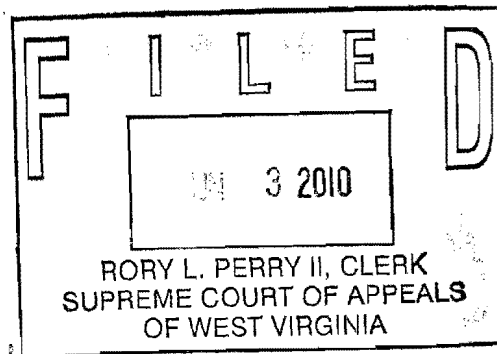

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 34724

LAWYER DISCIPLINARY BOARD,

v.

**DOUGLAS A. SMOOT, a
member of the West Virginia
State Bar.**



**BRIEF AMICUS CURIAE OF
ATTORNEY GENERAL DARRELL V. McGRAW, JR.
IN SUPPORT OF THE OFFICE OF DISCIPLINARY COUNSEL**

**SCOTT E. JOHNSON (WVSB No. 6335)
ASSISTANT ATTORNEY GENERAL**
Attorney General's Office
Building 1, Room W-435
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305
(304) 558-2522

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I.

INTRODUCTION

“West Virginia coal miners . . . work in anonymity to provide the power that fuels the American and global economy and provides electricity that allows all of us to live in unparalleled comfort.” Anne Marie Lofaso, *Approaching Coal Mine Safety from a Comparative Law and Interdisciplinary Perspective*, 111 W. VA. L. REV. 1, 2 (2008). Thus, the public policy of West Virginia has long been, as it should be, to protect the health, safety, and welfare of West Virginia’s coal miners. See, e.g., 52 W. Va. Att’y Gen. Op. 118 (Oct. 17, 1966) (noting state’s interest in the welfare of miners); 44 W. Va. Op. Att’y Gen. 204 (Aug. 27, 1951) (similar). Indeed, West Virginia was the first State to pass coal worker pneumoconiosis compensation legislation, *Energy Develop. Corp. v. Moss*, 214 W. Va. 577, 584, 591 S.E.2d 135, 142 (2003), to compensate miners when they are victims of coal worker pneumoconiosis, or as it is more commonly called, “Black lung disease, the scourge of the coal mining industry[.]” *Mullins v. Andrus*, 664 F.2d 297, 298 n.2 (D.C. Cir. 1980).

The Report of the Hearing Panel Subcommittee reaches a legally unsupported and factually indefensible conclusion that the Respondent did not violate the Rules of Professional Conduct. In doing so, it eviscerates not only the Rules, but places mostly unrepresented and unsophisticated miners—some desperately ill and all unfamiliar with legal concepts and practices— in a “highly adversarial” and “complex” system, *United States Dep’t of Labor v. Triplett*, 494 U.S. 715, 733 (1990) (Marshall, J., concurring in the judgment), GENERAL ACCOUNTING OFFICE, BLACK LUNG BENEFITS PROGRAM: ADMINISTRATIVE AND STRUCTURAL CHANGES COULD IMPROVE MINERS’ ABILITY TO PURSUE CLAIMS 26 (Oct. 2009) (noting that few lawyers will represent black lung claimants), against highly paid company lawyers at all levels of the black lung system. *Triplett*, 494 U.S. at 733 (Marshall, J., concurring).

Therefore, the Attorney General as a constitutional officer of the State of West Virginia responsible for setting the State’s legal policy, *state ex rel. McGraw v. Burton*, 212 W. Va. 23, 569 S.E.2d 99, (2002); *State ex rel. Robb v. Caperton*, 191 W. Va. 492, 495 n.6, 446 S.E.2d 714, 717 n.6 (1994), files this brief amicus curiae supporting the Office of Disciplinary Counsel under the right to do so granted him by West Virginia Rule of Appellate Procedure 19 in order to protect the state’s public policy of dealing fairly with its coal miners and their families.

II.

