

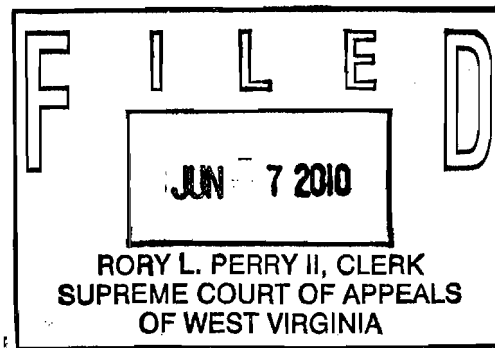
**IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA**

No. 34724

**Lawyer Disciplinary Board,
Petitioners Below,
Appellants**

vs.

**Douglas A. Smoot,
Member of the West Virginia Bar,
Appellee**



**BRIEF OF AMICI CURIAE
NATIONAL BLACK LUNG ASSOCIATION
And
APPALACHIAN CITIZENS' LAW CENTER, INC.**

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STATEMENT OF INTEREST AND STATEMENT OF FACTS

The National Black Lung Association (NBLA) is an unincorporated group of coal miners and their families and friends with a long history of advocating for better treatment of miners who have black lung disease and widows of miners who had black lung disease. The group has provided information and assistance to miners and widows proceeding *pro se* on claims arising under the Federal Black Lung Benefits Program. The Appalachian Citizens' Law Center, Inc., (Law Center) is a non-profit Kentucky corporation formed in 2001 to provide legal assistance to low-income citizens. Attorneys with the Law Center regularly represent miners and widows on claims arising under the Federal Black Lung Benefits Program.

Both the NBLA and the Law Center have a special interest in the fair and just administration of the Federal Black Lung Benefits Program and the public's confidence in the program. Because of their special interest in the administration of the Federal Black Lung Benefits Program, the NBLA and the Law Center seek permission to participate as amici curiae in this case.

This proceeding arises from a Federal Black Lung Benefits Claim filed by Elmer Daugherty. Mr. Daugherty, a disabled underground miner born on October 25, 1925, with an 8th grade education, filed his third claim for federal black lung benefits on June 1, 2000, and was awarded benefits which he began receiving on February 2, 2001, which he received until his death on December 2, 2005. Mr. Daugherty proceeded *pro se* until March 30, 2004, when Attorney Robert F. Coleman began representing him. Mr. Daugherty received over thirty thousand dollars in benefits, and if the finding of the ALJ had been adverse to him, he would be subject to overpayment and repayment of benefits received. Attorneys representing

Westmoreland Coal Company know of this overpayment requirement, and failure to be candid with Mr. Daugherty as to his total irrefutable presumption of disability which is discussed herein would require a disabled miner or his family to be subject to great financial hardship and mental anguish in having to repay monies to which Mr. Daugherty was absolutely entitled to receive.

Douglas A. Smoot, an attorney with Jackson Kelly PLLC and a member of the West Virginia Bar, represented Westmoreland Coal Company, Mr. Daugherty's former employer which was potentially liable for benefits to Mr. Daugherty under the Federal Black Lung Benefits Program. During the course of the proceedings in the Federal Black Lung Benefits Claim, Mr. Smoot, on behalf of Westmoreland, arranged for Mr. Daugherty to be examined by Dr. George L. Zaldivar. When Mr. Smoot received Dr. Zaldivar's independent medical evaluation report (IME), he disassembled the IME, and submitted the physician's "report," without the physician's diagnoses and conclusions, to the Administrative Law Judge (ALJ) with a copy to Mr. Daugherty. Most important, Mr. Smoot's cover letter, which he sent to the ALJ and Mr. Daugherty on November 12, 2001, identified the partial report sent to the ALJ and Mr. Daugherty as Dr. Zaldivar's "exam report" when in fact, Mr. Smoot knew that the document represented only a part of that report and excluded Dr. Zaldivar's conclusions including his diagnosis of complicated pneumoconiosis. (Respondent's Exhibit No. 5, Bates No. 00195.)

In March, 2005, Administrative Law Judge Michael P. Lesniak, who presided over proceedings in Mr. Daugherty's Federal Black Lung Benefits Claim, reviewed Respondent's conduct and found:

17. The issue of Dr. Zaldivar's reports is another matter. Dr. Zaldivar examined the Claimant on February 7, 2001, then wrote a report dated May 16, 2001 containing a narrative, history, physical examination and laboratory information. This was one integrated report sent to Jackson Kelly PLLC in one envelope (see footnote 3 above). Yet Jackson Kelly PLLC chose to withhold the narrative section from the Claimant, who was at that time pro se, and from its own medical consultants. The narrative finally appeared three years later, however, Jackson Kelly's PLLC other medical experts have never seen it. During the hearing of December 16, 2004, in spite of Rule 3.4 entitled Fairness to Opposing Party and Counsel (see footnote 5 above), Jackson Kelly PLLC attorneys actually defended the practice of withholding Dr. Zaldivar's May 16, 2001 narrative from the Claimant as lawful, since it was finally provided to the Claimant prior to the 20-day deadline, albeit three years after Claimant received only the enclosures to Dr. Zaldivar's May 16, 2001 report, TR at 26, 27. I assume, then, I can expect more of the same from Jackson Kelly PLLC.

