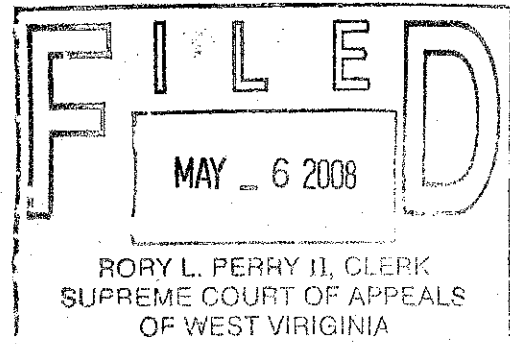
LAWYER DISCIPLINARY BOARD,
Complainant,

vs.

No. 33069

WILLIAM H. DUTY, a member
of The West Virginia State Bar,
Respondent.

REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD



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

This is a disciplinary proceeding against Respondent William H. Duty (hereinafter "Respondent") arising as the result of a Statement of Charges issued against him and filed with the Supreme Court of Appeals of West Virginia on or about April 28, 2006. The matter proceeded to hearing in Williamson, West Virginia on January 18, 2007. Presiding over the matter were Subcommittee Chairperson Charlene R. Vaughan, Esquire, and Subcommittee members Daniel B. Fowler, II, Esquire, and A. Lawrence Crimmins, Jr. Appearing for the Office of Disciplinary Counsel were Lawrence J. Lewis, Chief Lawyer Disciplinary Counsel, and Charles A. Jones, III, Disciplinary Counsel. Respondent appeared in person, and by and through counsel, Glen R. Rutledge, Esquire.

The Office of Disciplinary Counsel presented the testimony of Rita Sammons, Sheria Fields, Kevin Prater, Christian R. Harris, Esquire, Sandy Gillman and Randy Stiltner. In addition, the Office of Disciplinary Counsel's Exhibits 1 through 76 were admitted into evidence. The Respondent presented the testimony of Maria D. Encornacion, M.D., Kimberly Maynard, Krista Ann Duty, Tonya Lee, William Douglas Duty and Respondent. Respondent's Exhibits 1 through 4 were admitted into evidence.

On or about May 17, 2007, the Hearing Panel Subcommittee issued its decision in this matter. The Hearing Panel Subcommittee properly determined that the evidence established that Respondent violated several Rules of Professional Conduct, including: Count I - Rules

1.3, 1.4(a), 1.4(b), 1.16(d) and 8.1(b); Count II - Rule 5.4(a); Count III - Rules 1.5(a), 8.4(a) and 8.4(c); Count IV - Rules 1.15(a), 1.15(b), 8.1(a), 8.4(a), 8.4(c) and 8.4(d); Count V - Rules 1.4(a), 1.4(b), 1.5(b), 1.15(c) and 1.16(d).

The Hearing Panel Subcommittee recommended the following:

1. that Respondent's license to practice law in the State of West Virginia be annulled;
2. that Respondent make restitution of \$2,000.00 to Mr. and Mrs. Randy Stiltner;
3. that as a condition of any reinstatement, Respondent's practice be supervised for a period of two (2) years;
4. that Respondent be required to participate in an Alcoholics Anonymous or Narcotics Anonymous program approved by the Office of Disciplinary Counsel;
5. that Respondent complete twelve (12) hours of continuing education in legal ethics; and
6. that Respondent pay the costs of these proceedings.

Respondent filed his exceptions to the Hearing Panel Subcommittee recommendations on or about June 25, 2007. On or about September 6, 2007, this Court directed the Office of Disciplinary Counsel and Respondent to file its/his respective brief in support of its/his position within thirty (30) days of receipt of the Order. Pursuant to the Court's Order, the Lawyer Disciplinary Board filed its Brief in support of Respondent's annulment and properly served Respondent with the same on or about October 11, 2007. After receiving no Brief in support of his position, the Lawyer Disciplinary Board filed a Motion to Deny Oral Argument. This Honorable Court scheduled this matter for oral argument on January 8, 2008, and former Chief Disciplinary Counsel Lawrence J. Lewis appeared on behalf of the Lawyer Disciplinary Board. Respondent did not appear.

Respondent did not otherwise contact the Office of Disciplinary Counsel or this Honorable Court until the filing of a Motion for a Second Oral Argument on or about January 22, 2008. Respondent did not serve the Office of Disciplinary Counsel with this Motion despite verifying the same by Certificate of Service. The Office of Disciplinary Counsel filed its objection to the same on January 23, 2008. This Honorable Court issued an opinion annulling Respondent's law license on or about February 15, 2008. Respondent filed a Motion for Reconsideration on or about March 17, 2008. Again, despite verifying so by Certificate of Service, Respondent did not serve the Office of Disciplinary Counsel with this Motion. The Court granted the Motion for rehearing and directed Respondent and the Office of Disciplinary Counsel to file its/his respective brief in support of its/his position. Respondent filed his brief on or about April 21, 2008. Again, despite verifying so on the Certificate of Service, Respondent failed to serve the Office of Disciplinary Counsel.

II. STANDARD OF REVIEW

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. Syllabus Point 3, Committee on Legal Ethics v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984); Syllabus Point 7, Committee on Legal Ethics v. Karl, 192 W.Va. 23, 449 S.E.2d 277 (1994). 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 of West Virginia gives respectful consideration to the Lawyer Disciplinary Board's recommendations as to questions of law and the appropriate sanction while ultimately exercising its own independent judgment. McCorkle, 452 S.E.2d at 381.

The 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 Syllabus Point 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995). That burden of proof rests with the Office of Disciplinary Counsel at the hearing stage of the proceedings. The Office of Disciplinary Counsel met its burden of proof in this matter and the Hearing Panel Subcommittee's recommendation is based in fact and law. 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. Lawyer Disciplinary Board v. Cunningham, 195 W. Va. 27, 464 S.E.2d 181 (1995).

At the Supreme Court of Appeals 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.

Respondent has failed to meet this burden and this Honorable Court should adopt the recommendations of the Hearing Panel Subcommittee. Respondent's exceptions are discussed *infra*.

III. FINDINGS OF FACTS AND CONCLUSIONS OF LAW OF THE HEARING PANEL SUBCOMMITTEE

William H. Duty, Respondent herein, is a lawyer who practices in Williamson, Mingo County, West Virginia. Respondent was admitted to the West Virginia State Bar on May 20, 1986, and is an active member of the West Virginia State Bar. As such, he is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.