FACTS

A. Federal Black Lung Law and Procedure

The underlying case giving rise to this disciplinary proceeding dealt with coal miners pneumoconiosis, or as it is more commonly known, Black Lung. “Prolonged exposure to

coal dust has subjected hundreds of thousands of coal miners to pneumoconiosis—a serious and progressive pulmonary condition popularly known as “black lung.” *Mullins Coal Co. v. Director*, 484 U.S. 135, 138 (1987). Black Lung causes “severe, and frequently crippling, chronic respiratory impairment.” *Elm Grove Coal Co. v. Director*, 480 F.3d 278, 282 n.4 (4th Cir. 2007) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 6 (1976)). “[B]lack lung condemn[s] thousands of miners to live out their days crippled by the devastating effects of progressive, chronic lung disease[,]” David C. Vladeck, *The Failed Promise of Workplace Health Regulation*, 111 W. VA. L. REV. 15, 19 (2008) and kills between 1,000 about 1,500 former coal miners yearly. Compare Anne Marie Lofaso, *Approaching Coal Mine Safety from a Comparative Law and Interdisciplinary Perspective*, 111 W. VA. L. REV. 1, 13 n.5 (2008) (noting that the United Mine Workers of America puts the toll at 1,500) with David C. Valdeck, *The Failed Promise of Workplace Health Regulation*, 111 W. Va. L. Rev. 15, 17 & n.8 (2008) (noting the National Institute of Occupational Health places the number at 1,000).

To deal with the tragedy, Congress enacted the “Black Lung Benefits Act of 1972, 83 Stat. 792, as amended, 30 U.S.C. § 901 *et seq.* (1982 ed. and Supp. V), [which] provides federal funds to those who have been totally disabled by pneumoconiosis . . . and to their eligible survivors.” *United States Dep’t of Labor v. Triplett*, 494 U.S. 715, 717 (1990). The system the Congress and the Department of Labor created was, however, “highly adversarial.” *Id.* at 733 (Marshall, J., concurring in the judgment). “[T]he responsible mine operator actively oppose[s] the award of benefits to a claimant at all levels of the black lung system. Because an operator faces the prospect of paying significant awards, it is often willing to pay substantial legal fees to defend against black lung claims.” *Id.* “An

unsophisticated and desperately ill miner, unfamiliar with legal concepts and practices, is at a severe disadvantage when he faces the expert lawyers of the Government or operators without professional assistance of his own.” *Id.* at 734.¹

B. Facts of this case.

Elmer Daugherty was a former coal miner who worked for Westmoreland Coal Company for 26 years. Rec. Bates Stamp # 1505. He filed a claim for Black Lung benefits with the federal Department of Labor on June 1, 2000. Rep. Hearing Pan. Subcomm. at 4 ¶ 5. Mr. Daugherty was not represented by a lawyer at this point (and was not until March 31, 2004), and had only the assistance of a Black Lung Benefits counselor. *Id.* ¶ 4.²

Shortly after Mr. Daugherty filed his claim, Westmoreland Coal Company hired the Law Firm of Jackson Kelly PLLC to represent it in Mr. Daugherty’s Black Lung claim. *Id.* at 5 ¶ 5. Jackson Kelly initially assigned the case to the Respondent. *Id.* On October 26, 2000, the Department of Labor, through its district director, made an initial finding awarding benefits. *Id.* at 5 ¶ 6. Westmoreland appealed on November 21, 2000. *Id.*

¹In 2000, the Department of Labor promulgated new Black Lung procedural rules filling almost 200 pages of the FEDERAL REGISTER. Brian C. Murchison, *Due Process, Black Lung, and the Shaping of Administrative Justice*, 54 ADMIN. L. REV. 1025, 1025-26 (2002). However, the pertinent rules at issue here are those effective in 1991 since the Black Lung claim that underlies this case was filed before 2001. 20 C.F.R. § 725.2(c). Even under the new rules, however, most claims are initially denied and about half of all appeals result in denial of claims, GENERAL ACCOUNTING OFFICE, BLACK LUNG BENEFITS PROGRAM: ADMINISTRATIVE AND STRUCTURAL CHANGES COULD IMPROVE MINERS’ ABILITY TO PURSUE CLAIMS 19 (Oct. 2009), which is some improvement over the pre-2000 rules where the approval rate was only 7.6%. Brian C. Murchison, *Due Process, Black Lung, and the Shaping of Administrative Justice*, 54 ADMIN. L. REV. 1025, 1027 (2002).

²Department of Labor Administrative Law Judge have reported to the general accounting office that lay representatives can provide effective guidance and support in helping claimants understand the claims process and in completing the required documentation in a timely manner. GAO, *Black Lung Benefits Program* at 27. These lay representatives are better suited to assisting claimants with initial claims than with appeals, which the Administrative Law Judges said generally requires formal legal training. *Id.*

On December 15, 2000, the Respondent informed Mr. Daughtery that Westmoreland exercised its right to have Mr. Daughtery examined by a physician of Westmoreland's own choosing. *Id.* ¶ 7. 20 C.F.R. § 725.414(a) (2000). This examination was conducted by Dr. George L. Zaldivar on February 7, 2001. Rep. Hearing Pan. Subcomm. at 5: ¶ 8.

On February 1, 2001, Mr. Daughtery began to receive benefits under a "pay status" until his death on December 2, 2005. *Id.* ¶ 9.³

After January 30, 2001, no further proceedings took place before the district director and on March 19, 2001, the district director transferred the case to the Office of Administrative Law Judges. *Id.* ¶ 10.

Around March 22, 2001, Dr. Zaldivar sent the Respondent a packet which contained Mr. Daughtery's medical history and physical examination report, test results, and a narrative report dated May 16, 2001. *Id.* at 6 ¶ 11. The Hearing Panel concluded that this information was to be considered as one document. *Id.* at 16 ¶ 11. On November 12, 2001, the Respondent provided a letter to Mr. Daughtery addressed to Administrative Law Judge Daniel L. Leland⁴ which purported to include the "Exam Report of Dr. George L. Zaldivar

³The Hearing Panel Subcommittee observed that Mr. Daughtery sought and received a number of continuances of his hearing while still receiving benefits and the Respondent never objected. Rep. Hearing Pan. Subcomm. at 6-7 ¶¶ 13 & n.4-14. At best this appears to be some sort of a tu quoque or argumentum ad hominem, neither of which is legally or logically justifiable. Whether Mr. Daughtery lost black lung benefits or not, is irrelevant because "[t]his Court has consistently declared that "'attorney disciplinary proceedings are primarily designed to protect the public, to reassure it as to the reliability and integrity of attorneys and to safeguard its interest in the administration of justice.'" *State ex el. Potter v. Office of Disciplinary Counsel*, ____ W. Va. ____, ____ n.10, 2010 WL 1265205, at * 4 n.10 (W. Va. Apr. 1, 2010) (per curiam) (quoting *Lawyer Disciplinary Bd. v. Roberts*, 217 W. Va. 189, 197, 617 S.E.2d 539, 547 (2005) (quoting *Committee on Legal Ethics v. Keenan*, 192 W. Va. 90, 94, 450 S.E.2d 787, 791 (1994))).

⁴This letter was signed by a paralegal. Rep. Hearing Pan. Subcomm. at 6 ¶ 12. There is no dispute that the decision to omit the narrative was made by the Respondent.

dated February 7, 2001.” *Id.* at 6 ¶ 12.⁵ However, this November 12, 2001 letter did not contain the full examination report; rather, the Respondent did not include the Dr.’s narrative, *id.* at 8 ¶ 21, 16 ¶ 10, in what has been termed the “disassembly” of the report. *Id.* at 13 ¶ 1.⁶ The Hearing Panel Subcommittee concluded that the narrative was beneficial to Mr. Daugherty. *Id.* at 16 ¶ 12. And, in fact, Administrative Law Judge Michael P. Lesniak in his *Order Certifying Facts to the United States District Court for the Southern District of West Virginia in Daugherty v. Westmoreland Coal Co.* at 2 ¶ 6, Claim 2001-BLA-594 (Oct. 21, 2005), explained that the narrative report was “extremely damaging to [Westmoreland’s] contest of [Daugherty’s] claim for benefits” because the report showed Mr. Daugherty to have complicated pneumoconiosis, which, under 20 C.F.R. § 718.304 creates an irrebutable presumption that the miner is totally disabled by the complicated pneumoconiosis. *See, e.g., Double B Min., Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999).⁷

The Respondent has consistently defended his decision to provide only part of Dr.