Respondent's wrongful conduct includes, among other things, the commingling and conversion of a client's \$25,000.00 settlement (Count IV), the attempt to overbill a client \$3,500.00 (Count III), fee sharing with a non-lawyer (Count II), failure to keep disputed sums separate from his own (Count V) and failure to act diligently and keep his client reasonably informed (Counts I and V). Moreover, Respondent made false statements to Disciplinary Counsel under oath and attempted to interfere with the disciplinary process by attempting to convince his client to withdraw or dismiss her ethics complaint against him (Count IV).

Count I I. D. No. 05-03-165 Complaint of Sandy Gillman

On or about June 3, 2004, Complainant Sandy Gillman retained Respondent to pursue a personal injury action on her behalf arising as the result of a March 14, 2003 automobile

accident in Mingo County, West Virginia. The retainer agreement provided Respondent would be paid 33 -1/3 percent of anything recovered by compromise, settlement or suit. An additional ten percent of the amount recovered would be charged in event of an appeal or second trial. The agreement further provided that the client would pay costs and expenses, and that the attorney was authorized to advance such costs and expenses, which the client would repay promptly upon request. Ms. Gillman contended that she advanced Respondent \$250.00 at the time she retained Respondent. (Transcript at 130). Respondent, however, asserted that the \$250.00 paid him was for his services in a prior criminal matter in magistrate court. (Transcript at 342). Respondent's Exhibits 2 and 3 are receipts which indicate the money was received by Respondent's office on April 28 and April 29, 2004, and Respondent's Exhibit 1 indicates the magistrate court hearing was held on May 24, 2004, prior to the time he was retained in the civil matter on June 3, 2004.

In any event, whether the \$250.00 was for costs or for services in another case, it is undisputed that Respondent also undertook to represent Ms. Gillman on the automobile accident in or about June 2004. On June 17, 2004, he made inquiry of her insurance carrier concerning medical coverages to which it replied on July 13, 2004 (ODC Ex. 7), on June 19, 2004, he provided a letter of protection on her behalf to Dr. Hoover (ODC Ex. 6), and on August 17, 2004, he provided a letter of protection on her behalf to Physical and Aquatic Therapy. (ODC Ex. 9).

Ms. Gillman asserted that she unsuccessfully attempted to contact Respondent many times after retaining him, but was generally told that "he wasn't there". (Transcript at 131). She indicated she was only able to talk with him personally in June 2004 when she first retained him and again in March 2005 when he refused to proceed on her case. (Transcript at 132). Otherwise, she was only able to speak to the person taking his messages.

When Ms. Gillman eventually met with Respondent on March 8, 2005, he provided her a letter advising her that the statute of limitations for her claim would expire March 11, 2005. The letter further advised her that "as I told you, you must pay the filing fee. Otherwise, I will not proceed and you will have forever lost your right to sue". (ODC Ex. 1 at Bates No. 0004). Ms. Gillman stated that Respondent told her she needed to come up with \$200.00 cash before Respondent would file suit and that she must do so that day or no later than that evening. (Transcript at 141). She testified she did not know what the statute of limitations was and indicated that Respondent first used the term at the March 8, 2005 conference. (Transcript at 143). When Respondent presented her with the letter of March 8, 2005, he requested that she sign the same and she did so. She was unable to provide the money on such short notice. (Transcript at 143). Moreover, she was unable to obtain new counsel and the statute ran on her claim. (Transcript at 144)

Respondent's wife, Krista Ann Duty, testified that she had seen Ms. Gillman from time to time during the representation and had told her to make an appointment with Respondent. Mrs. Duty said she saw Ms. Gillman several times at the courthouse and stopped her on the

street to tell her she needed to come to their office and talk to Respondent about her case. She admitted, however, that although she told Ms. Gillman the statute of limitations was approaching, she did not explain to her the meaning of the term. (Transcript at 292). Tonya Lee, Respondent's secretary, likewise testified she approached Ms. Gillman several months before March 2005 and that she had made numerous attempts to contact her by phone. (Transcript at 306). She also stated that she advised Ms. Gillman at Christmastime that the statute was coming up in the spring. She asserted that she advised Ms. Gillman of the meaning of the term "statute of limitations". (Transcript at 310).

Respondent however admitted that he does not know if he ever used the words "statute of limitations" with Ms. Gillman except in the letter of March 8, 2005. (Transcript at 343). Moreover, other than information copies of various letters mailed to third parties, Respondent admitted he did not correspond with her. (Transcript at 364). He had no explanation why he did not write her between August 2004 and March 2005 if he were otherwise having difficulty contacting her. He further admitted that it would have been easy for him to withdraw from her case two or three months earlier if she were not cooperating with him. (Transcript at 366).

On March 31, 2005, Ms. Gillman filed her verified complaint against Respondent with the Office of Disciplinary Counsel. The Office of Disciplinary Counsel forwarded the complaint to Respondent on or about April 6, 2005, by first class mail, with a request to provide a verified response to the same by April 29, 2005. Respondent's office requested an extension of ten days from Office of Disciplinary Counsel to respond which was granted.

Nevertheless, Respondent failed to respond to Office of Disciplinary Counsel's April 6, 2005 communication and on June 17, 2005, Office of Disciplinary Counsel made a second request to Respondent by certified mail. Respondent concedes that he again failed to respond to Office of Disciplinary Counsel.

With regard to Count I of the Statement of Charges, the Hearing Panel Subcommittee concluded that Respondent was in fact retained and had accepted representation of Ms. Gillman on June 3, 2004. It further concluded that the evidence established Respondent did not thereafter act with reasonable diligence and promptness, did not keep his client reasonably informed about her case, and did not explain the matter to her to the extent reasonably necessary to permit her to make informed decisions regarding his representation. Moreover, he failed to timely advise her that he would not proceed on her case without an advanced filing fee until just a few days before the lapsing of the statute of limitations. It was clear from the evidence that Ms. Gillman did not understand the significance of the statute of limitations until sometime after her meeting with Respondent of March 8, 2005. The Panel concluded that the evidence demonstrated that Respondent violated Rule 1.3 with regard to diligence, Rule 1.4(a) and Rule 1.4(b) with regard to communication, and Rule 1.16(d) with regard to declining and terminating representation. Finally, because he failed to respond to Office of Disciplinary Counsel's requests for verified responses to Ms. Gillman's complaint, Respondent violated Rule 8.1(b) of the Rules of Professional Conduct.

Count II
I. D. No. 04-03-133
Complaint of Sheria J. Fields

The evidence clearly indicates that Sheria J. Fields had been an employee of Respondent for over ten years until she was terminated by him on or about July 28, 2003. She interrupted her employment briefly during this ten-year period when she left Respondent in June 2002 (Transcript at 54), but she returned in December 2002. (Transcript at 55). Ms. Fields is not a lawyer.

Ms. Fields was acquainted with Ernest K. Prater, who was injured in an automobile accident in Kentucky in or about January 2001. Mr. Prater contacted Ms. Fields shortly after the accident and retained Respondent as counsel. Mr. Prater's sole reason for retaining Respondent was because he knew Ms. Fields. (Transcript at 107). He never met or talked to Respondent until sometime after signing a retainer agreement.

Ms. Fields testified that she spoke with Respondent about Mr. Prater and explained the nature of his accident to him. She said Respondent promised her that if she could get the case he would give her half of the attorney fees. (Transcript at 52). She stated this conversation occurred in February 2001. (Transcript at 53).

Mr. Prater's case was settled in June 2003 for the sum of \$100,000.00. Based on the settlement, Ms. Fields calculated the amount due her was approximately \$16,000.00. (Transcript at 56). On July 28, 2003, Respondent wrote Ms. Fields a check for \$8,333.00 (ODC Ex. 56 at Bates No. 0226). He also wrote a second check dated July 29, 2003, for

\$8,333.00 (ODC Ex. 56 at Bates No. 0227). Ms. Fields testified that two checks were written so they would be under \$10,000.00 and would not have to be reported to the IRS (Transcript at 60). She cashed the first check on July 28, 2003, and the second one July 29, 2003. (Transcript at 61).

Respondent denied he made a fee sharing arrangement with Ms. Fields in February 2001, but conceded that he told her after she had stopped work for him that if she would come back he would give her fifty percent of the attorney fee. Moreover, he conceded that one of the reasons for giving her the fee was because Mr. Prater was a friend of hers and that he would not have met the man had it not been for Ms. Fields. He agreed that he never met Mr. Prater until sometime after Mr. Prater had signed a retainer agreement.

Mr. Prater's accident occurred in Kentucky and Respondent is not licensed to practice in that State. Accordingly, in order to pursue Mr. Prater's claim, he was required to associate with an attorney admitted to the practice of law in Kentucky. He agreed to split his fee equally with Kentucky counsel. A dispute then arose between Respondent and Ms. Fields as to whether her portion of the fee should be based upon the total attorney fee received in the case or just the portion received by Respondent.

Respondent believed that Ms. Fields was entitled to 50% of the attorney fee he received after paying Kentucky counsel. Ms. Fields, however, insisted the agreement was that she was to receive 50% of the total attorney fee, not just 50% of Respondent's portion. She argued whatever agreement Respondent made with Kentucky counsel was his business, but

her fee was to be based on the total fee paid by the client. The moneys eventually paid to her by Respondent did constitute 50% of the total attorney fee generated by the Prater case. The other 50% was paid to Kentucky counsel.

Concerning Count II, the Hearing Panel Subcommittee concluded that Respondent agreed to share and did share a legal fee with a non-lawyer. Accordingly, he violated Rule 5.4(a) of the Rules of Professional Conduct.

Count III
I. D. No. 04-02-256
Complaint of Ernest K. Prater

In order to pursue the claim of Ernest K. Prater, Respondent asked Christian R. Harris, an attorney in Williamson, West Virginia, to associate with him on the case. Mr. Harris is licensed to practice both in West Virginia and Kentucky. The agreement between the attorneys was to split the fee fifty/fifty. (Transcript at 119).

Mr. Prater's case settled in or about June or July 2003 and the closing of that case was conducted by Mr. Harris. Prior to closing, Respondent asked Mr. Harris to withhold \$3,500.00 from the settlement as Respondent's expenses for the case. (Transcript at 347, 375). Mr. Harris informed Respondent that in order to withhold the \$3,500.00, he would need documentation of the expenses. (Transcript at 121). Respondent then attempted in a phone conversation to persuade Mr. Harris to withhold the funds without documentation. Mr. Harris refused. Eventually, Respondent became angry and the conversation ended. Mr. Harris described the talk as a "fairly heated conversation". (Transcript at 122). Later, Respondent

phoned Mr. Harris and relented, telling him to distribute the settlement money and not take out expenses. (Transcript at 123).

As to Count III, the Panel concluded that Respondent's attempt to collect an additional \$3,500 from Mr. Prater which was not due constituted conduct involving dishonesty, fraud, deceit and misrepresentation. Had Respondent been successful in his attempt to obtain the fee it would have been unreasonable. The Panel recognized that an attempt to violate a Rule of Professional Conduct is a violation of that rule. It found that his actions violated Rules 1.5(a), 8.4(a) and 8.4(c) of the Rules of Professional Conduct.

Count IV
I. D. No. 04-03-431
Complaint of Rita Sammons
I. D. No. 04-03-432
Complaint of Rachel F. Lockhart

Rita G. Sammons and Rachel F. Lockhart (now deceased) are sisters. Rachel passed away on May 20, 2005. She was injured in an automobile accident on or about April 29, 2000, and retained Respondent to pursue damages for her arising from the matter. She had been referred to him by her sister, Rita, who had previously been represented by Respondent.

On or about February 10, 2003, Respondent received from Allstate Insurance Company a bodily injury settlement check for Ms. Lockhart in the sum of \$25,000.00. At the same time, he was also attempting to settle an underinsured motorist claim on her behalf against State Farm Insurance Company and arising out of the same accident. Ms. Lockhart was ill and was drawing Supplemental Security Income (SSI). (Transcript at 19). She was approximately 56

years of age. Because of concerns about her SSI, Ms. Lockhart requested that Respondent keep her settlement with Allstate Insurance in a trust. Ms. Sammons testified that Respondent was to contact the Social Security Administration and determine whether a trust fund could be established so her sister would not lose benefits. (Transcript at 21-22). However, upon receiving them, Respondent failed to place Ms. Lockhart's funds into a trust account but admittedly used them to open an account at the Bank of Mingo, Mingo County, West Virginia. The account was not a trust account but was a regular checking account, opened on February 10, 2003, in the name of Respondent. Moreover, rather than keeping the funds of Rachel F. Lockhart separate from his own, Respondent began writing checks for his own use upon the funds and also began depositing and commingling other funds in the account. By February 19, 2003, the total available funds of the account into which Ms. Lockhart's \$25,000.00 settlement check was deposited had been reduced to \$7,634.12.