⁵This letter and (partial) report was not received by the Office of Administrative Law Judges. *Order Certifying Facts to the United States District Court for the Southern District of West Virginia in Daugherty v. Westmoreland Coal Co.* at 2 ¶ 7, Claim 2001-BLA-594 (Oct. 21, 2005),

⁶The disassembly of the report only came to light when Jackson Kelly Lawyer Kathy Snyder provided the May 16, 2001 narrative to Mr. Daugherty’s lawyer in response to Interrogatories and Request for Production of Documents. Rep. Hearing Pan. Subcomm. at 7-8 ¶¶ 17-18. Ms. Snyder included the May 16 in, what she termed, the “Supplemental Report of Dr. George L. Zaldivar dated September 20, 2004.” *Id.* at 7-8 ¶ 18.

⁷Pneumoconiosis is classified customarily as either “simple” or “complicated.” *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976). In general, complicated pneumoconiosis is much more serious than simple pneumoconiosis; complicated pneumoconiosis involves progressive massive fibrosis- a complex reaction to dust and other factors (which may include tuberculosis or other infection), and usually produces significant pulmonary impairment and marked respiratory disability. This disability limits the victim’s physical capabilities, may induce death by cardiac failure, and may contribute to other causes of death.” *Id.* (footnotes omitted).

Zaldivar's report—while characterizing it as his complete report—on the basis of the nature of federal Black Lung benefit proceedings. Specifically, the Respondent asserts that (1) while a claim was pending before the district director, then 20 C.F.R. § 725.414 (2000) requires the production of the report of a medical examination under 20 C.F.R. § 725.414(a) (2000) to the district director and other parties to the claim, but (2) once a claim is transferred to the OALJ then 20 C.F.R. § 18.19(c)(4) (2000) requires the production of the medical report only upon request.

That is, while a case is pending before the district director, all evidence is required to be turned over, but once the case moves from the director to the OALJ the submission obligations change. Rep. Hearing Pan. Subcomm. at 20 ¶ 21, that is, there is no duty to provide anything unless requested. *Id.* at 22-23 ¶ 26.

During proceedings before Administrative Law Judge Lesniak, Administrative Law Judge Lesniak entered an Order remanding the case to the district director. *In re Daughtery*, Claim No. 2001-BLA-594, *Order Remanding Case to District Director* (Mar. 21, 2005). In this Order, Administrative Law Judge Lesniak found “the separating of Dr. Zaldivar's May 16, 2001 narrative to be unconscionable and reprimand[ed] the attorney or attorneys responsible; this was a deliberate attempt to mislead the Claimant I find their defense of this practice to be ludicrous.” *Id.* at 7-8. Additionally, Administrative Law Judge Lesniak found in his *Decision on Motion for Reconsideration* at 1, *In re Daughtery*, Claim No. 2001-BLA-594 (June 27, 2005) that the prior Administrative Law Judge in the case, Daniel L. Leland, issued a Notice of Hearing requiring that all parties exchange documentary evidence 20 days before the hearing. Administrative Law Judge Lesniak found that the disassembly of the Zaldivar report was in fact disassembly of the report and

that “this was a deliberate attempt to mislead [Mr. Daugherty] . . . a violation of Judge Daniel L. Leland’s Notice of Hearing [and thus] a serious breach of trust.” *Decision on Motion for Reconsideration* at 2 ¶ 2, *In re Daugherty*, Claim No. 2001-BLA-594 (June 27, 2005). Administrative Law Judge Lesniak also observed that “I myself have never encountered an attorney tampering with evidence, in this case, a medical exhibit, not as an Administrative Law Judge and not during my years of practicing law. Thus, to my knowledge this is not a common practice, not by attorneys who appear before me and not by the law firm Jackson Kelly.” *Id.* ¶ 3.