Respondent continued to commingle other funds into the account and write numerous checks¹ including checks for his own personal expenses. On April 11, 2003, the account balance was reduced to \$128.43. Between April 17, 2003, and May 15, 2003, the account varied between a high of \$20,128.43 to a low of \$199.34. From May 16, 2003, through August 15, 2003, the account ranged from a high of \$51,815.35 to a low of \$145.37. Between

¹Respondent also deposited other settlement funds of other clients into this account. See ODC Ex. 56, Bates Nos. 0134 (\$10,500 - David & Sandra Chafin), 0149 (\$20,000 - Dennis Hannah), 0202 (\$50,000 - Peggy Hannah & Dennis Hannah), 0230 (\$5,000 - Terry Steel), 0293 (\$20,000 - Ida Mae Brewer), 0321 (\$11,000 - Dawn Brewer), 0360 (\$20,000 - Dawn Brewer), 0452 (\$35,000 - James E. Spence), 0501 (\$7,500 - Carman West), 0516 (\$15,000 - Doris Trent), 0540 (\$7,000 - Dawn Brewer), 0575 (\$7,000 - Dawn Brewer), 0613 (\$5,000 - Helen Butcher) and 0636 (\$50,000 - Helen Butcher). It is noted that Ms. Helen Butcher filed a complaint with ODC alleging misappropriation, this complaint was never answered by Respondent and is discussed *infra*.

August 16, 2003, and November 14, 2003, it varied between \$21,517.12 and \$17.12. In the period between November 15, 2003, and February 13, 2004, the account varied between a high of \$39,097.76 to a low of -\$460.26. Between February 14, 2004, and May 14, 2004, the account varied between \$35,809.28 and -\$83.54. Finally, from May 14, 2004, through August 13, 2006, the account varied from a high of \$51,415.63 and a low of -\$37.41. At no time from February 10, 2003, through August 13, 2004, did Respondent ever make any disbursement of proceeds to Ms. Lockhart.

Several months after Respondent's receipt of the \$25,000.00 settlement check, Ms. Lockhart and Ms. Sammons became concerned. They had heard nothing about their money and their calls were not returned by Respondent. (Transcript at 23). On or about August 10, 2004, Rachel Lockhart wrote to Respondent and requested the proceeds due her from the \$25,000 settlement. (ODC Ex. 42 at Bates No. 0076). She received no response and on August 21, 2004, again wrote to Respondent asking for the proceeds. In addition, she terminated Respondent's services. (ODC Ex. 42 at Bates No. 0077 and Transcript at 24-25) and filed a complaint with the Office of Disciplinary Counsel against Respondent on August 11, 2004. (ODC Ex. 40 at Bates No. 0068).

Subsequent to the filing of the complaint with the Office of Disciplinary Counsel, Respondent called Ms. Sammons and requested that she and her sister drop the complaint. (Transcript at 26). Ms. Sammons recorded the conversation which took place on or about October 14, 2004. (Transcript at 29 and ODC Ex. 45 at Bates No. 0082). During the course

of the conversation Respondent represented that he had always had Ms. Lockhart's money and that it had always been there. He expressed the hope on at least three occasions that Ms. Lockhart and Ms. Sammons would withdraw the ethics complaint and stated that he did not need the ethics committee on his back. He further assured her that the money had "always been there."

On or about October 25, 2004, Ms. Lockhart and Ms. Sammons met with Respondent at his office. Ms. Sammons indicated that they arrived about ten o'clock that morning but were unable to conclude the matter until three o'clock in the afternoon. Respondent delivered to Ms. Sammons on behalf of her sister the sum of \$17,342.00, for which she signed a receipt. (ODC Ex. 39 at Bates No. 0067).

On or about March 31, 2005, during his sworn statement at the Office of Disciplinary Counsel, Respondent was asked about his handling of Ms. Lockhart's funds and he falsely testified he had deposited them in his trust account and that he had not spent or embezzled his client's money. (ODC Ex. 75 at Bates No. 1239-1240, 1242-1243).

Regarding Count IV, the Panel concluded that Respondent's treatment of Ms. Lockhart's funds constituted commingling and conversion in violation of Rules 1.15(a), 1.15(b), and 8.4(c). Furthermore, because he made false statements to Disciplinary Counsel in his sworn statement of March 31, 2005, Respondent violated Rule 8.1(a). In addition, Respondent attempted to convince Ms. Sammons to withdraw or dismiss the ethics complaint she and Ms. Lockhart had filed against him and this constituted attempts to interfere with the

disciplinary process and was prejudicial to the administration of justice. Accordingly, he violated Rules 8.4(a) and 8.4(b).

COUNT V
I. D. No. 04-03-541
Complaint of Randy Stiltner

In or about April 2002, Randy Stiltner retained Respondent to represent him and his wife in a defective mobile home case. According to Mr. Stiltner, Respondent agreed to represent them for a flat fee of \$1,500.00 plus a \$125.00 filing fee. He paid Respondent these sums. (Transcript at 224). No retainer agreement was signed, but Respondent provided two receipts, one for the \$1,500.00 and one for the \$125.00 filing fee. (Transcript at 225 and ODC Ex. 64 at Bates No. 1081).

Mr. Stiltner stated that he advised Respondent that he and his wife would like to be made aware of any hearings and kept up to date on the case. Suit was instituted against both the manufacturer and the dealer in the Circuit Court of Mingo County. However, it was referred to mandatory arbitration. Mr. Stiltner testified that although the arbitration order was signed in August 2002, he was not advised of the decision until the following November.

On or about September 4, 2003, Mr. Stiltner received a letter from Respondent requesting an additional \$500.00 for his fee. Upon calling Respondent, an appointment was made for the following day and the Stiltners were advised that an additional \$1,000.00 rather than \$500.00 would be necessary. They agreed to pay the additional \$1,000.00 at \$250.00 per month. (Transcript at 231). They made a \$250.00 payment in October 2003 and another

\$250.00 payment in November 2003. Respondent provided receipts for the payments. (ODC Ex. 64 at Bates No. 1080). However, at no time during Respondent's representation from April 2002 through January 2004 was a billing statement provided to the Stiltners although they had requested one more than once. (Transcript at 233-234, 248).

A hearing before the arbitrator was scheduled on November 19, 2003, but the Stiltners were not advised of the same until November 17, 2003. As a result they only had a short time to obtain a contractor as an expert witness. They were unable to obtain an expert for the November 19 hearing, but nevertheless one of the defendants settled with them for \$2,500.00. The arbitrator granted them additional time to obtain testimony of an expert as to their claim against the second defendant.

An additional hearing was scheduled on December 18, 2003, but Respondent failed to appear because of other scheduling conflicts and the matter was rescheduled to December 23, 2003. Following that hearing, the arbitrator awarded the Stiltners a judgment of \$21,500.00 against the remaining defendant.

Mr. Stiltner testified that Respondent then announced he would keep the \$2,500.00 received from the first defendant as his attorney fees on top of what the Stiltners had already paid. The Stiltners, however, disagreed with his proposal because they had originally agreed to pay him \$1,500.00 and then agreed to pay him an additional \$1,000.00, of which they had already paid \$500.00. They believed they owed Respondent only an additional \$500.00. (Transcript at 242).