Ultimately this matter worked its way to the United States District Court for the Southern District of West Virginia on a certification order from the OALJ to deal with a consideration of sanctions. *In re Jackson Kelly PLLC*, Civil Action No. 2:05-CV-0853 (Mem. Op. Aug. 30, 2006). Although finding it lacked the authority to sanction to Respondent, the Court nonetheless found that the Respondent’s (and his law firm’s) assertions in excuses and arguments in defense of dissembling the Zaldivar report were “flimsy at best.” *Daugherty v. Westmoreland Coal Co. (In re Jackson Kelly PLLC)*, Mem. Ord. at 12 (Aug. 30, 2006). The Court also found that “[i]f claimant’s allegations are true, it is clear that Jackson Kelly has done a great disservice to our legal system and, thereby, is subject to discipline.” *Id.* (And, of course, the Hearing Panel found that the allegation that the Respondent dissembled the Zaldivar report *was true*. Rep. Hearing Pan. Subcomm. at 8 ¶ 21). The Investigative Panel of the Lawyer Disciplinary Board issued a Statement of Charges against the Respondent for violating West Virginia Rules of Professional Conduct 3.4(a), 4.3 and 8.4(c) and (d).

III.

STANDARD OF REVIEW

This Court has held that

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

Syl. Pt. 1, *Lawyer Disciplinary Bd. v. Losch*, 219 W. Va. 316, 633 S.E.2d 261 (2006) (*per curiam*) (quoting Syl. Pt. 3, *Committee on Legal Ethics v. McCorkle*, 192 W. Va. 286, 452 S.E.2d 377 (1994)). Additionally, “[t]his Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions, or annulments of attorneys’ licenses to practice law.” Syl. Pt. 3, *Committee on Legal Ethics v. Blair*, 174 W. Va. 494, 327 S.E.2d 671 (1984).

IV.

ARGUMENT

“Honesty is one of the cornerstones of the legal profession.” *Office of Lawyer Disciplinary Counsel v. Galford*, 202 W. Va. 587, 590, 505 S.E.2d 650, 653 (1998) (*per curiam*). “The accuracy of documents and instruments utilized before a tribunal in proceeding is of utmost importance to the administration of justice.” *Lawyer Disciplinary Board v. Ansell*, 210 W. Va. 139, 143 n. 5, 556 S.E.2d 106, 110 n. 5 (2001) (*per curiam*)

(quoting *In re Siegel*, 708 N.E.2d 869, 872 (Ind.1999)). “Documents are an attorney’s stock in trade, and should be tendered and accepted at face value in the course of professional activity.” *In re Lawrence*, 884 So.2d 561, 567 (La. 2004) (quoting *In re Schneider*, 553 A.2d 206, 209 (D.C.1989)). The withholding of a portion of the Zaldivar report leaving Mr. Daughtery in ignorance of its existence clearly violates the Rules of Professional misconduct, specifically Rule 3.4(a) and 8.4(c) & (d).

A. The Respondent’s violation of Rule of Professional Conduct 3.4(a).

West Virginia Rule of Professional Conduct 3.4(a) provides, in pertinent part, that a “lawyer shall not . . . unlawfully alter, . . . or conceal a document or other material having potential evidentiary value.” Thus, for a violation of 3.4(a) to occur: (1) a lawyer must alter or conceal a document; (2) having potential evidentiary value; and (3) do so unlawfully—all of which occurred here.

First, the Respondent altered and concealed a document. The Respondent removed the narrative report from the packet Dr. Zaldivar provided him, Rep. Hearing Pan. Subcomm. at 8 ¶ 21, and sent the truncated report to Administrative Law Judge Leland and Mr. Daughtery purporting that it was the “Exam Report of Dr. George L. Zaldivar dated February 7, 2001.” *Id.* at 6 ¶ 12.

Second, although not addressed by the Hearing Panel Subcommittee, (because it believed the withholding to be lawful), the narrative had potential—indeed, to Westmoreland devastating—evidentiary value. As Administrative Law Judge Lesniak found in his *Order Certifying Facts to the United States District Court for the Southern District of West Virginia* in *Daugherty v. Westmoreland Coal Co.* at 2 ¶ 6, Claim 2001-BLA-594 (Oct. 21, 2005) (internal citations omitted):

[I]n the narrative report dated May 16, 2001, Dr. Zaldivar found that Claimant suffered from complicated pneumoconiosis. Under the Act, there is an irrebutable presumption that a miner found to have complicated pneumoconiosis is totally disabled by it. Thus, Dr. Zaldivar's May 16, 2001 narrative was extremely damaging to Employer's contest of Claimant's claim for benefits.