On or about January 14, 2004, the \$21,500.00 check arrived out of which Respondent provided the Stiltner \$19,000.00. (Transcript at 245). Respondent advised the Stiltner that the \$2,500.00 portion of the settlement had not yet arrived. (Transcript at 245).

The Stiltner made a number of calls to Respondent's office regarding the status of the \$2,500.00 settlement check, but were always advised that it had not arrived. Mr. Stiltner then called the office of the attorney for the defendant on February 10, 2004, and was advised the check had been sent out in January. (Transcript at 247-248). On February 27, Mr. Stiltner called Respondent's office again and was advised that the \$2,500.00 was there and he was told to come to the office. (Transcript at 249). When the Stiltner arrived, they were presented with a \$2,500.00 personal check from Respondent. It was not the check from the defendant and the Stiltner have never seen the \$2,500.00 settlement check. (Transcript at 249). According to Mr. Stiltner, Respondent withheld a total attorney's fee of \$4,300.00 whereas he had only initially agreed to pay Respondent \$1,500.00. (Transcript at 250). Mr. Stiltner believed he was overcharged by \$2,800.00. (Transcript at 255-256). He was never provided a billing statement, provided his case file although he had requested both. (Transcript at 250-251).

Respondent testified that his hourly rate with regard to the Stiltner matter was \$100.00 an hour. (Transcript at 348). He conceded he did not communicate well enough with Mr. Stiltner, but that he got a good result in the matter. Respondent stated he cannot deny that he violated the Rules regarding attention to the case. He further testified he had never

represented Mr. Stiltner in any previous matter, and did not communicate with him in writing about his fee. (Transcript at 376). Further, he did not provide Mr. Stiltner with an accounting and did not provide an itemized statement. (Transcript at 376). Although he asserted he was charging Mr. Stiltner \$100.00 an hour and the \$1,500.00 was merely a retainer, Respondent conceded that he had not placed the \$1,500.00 in a trust account. (Transcript at 377). Furthermore, he did not keep an itemization of his time. (Transcript at 377).

Respondent also admitted that Mr. Stiltner objected when he told him he was going to keep an additional \$2,500.00 for his fee and he understood that Mr. Stiltner was disputing it. Nevertheless, he did not put the additional \$2,500.00 in a trust account or keep it separate and apart from his own property until the dispute with Mr. Stiltner was resolved. (Transcript at 378). He has no records to indicate that he ever provided Mr. Stiltner with his file when it was requested.

The Hearing Panel Subcommittee concluded that Respondent failed to adequately communicate with his client in violation of Rules 1.4(a) and 1.4(b) of the Rules of Professional Conduct. Furthermore, he did not communicate the basis of his fee to his client either before or within a reasonable time after commencing his representation and therefore violated Rule 1.5(b). Because Respondent failed to keep the disputed \$2,500.00 sum separate from his own property until there was an accounting and severance of his interest, he violated Rule 1.15(c). Finally, he violated Rule 1.16(d) by failing to provide a billing statement or surrender papers and property to his client.

IV. RESPONDENT'S EXCEPTIONS

As to Count I, Respondent suggested that "Ms. Gillman knew the deadline for filing her suit long before it occurred and that she purposefully failed to do anything about the same". She failed to do anything, except for, of course, hire Respondent, an attorney to pursue her civil interests. Respondent also states that he "is acutely aware that a few letters would have saved hours and hours of work for the undersigned, the ODC, and most importantly, this Honorable Court." Actually, to protect his client's interests, Respondent could have performed the work he was retained to do on Ms. Gillman's behalf and/or adequately communicated with her about his failures, and then subsequently responded to ODC's lawful requests for information. The Hearing Panel Subcommittee properly concluded that Respondent violated Rules 1.3 with regard to diligence, Rule 1.4(a) and Rule 1.4(b) with regard to communication, and Rule 1.16(d) with regard to declining and terminating representation. Finally, because he failed to respond to Office of Disciplinary Counsel's requests for verified responses to Ms. Gillman's complaint, Respondent violated Rule 8.1(b) of the Rules of Professional Conduct.

As to Count Two, Respondent stated that "it is difficult for the undersigned to understand how what he did- i.e., offer an incentive to a former employee as inducement to return to work" is a violation." Respondent suggests that it is a "technical violation of the fee-splitting (or sharing) prohibition" and suggests that he did not violate "the spirit(s) of the prohibition against "fee-splitting" with non-lawyers". It is deeply concerning that Respondent

fails to acknowledge the wrongfulness of his conduct and this failure makes it more likely that this type of misconduct will occur in the future. In short, lawyers can not determine which of the Rules of Professional Conduct they would like to follow based on the circumstances. As a self-regulating Bar, West Virginia lawyers have adopted high standards of ethics and strive to maintain those standards by obligating themselves to uphold the law and abide by the Rules of Professional Conduct. As this Court noted in Ball “[t]he Rules of Professional Conduct speak for themselves. To the extent that a lawyer ignores the well-reasoned prohibitions and duties under those Rules, he/she does so at his/her own peril.” Lawyer Disciplinary Board v. Ball, 219 W.Va. 296, 633 S.E.2 at 250 (2006). The Hearing Panel Subcommittee properly concluded Respondent agreed to share and did share a legal fee with a non-lawyer and he violated Rule 5.4(a) of the Rules of Professional Conduct.

As to Count III, Respondent admitted that he “voiced a claim for \$3,500.00 in expenses” when “his expenses were actually less than \$3,500.00”. But now suggests, beyond attempting to get these expenses from co-counsel, “there was no act or conduct in furtherance of the alleged plan or scheme to defraud Mr. Prater.” He indicates that it is speculative at best that but-for Mr. Harris’ refusal to act in concert, he would have defrauded Mr. Prater. It is hard to imagine what else Respondent could have done to attempt to get these expenses. He telephoned co-counsel in Kentucky and requested Mr. Harris to withhold \$3,500.00 from the settlement as Respondent’s expenses for the case. When he was informed he would need

documentation to do so, Respondent then attempted in a phone conversation to persuade Mr. Harris to withhold the funds without documentation. Mr. Harris refused.

The Panel properly concluded that Respondent's attempt to collect an additional \$3,500 from Mr. Prater which was not due constituted conduct involving dishonesty, fraud, deceit and misrepresentation. Had Respondent been successful in his attempt to obtain the fee it would have been unreasonable. The Panel recognized that an attempt to violate a Rule of Professional Conduct is a violation and found that his actions violated Rules 1.5(a), 8.4(a) and 8.4(c) of the Rules of Professional Conduct.