Third, the disassembly was unlawful. The Hearing Panel Subcommittee correctly found that a violation of Rule 3.4(a) can only occur if the alteration or concealment was unlawful. Rep. Hearing Pan. Subcomm. at 17-18 ¶ 17. "[U]nlawfully' is a key term, suggesting that a lawyer who conceals evidence would violate the Rule only if the lawyer already has some obligation to disclose it[.]" ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 3.4 (6th ed. 2007). It also found that, it would be persuasive (although not dispositive), if "another tribunal with jurisdiction over federal black lung claims [found] that Respondent's failure to submit Dr. Zaldivar's May 16, 2001 narrative letter on November 12, 2001, was in violation of an applicable rule or regulation[.]" Rep. Hearing Pan. Subcomm. at 19, but that no such fining had ever been made. Rep. Hearing Pan. Subcomm. 24 ¶ 29. This is inaccurate.

Administrative Law Judge Lesniak found in his *Decision for Motion for Reconsideration* that the withholding of the narrative was "a deliberate intent to mislead the Claimant **and a violation of Judge Daniel L. Leland's Notice of Hearing Order dated September 20, 2001... [and] a serious breach of trust.**" (emphasis added). Pg. 2, ¶ 2. Consequently, a tribunal of competent jurisdiction over Mr. Daughtery's claim made a finding that the disassembly of the narrative was in violation of a tribunal order.

Indeed, Administrative Law Judge Lesniak specifically stated in his *Order*

Remanding Case to District Director, pg. 7 ¶ 17 that “Jackson Kelly PLLC attorneys actually defended the practice of withholding Dr. Zaldivar’s May 16 narrative from the Claimant as lawful” *Id.* Administrative Law Judge Lesniak then found that “the separating of Dr. Zaldivar’s May 16; 2001 narrative to be unconscionable and reprimand the attorney or attorneys responsible[,]” *id.* ¶ 18, and further found that the defense of this “practice (withholding Dr. Zaldivar’s narative, which was surely detrimental to Westmoreland’s case) to be ludicrous.” *Id.* Since Administrative Law Judge Lesniak found that the argument that withholding the narrative was “lawful” to be “ludicrous,” the end result must be that he concluded such conduct *was unlawful*. And if *unlawful*, then the conduct of dissembling the narrative from the remainder of Dr. Zaldivar’s report and sending the remaining portions out as the full report places such conduct squarely within the prohibition of Rule 3.4(a).

Moreover, “[r]egulations are created to provide guidance and uniformity to an agency’s decision-making. Those regulations, however, should not be so strictly interpreted as to provide unreasonable, unfair, and absurd results.” *Chowdhury v. Ashcroft*, 241 F.3d 848, 853 (7th Cir. 2001). It is unfair to allow a party to speak in half truths. While a party may have no duty to disclose anything, once a party discloses something there is a corresponding duty to disclose everything material to the original disclosure. “In other words, a duty to disclose will be imposed on a party insofar as he or she voluntarily makes a disclosure; thus, a party who assumes to speak must make a full and fair disclosure as to the matters about which he or she assumes to speak.” 37 C.J.S. *Fraud* § 32 (footnote omitted). The lawyer’s obligation when appearing in an administrative tribunal is no different and should not be interpreted differently from the obligations of an advocate in

a judicial tribunal. James J. Brosnahan and Carol S. Brosnahan, *Attorney's Ethical Conduct during Adversary Proceedings*, 523 PLI/Lit 225, 271 (1995). In short, “[m]isleading any opposing party is improper.” *Id.*

Such a rule should be especially applicable here where the Respondent's claim is that the rules require a discovery request before the duty to disclose arises. “Given claimants' difficulty in obtaining legal representation, the cases will be few indeed in which a claimant requests production of withheld evidence or files a motion to compel.” Murchison, *Due Process, Black Lung, and the Shaping of Administrative Justice*, 54 ADMIN. L. REV. at 1067.

Finally, the Respondent argues that his conduct was consistent with the conduct throughout the Black Lung system.⁸ *Vitia temporis*. But “everybody does it’ was and is a cowardly evasion of responsibility[.]” Thomas L. Shaffer, (Book Review) *Francis Bacon: the Temper of a Man*. By Catherine Drinker Bowen. Boston: Little, Brown & Co., 73 Yale L.J. 537, 539 (1964).