Perhaps the most disturbing, when addressing Count IV, Respondent suggested that the relationship between Rachel Lockhart and Respondent was not that of an attorney and client after Ms. Lockhart executed a release and requested Respondent keep her money... "[t]hat is, anyone could have held Rachel's money....[t]he undersigned neither needed a law license to do this nor was he "practicing law" when he did so. In short, the undersigned was a bailee of and for Rachel's money." The fact that a nonlawyer can also provide such services but is not subject to the Rules of Professional Conduct does not release the lawyer from his ethical obligations under the Rules.

In short, a review of the bank records *supra* clearly demonstrates that Respondent used Ms. Lockhart's money as if it was his own and therefore, converted and misappropriated funds which were entrusted to him. Even Respondent acknowledges that such conduct generally warrants annulment and this case is no different. The Panel properly concluded that

Respondent's treatment of Ms. Lockhart's funds constituted commingling and conversion in violation of Rules 1.15(a), 1.15(b), and 8.4(c). Furthermore, because he made false statements to Disciplinary Counsel in his sworn statement of March 31, 2005 when asked about any embezzlement of Ms. Lockhart's funds wherein he denied the same, Respondent violated Rule 8.1(a). In addition, Respondent attempted to convince Ms. Sammons to withdraw or dismiss the ethics complaint she and Ms. Lockhart had filed against him and this constituted attempts to interfere with the disciplinary process and was prejudicial to the administration of justice in violation of Rules 8.4(a) and 8.4(b).

As to Count V, Mr. Stiltner in a matter involving a faulty "set-up" of his then new mobile home which he had purchased for approximately \$45,000.00 in April, 2001. Mr. Stiltner retained the undersigned in April 2002. It is not disputed that Mr. Stiltner complied with each request from Respondent for additional monies "without incident". Respondent stated that "the end result was more favorable than the initially expected."

Respondent cites to Lambert v. Peters, 143 W.Va. 588, 103 S.E. 2d 788 (1958), and calls upon this Court to uphold his wrongful taking of the additional \$2,500.00 in the interests of public policy. He further argues that requiring him to reimburse Mr. Stiltner \$2,500.00 would create an unmerited substantial windfall. Respondent reasoned that he could now ask the Court to hold the contract he entered into with Mr. Stiltner void as being against the public policy that is in the public interest for attorneys to be adequately compensated and/or appeal

to the Court's equitable jurisdiction and ask the Court to deny the ODC's request that the Court grant Mr. Stiltner a \$2,500.00 windfall.

Respondent refused to accept this case on a contingency fee basis. Respondent failed to reduce any agreement to writing. Respondent failed, despite repeated requests, to provide the Stiltners with an accounting of how the monies they were paying him were being spent and threatened withdrawal if the fees were not paid. The case settled for more than he anticipated and he unilaterally determined that he was not fairly compensated and thus, wrongfully withheld \$2,500.00 from the Stiltners. Regardless of the claim of unfair compensation, Respondent admitted that Mr. Stiltner objected when he told him he was going to keep an additional \$2,500.00 for his fee and he understood that Mr. Stiltner was disputing it. Nevertheless, he did not put the additional \$2,500.00 in a trust account or keep it separate and apart from his own property until the dispute with Mr. Stiltner was resolved.

The Hearing Panel Subcommittee concluded that Respondent failed to adequately communicate with his client in violation of Rules 1.4(a) and 1.4(b) of the Rules of Professional Conduct. Furthermore, he did not communicate the basis of his fee to his client either before or within a reasonable time after commencing his representation and therefore violated Rule 1.5(b). Because Respondent failed to keep the disputed \$2,500.00 sum separate from his own property until there was an accounting and severance of his interest, he violated Rule 1.15(c). Finally, he violated Rule 1.16(d) by failing to provide a billing statement or surrender papers and property to his client.

Moreover, “[t]he burden of proof is always upon the attorney to show the reasonableness of the fees charged. Syl. Pt. 2, Committee on Legal Ethics of West Virginia State Bar v. Tatterson, 177 W.Va. 356, 352 S.E.2d 107 (1986). The same burden to prove reasonableness remains with the attorney under any fee structure. Attorneys who fail to effectively document their efforts on behalf of a client run the risk of being unable to convince a reviewing court, based on their word alone, of the reasonableness of the fee charged or, in cases where it applies, the full and proper value of fees to be awarded on a *quantum meruit* basis.” Bass v. Cotelli Rose, 216 W.Va. 587, 592, 609 S.E.2d 848, 853 (2004).

V. ARGUMENT

Syl. Pt. 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 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 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 four of these factors.

A. Respondent violated duties to his clients, to the public, to the legal system and to the profession.

Lawyers owe duties of candor, loyalty, diligence and honesty to their clients. However, the evidence in this case establishes by clear and convincing proof that Respondent has

violated several duties owed to his clients. He commingled and misappropriated client funds and wrongfully attempted to convince Ms. Lockhart to withdraw her complaint against him (Count IV), he attempted to extract additional monies not due him from a Mr. Prater (Count III), he failed to act diligently in representing his clients and failed to keep Ms. Gillman and Mr. Stiltner reasonably informed (Counts I and V); he failed to keep disputed money separate and apart from his own (Count V), and he terminated representation of a client without reasonable notice or opportunity for her to employ other counsel (Count I).

With regard to Ms. Lockhart (Count IV), Respondent was to establish a trust fund for her in a manner that her SSI benefits would continue. Instead, he deposited her money into his own personal checking account and began spending it immediately. Within nine days of its deposit, the \$25,000.00 settlement check had been reduced to \$7,634.12, and approximately two months later, the account balance was reduced to \$128.43. Respondent continuously wrote checks for his own use out of the account and deposited other settlement funds of other clients into it. He continued this activity from February 2003 until at least through August 2006. On numerous occasions the account was overdrawn between the time he deposited Ms. Lockhart's \$25,000.00 check in February 2003 and when he finally paid her in October 2004.

This Court has stated that “[t]he general rule is that absent compelling extenuating circumstances, misappropriation or conversion by a lawyer of funds entrusted to his/her care warrants disbarment.” Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d

722 (1998); Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 561, 505 S.E.2d 619, 631 (1998) remanded with directions, *See* Lawyer Disciplinary Board v. Kupec (Kupec II), 204 W.Va. 643, 515 S.E.2d 600 (1999). *See also* Lawyer Disciplinary Board v. Wheaton, 216 W.Va. 673, 610 S.E.2d 8 (2004).

It was not until Ms. Lockhart and her sister filed complaints with the Office of Disciplinary Counsel that Respondent agreed to pay her the money owed her. He finally did so on or about October 14, 2004, 20 months after he had deposited it into his own personal account. Even then he suggested that Ms. Lockhart and her sister withdraw the ethics complaint against him, stating he did not need the "ethics committee" on his back. Thereafter, he falsely swore to the Office of Disciplinary Counsel that he had deposited Ms. Lockhart's money into his trust account and that he had not spent or embezzled her money.

The fact that Respondent refunded monies to Ms. Lockhart after she instituted her ethics complaint against him does not negate his conduct and is not a defense for his conduct. Syllabus Point 8, Lawyer Disciplinary Board v. Geary M. Battistelli, 206 W.Va. 197, 523 S.E.2d 257 (1999); Syllabus Point 4, Committee on Legal Ethics v. Hess, 186 W.Va. 514, 413 S.E.2d 169 (1991); Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 569-570, 505 S.E.2d 619, 632-633 (1998), *remanded with directions*, Lawyer Disciplinary Board v. Kupec (Kupec II), 204 W.Va. 643, 515 S.E.2d 600 (1999). Furthermore, his eventual refund of the money to Ms. Lockhart is not mitigating on the issue of sanction. Battistelli and Hess

note in this regard that mitigation of punishment because of restitution must be governed by the facts of the particular case.

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 pressure of the threat of disciplinary proceedings, some courts have refused to consider it a mitigating factor.

515 S.E.2d at 570, citations omitted.

Moreover, in Wheaton, the Court made clear that to be viewed as a mitigating factor, restitution must be made promptly. In view of Respondent's delay of 20 months in paying Mrs. Lockhart her money and then doing so only after an ethics complaint was filed against him, such payment cannot be mitigating.

Respondent's misconduct toward his clients also includes an attempt to collect an additional \$3,500.00 from Ernest K. Prater (Count III) to which he was not entitled. Moreover, he charged his client Randy Stiltner (Count V) at least \$2,000.00 more than was agreed. At the time he took this money out of Mr. Stiltner's settlement funds, Respondent understood that Mr. Stiltner was disputing the charges, yet he did not put the disputed sum in a trust account or keep it separate and apart from his own property until the dispute had been resolved. Respondent further failed to provide Mr. Stiltner with an itemization of his time although he testified that he was charging Stiltner an hourly rate of \$100.00.

Respondent's attempt to overcharge Kevin Prater \$3,500.00 would have constituted an unreasonable fee under Rule 1.5(a) and violated Rule 8.4(a) of the Rules of Professional Conduct. This Court has recognized that an attempt to violate a rule of Professional Conduct is a violation of that Rule. Lawyer Disciplinary Board v. Ball, 219 W.Va. 296, 633 S.E.2d 241 (2006). Respondent also failed to act diligently on matters involving Ms. Gillman and failed to keep her and Mr. Stiltner reasonably informed. His tardy withdrawal as Ms. Gillman's counsel within days of the lapse of the statute of limitations prejudiced her claim.

Respondent's failure to respond to Disciplinary Counsel's requests for information regarding Ms. Gillman's claim (Count I), and his false testimony during his March 31, 2005 sworn statement at the Office of Disciplinary Counsel regarding Ms. Lockhart's funds are violations of the duties he owes to the legal system and the profession. His attempt to convince Ms. Lockhart and Ms. Sammons to withdraw their complaints against him were attempts to interfere with the disciplinary process and were prejudicial to the administration of justice. *See* Lawyer Disciplinary Board v. Artimez, 208 W.Va. 288, 540 S.E.2d 156 (2000). Moreover, the general public is entitled to be able to trust lawyers and expect them to exhibit the highest standards of honesty and integrity. Lawyers have a duty not to engage in conduct involving dishonesty or interference with the administration of justice.

B. Respondent acted intentionally and knowingly.

Respondent's actions were not merely the result of simple negligence. To the contrary, the overwhelming evidence demonstrates that he acted intentionally and knowingly when he

committed the violations of the Rules of Professional Conduct. He intentionally and knowingly misappropriated funds belonging to his client, he intentionally and knowingly attempted to charge an excessive fee to his client, he intentionally and knowingly shared a fee with a non-lawyer, he intentionally and knowingly attempted to obstruct the disciplinary process, he intentionally and knowingly testified falsely to Office of Disciplinary Counsel, he intentionally and knowingly paid himself monies that he knew were disputed by his client rather than keeping them separate and apart, and he intentionally and knowingly withdrew from the representation of a client within three days of the running of the statute of limitations on her claim when she could not obtain other counsel. In addition, he failed to act diligently, failed to keep clients reasonably informed, failed to respond to Office of Disciplinary Counsel, and failed to surrender files to his client upon termination.

C. The amount of potential and real injury is substantial.

As a result of Respondent's actions, his clients suffered immediate and actual damage. The statute of limitations ran on Ms. Gillman's claim because she did not have reasonable time to obtain other counsel when he advised her he would not proceed. Ms. Lockhart was denied access to her funds for twenty months, and Mr. Stiltner paid \$2,000.00 more than he agreed for Respondent's services. In addition, Respondent's conduct has brought the legal system and legal profession into disrepute.

V. SANCTION

The principal purpose of attorney disciplinary proceedings is to safeguard the public's

interests in the administration of justice. Syllabus Point 3, Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Syllabus Point 2, Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999). Given Respondent's ongoing misconduct the appropriate way to protect the public is to remove him from the practice of law.

"Disbarment of an attorney to practice law is not used solely to punish the attorney but is for the protection of the public and the profession." Syllabus Point 2, In Re: Daniel, 153 W.Va. 839, 173 S.E.2d 153 (1970); Syllabus Point 6, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998). 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. Syllabus Point 2, Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993); Syllabus Point 3, Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Syllabus Point 5, Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Syllabus Point 3, Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); and Syllabus Point 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 who lie and convert client funds must be swiftly removed from the practice of law. A severe sanction is also necessary to deter other potentially less-than-honest lawyers who may be considering or who are engaging in similar conduct.

Respondent's misconduct includes commingling and misappropriation of client funds, lying under oath to disciplinary counsel, and attempting to convince a complainant to withdraw her complaint against him (Count IV). He has attempted to extract additional monies not due him from a client and he has shared a legal fee with a non-lawyer (Counts II and III). Furthermore, he has failed to act diligently in representing clients, failed to keep them informed (Counts I and V), failed to keep disputed monies separate and apart from his own (Count V), and terminated his representation of a client without reasonable notice or opportunity for her to employ other counsel (Count I). In addition, he has failed to respond to requests from Disciplinary Counsel and made a false statement under oath to Disciplinary Counsel.