The Respondent violated Rule 3.4(a) and this Court should reject the Hearing Panel Subcommittee's Report.

B. The Respondent's violation of Rule of Professional Conduct 8.4(c) & (d).

Rule of Professional Responsibility 8.4(c) provides in pertinent part, “[i]t is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]” Rule of Professional Responsibility 8.4(d) provides in pertinent part, “[i]t is professional misconduct for a lawyer to: . . . engage in conduct that

⁸Although Administrative Law Judge Lesnaik would disagree. *Decision on Motion for Reconsideration* at 2 ¶ 3, *In re Daugherty*, Claim No. 2001-BLA-594 (June 27, 2005).

is prejudicial to the administration of justice[.]”

1. Rule 8.4(c).

West Virginia Rule of Professional Conduct 8.4(c) is identical to American Bar Association Model Rule of Professional Conduct 8.4(c). “Rule 8.4(c) is implicated when a lawyer misleads or lies to a tribunal” as well as when a lawyer “deceiv[es] an adverse party or opposing counsel.” ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 8.4 (6th ed. 2007). Contrary to the Hearing Panel’s Report, the Respondent violated Rule 8.4(c) in both of these regards.

A case analogous to this is *In re Zeiger*, 692 A.2d 1351 (D.C. 1997). Zeiger’s client was hit by a car and the client retained Zeiger to represent him in his claim against Aetna Insurance. *Id.* at 1354. An Aetna claims agent wrote Zeiger asking him to send her the client’s hospital records. *Id.* Zeiger submitted no records at that time. *Id.* At a later meeting, the client denied he had been drinking. *Id.* Zeiger obtained the hospital records and found that his client was intoxicated when admitted after the accident. *Id.* Zeiger admitted he altered the hospital records by obliterating all references to alcohol use at the time of the accident, to alcoholism, and to treatment related to his alcoholism while at the hospital. *Id.* Zeiger failed to advise Aetna of the alterations when he submitted the records and hospital bills to it with a letter asking for a settlement. *Id.* “The [District] Hearing Committee . . . found clear and convincing evidence of a violation of Rule 8.4” because by “[s]ending the altered materials to the insurance agent in the apparent hope that she would assume them to be complete and rely on them in dealing with the claim . . . was “dishonest[.]” *Id.* at 1355. And even if not dishonest, the dissembly was a misrepresentation.

Moreover, the Report of the Hearing Panel Subcommittee incorrectly concluded that because it is a practice within the Federal Black Lung Bar not to provide complete records, that “[t]his leaves the Panel in the position of judging the *motive* of the Respondent when he disassembled and provided only part of the report,” Rep. Hearing Pan. Subcomm at 28 ¶ 43 (emphasis added), and that the “Panel is giving the Respondent the benefit of the doubt on his *intent* based on all of the above.” *Id.* at 29 ¶ 44 (emphasis added). While fraud and dishonesty might require intent or motive, misrepresentation does not. *In re Obert*, 89 P.3d 1173, 1177 (Or. 2004) (citation omitted). “A misrepresentation, in contrast [to dishonesty, fraud, and deceit] is unique in several ways. For example, it need not be driven by an improper motive. Neither does it require an intent to deceive or commit fraud.” *Id.* at 1178 (citations omitted). In other words, “[a] lawyer’s motivation—often described as an intent or purpose to deceive—is generally irrelevant to Rule 8.4(c).” ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 8.4 (6th ed. 2007). *See also Attorney Griev. Comm’n v. Reinhardt*, 892 A.2d 533, 540 (Md. 2006) (“specific intent is not a necessary ingredient of dishonesty or misrepresentation.”); *In re Dann*, 960 P.2d 416, 419 (Wash. 1998) (en banc) (“Simply put, the question is whether the attorney lied.”); *Ansell v. Statewide Griev. Comm.*, 865 A.2d 1215, 1222-23 (Conn. Ct. App. 2005) (finding no scienter requirement in a misrepresentation charge); Douglas R. Richmond, *Lawyers’ Professional Responsibilities and Liabilities in Negotiations*, 22 GEO. J. LEGAL ETHICS 249, 270 (2009) (“a lawyer’s motive is irrelevant when evaluating her conduct in relation to Rule 8.4(c)”)⁹

⁹Lawyers are only human and make mistakes, *see State v. Watkins*, 214 W. Va. 477, 480 (continued...)