While there is evidence in the record that Respondent has been addicted to OxyContin for two to three years, it cannot be said that the medical evidence establishes that this chemical dependency caused his misconduct. (Transcript at 158). To the contrary, the evidence indicates that Respondent has engaged in a long history of reckless and questionable misconduct. He has failed to pay state and federal withholding taxes on his legal assistant's earnings during her employment with him from 1993 through 2003. (Transcript at 91, 95-96, 403-404). Moreover, Respondent did not seek any treatment for any addiction until after the Statement of Charges in this matter was served upon him. His conduct has been dishonest and selfish and he only made restitution to Ms. Lockhart after her ethics complaint was filed against him. His conduct has involved multiple offenses and a serious pattern of misconduct

that involves deceit and dishonesty. This Court noted in Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E.2d 550 (2003), that a pattern of misconduct is an aggravating factor in a lawyer disciplinary proceeding.

Additionally, Respondent's pattern of misconduct of failing to cooperate or respond to lawful requests from Disciplinary Counsel continued throughout the prosecution of this case and to present time. In addition to the instant Statement of Charges, Respondent has been the subject of six additional complaints filed at the Office of Disciplinary Counsel: Gary L. Newsome v. William H. Duty, I.D. No. 06-02-446; Homer R. Crank v. William H. Duty, I.D. No. 07-02-236; Steven A. Dempsey v. William H. Duty, I.D. No. 07-02-313; Harry Browning v. William H. Duty, I.D. No. 07-02-343; Sandra Williams v. William H. Duty, I.D. No. 07-02-391; and Helen L. Butcher v. William H. Duty, I.D. No. 07-02-464. Despite receiving notice of the same on several occasions, Respondent filed a verified response as required by Rule 8.1(b) of the Rules of Professional Conduct to only Mr. Newsome's complaint.

With specific regard to the complaint of Helen Butcher filed in October of 2007, she also alleged that Respondent misappropriated and converted monies in her case. She executed checks in the amount of \$5,000.00 and \$50,000.00 as settlement in an automobile accident suit. [ODC Exhibit Bates No. 0613 and 0636]. After the case settled, Respondent took his fee and advised Mrs. Butcher that all outstanding medical bills had been paid. However, in the summer of 2007, Mrs. Butcher received notice from a collection agency about several unpaid

medical bills arising from injuries from the automobile accident. She contacted Respondent on several occasions, who initially indicated it was an 'oversight' and then promised to pay the providers. Mrs. Butcher delivered the medical bills per Respondent's request, but no payments were ever made to the medical providers. Respondent has never answered this complaint. This further exhibits Respondent's patterns and practice of misconduct towards his client and his failures to respond to the Office of Disciplinary Counsel.

After Respondent's law license was annulled, as is customary after a lawyer has been license annulled, each of the outstanding, unanswered complaints were closed pursuant to Rule 2.4 of the Rules of Lawyer Disciplinary Procedure and stated that because Respondent's law license had been annulled effective March 15, 2008, these matters would be closed and placed in his reinstatement file for consideration upon any petition for reinstatement.² Because Respondent never provided notice to ODC of any requests for reconsideration of the opinion that annulled his law license, the matters were closed. At this present circumstance, Disciplinary Counsel intends to request the matters be re-opened by the Investigative Panel of the Lawyer Disciplinary Board its June 2008 meeting.

Moreover, a Motion for Rehearing and/or Reargument was filed on or about January 22, 2008, and a Petition for Rehearing was filed on or about March 17, 2008, each pleading that was filed by Respondent with this Honorable Court bears the required certificate of service that indicates the same was duly served upon the Office of Disciplinary Counsel, and

² By letter dated March 21, 2008, Ms. Butcher objected to the closing of her complaint and this appeal has been placed on the June 21, 2008 Meeting of the Investigative Panel of the Lawyer Disciplinary Board.

despite Respondent's sworn certification that the following was served upon Disciplinary Counsel, none of these pleadings were sent to the Office of Disciplinary Counsel. In fact, on each occasion, including Respondent's Brief filed with this Honorable Court on April 21, 2008, Disciplinary Counsel had to contact the Clerk's Office to ascertain whether a pleading was filed and then had to respectfully request that the Clerk's Office send a copy of the pleading. This pattern of conduct should aggravate any sanction issued by this Honorable Court.

VI. CONCLUSION

In this case, Respondent has misappropriated client funds and engaged in other deceitful and dishonest acts. The mitigating factors are far outweighed by the seriousness of these offenses and by aggravating factors surrounding his misconduct. In addition to his pattern of serious misconduct, he was an experienced lawyer at the time of his misconduct, his motives were selfish and dishonest, he obstructed the disciplinary process, and he made false statements under oath.

Respondent's April 21, 2008 Brief fails to meet his burden of proof to set aside the factual and legal findings of the Hearing Panel Subcommittee. Instead, it further demonstrates that Respondent fails to acknowledge the wrongfulness of his conduct.

Accordingly, the Lawyer Disciplinary Board urges the Court to adopt the Hearing Panel Subcommittee's recommendations and that Respondent's license to practice law in the State of West Virginia be annulled, that he make restitution of \$2,000.00 to Mr. and Mrs.

Randy Stiltner, that as a condition of reinstatement, his practice be supervised for a period of two years, that he be required to participate in an Alcoholics Anonymous or Narcotics Anonymous program approved by the Office of Disciplinary Counsel, that he complete twelve hours of CLE in legal ethics, and that he pay the costs of this proceeding.

Lawyer Disciplinary Board
By Counsel



Rachael L. Fletcher Cipoletti
Rachael L. Fletcher Cipoletti, Esquire [Bar No. 8806]

Interim Chief Lawyer Disciplinary Counsel

LAWYER DISCIPLINARY BOARD

2008 Kanawha Boulevard, East

Charleston, West Virginia 25311

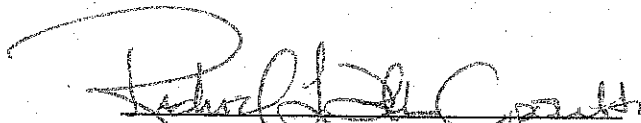
304 558-7999 phone

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CERTIFICATE OF SERVICE

This is to certify that I, **Rachael L. Fletcher Cipoletti**, Interim Chief Lawyer Disciplinary Counsel, counsel for the Lawyer Disciplinary Board have this the 6th day of May, 2008, served a true copy of the foregoing "**Reply Brief of the Lawyer Disciplinary Board**" upon Respondent **William H. Duty** by mailing the same via United States Mail, with sufficient postage, to the following address:

William H. Duty, Esquire
Post Office Box 277
Williamson, West Virginia 25661


Rachael L. Fletcher Cipoletti