“Misrepresentation’ may include an affirmative misstatement, an intentional failure to disclose material facts that may or may not have been intended to deceive, or a combination of both.” *In re Huffman*, 13 P.3d 994, 998 (Or. 2000). Thus, a misrepresentation can be “simply an omission of fact that is knowing, false, and material in the sense that, had it been disclosed, the omitted fact would or could have influenced significantly the hearer’s decision-making process, or conduct[.]” *Obert*, 89 P.3d at 1177. Here, the Respondent provided part of Zaldivar’s report, but represented it was the full report, thus making it false. He did so knowingly (that is, having actual knowledge that he was not providing the full report, *see* W. Va. R. Prof. Cond. Terminology). Finally, it was material in that it would or could have influenced the decision-making process, i.e., since the narrative found complicated pneumoconiosis and complicated pneumoconiosis raises the irrebutable presumption of total disability, the decision maker—if choosing to believe the narrative—would have *had* to award Mr. Daughtery Black Lung benefits.

The Hearing Panel Report is unsustainable by the facts and the law as the facts and law clearly establish the Respondent’s violation of Rule 8.4(a). This Court should reject the Panel’s Report.

2. Rule 8.4(d).

Like Rule 8.4(c), Rule 8.4(d) is identical to Model Rule 8.4(d), and like Rule 8.4(c), contains no “scienter requirement.” *Daniels v. Statewide Grievance Committee*, 804 A.2d

⁹(...continued)
n.2, 590 S.E.2d 670, 673 n.2 (2003) (per curiam), so this standard does not impose strict liability. “Although ‘motivation’ is irrelevant, courts do look for some culpable element of knowledge or reckless disregard, however they may characterize it.” ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 8.4 (6th ed. 2007). This is not a case where the Respondent accidentally altered the Zaldivar report or by simple mistake believed the whole report had been sent.

1027, 1032 (Conn. Ct. App. 2002). It is not whether the Respondent's "subjective motivation" in withholding the narrative was "improper or done in bad faith, but whether his conduct . . . violated rule 8.4[(d)]." *O'Brien v. Superior Court*, 939 A.2d 1223, 1241 (Conn. Ct. App. 2008). "[C]onduct prejudicial to the administration of justice under (d) do[es] not require specific intent." *Attorney Grievance Comm'n v. Pennington*, 876 A.2d 642, 657 (Md. 2005). All that is required to violate Rule 8.4(d) is conduct which is prejudicial to the administration of justice. Here, Administrative Law Judge Lesniak found that the Respondent intended to mislead Mr. Daughtery and that this conduct was in violation of Administrative Law Judge Leland's Notice of Hearing. Failing to provide information when ordered to by a court is a violation of Rule 8.4(d). *See Neal v. Clinton*, No. 2000-5677, 2001 WL 34355768, at *2 (Ark. Cir. Ct. Jan. 19, 2001) ("Mr. Clinton's conduct, heretofore set forth, in the *Jones* case violated Model Rule 8.4(d), when he gave knowingly evasive and misleading discovery responses concerning his relationship with Ms. Lewinsky, in violation of Judge Wright's discovery orders."). The Respondent violated Rule 8.4(d) and this Court should reject the Hearing Panel's recommendation.

V.

CONCLUSION

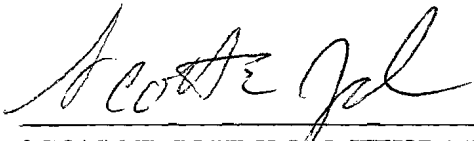
For the above reasons, the Court should reject the Hearing Panel's recommendation.

Respectfully submitted,

**ATTORNEY GENERAL
DARRELL V. MCGRAW, JR.,**

By counsel

**DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL**



**SCOTT E. JOHNSON (WVSB No. 6335)
ASSISTANT ATTORNEY GENERAL**

Office of the Attorney General
Building 1, Room W-435
State Capitol Complex
Charleston, WV 25305
(304) 558-2522