18. I find the separating of Dr. Zaldivar's May 16, 2001 narrative to be unconscionable and reprimand the attorney or attorneys responsible; this was a deliberate attempt to mislead the Claimant, I expected more from this law firm. I find their defense of this practice (withholding Dr. Zaldivar's narrative, which was surely detrimental to Westmoreland's case) to be ludicrous. I admonish the attorneys involved not to tamper with exhibits, potential exhibits and/or any type of documents which may be entered into evidence in the future. (Order Remanding Case to District Director issued March 21, 2005, ODC Ex. 18, footnotes omitted).

The Respondent admitted to the Administrative Law Judge that a portion of Dr. Zaldivar's report was not provided to Mr. Daugherty. (Report, Findings of Fact, Number 21, p. 8). The narrative report which was withheld contained Dr. Zaldivar's assessment of his exam results and diagnosis of complicated pneumoconiosis with severe pulmonary impairment, and disability due to emphysema and coal workers' pneumoconiosis. (Ex. 6, p. 68, 70 . Under the Federal Black Lung Program if a miner has complicated pneumoconiosis there is an irrebuttable presumption that the miner is totally disabled due to pneumoconiosis. (30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; emphasis added). A physician's finding of complicated pneumoconiosis is very significant and, if credited, establishes entitlement to an award of Federal Black Lung

Benefits. Thus, the portion of Dr. Zaldivar's report removed by Respondent before submitting it to the ALJ and the claimant supported Mr. Daugherty's claim and was extremely harmful to the position then advocated by the Respondent.

Amici submit that removing a physician's diagnoses and conclusions from an IME and then submitting the remainder as the physician's "exam report" is misleading and is not common practice in claims practiced under the Federal Black Lung Benefits Program. Amici do not agree with the Hearing Panel Subcommittee's finding that the Respondent's act of submitting Dr. Zaldivar's IME "report" after removing his diagnoses and conclusions "was in compliance with the applicable Federal Black Lung Regulations." (Report, The Scope of the Statement of Formal Charges, number 30, p. 24). At best, the regulations are silent on the conduct at issue. Although the applicable Federal Black Lung Regulations may not specifically address the conduct of the Respondent, they certainly do not permit misleading conduct or misrepresentation of an IME to anyone, let alone a *pro se* claimant and to an administrative tribunal.

The Administrative Law Judge (ALJ) clearly found that Mr. Smoot's conduct was intended to mislead Mr. Daugherty and was a breach of trust. In his Decision on Motion for Reconsideration Judge Lesniak stated:

2. However, I would consider certifying the record to the District Court requesting the Court to hold in contempt, if the District Court agreed with my analysis, the person or persons responsible for separating the narrative section of Dr. Zaldivar's May 16, 2001 medical report and sending the remaining portion to the Claimant on November 12, 2001. As I stated previously, this was a deliberate attempt to mislead the Claimant and a violation of Judge Daniel L. Leland's Notice of Hearing Order dated September 20, 2001 ordering the parties to exchange all documentary evidence no later than twenty calendar days prior to the date of the hearing. I find this to be a serious breach of trust. (See my Order of Remand dated March 21, 2005, paragraphs 17 and 18).

3. While I am not so naïve as to think that attorneys never misbehave, I myself have never before 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 common practice, not by attorneys who appear before me and not by the law firm Jackson Kelly.

(Decision on Motion for Reconsideration, June 27, 2005, ODC Ex. Number 20).

ISSUE

Does an attorney for a coal company who arranges for an IME of a black lung claimant disassembling the report and removing conclusions that are favorable to the claimant and then submits the report to the administrative law judge as if it were the complete report violate Rules 3.4(a), (c) and (d), 8.4(c) and/or 8.4(d) of the West Virginia Rules of Civil Procedure.

ARGUMENT

I. THE PANEL FAILED TO ADEQUATELY CONSIDER THE ISSUE OF MISREPRESENTATION.

Introduction

West Virginia Rules of Professional Conduct 3.4 is entitled “Fairness to opposing party and counsel.” It states in part as follows:

A lawyer shall not:

(a) **unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; ...**

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonable diligent effort to comply with a legally proper discovery request by an opposing party;...

West Virginia Rules of Professional Conduct 8.4 states in part as follows:

It is professional misconduct for a lawyer to:

...(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;... (Emphasis added).

Rule 3.4(a) and 8.4(c) and (d) broadly govern misconduct. These Rules plainly prohibits conduct that involves dishonesty, fraud, deceit or misrepresentation. Misrepresentation to a court or other tribunal, to another attorney, to a client, or to an adverse party subjects a lawyer to discipline. These Rules prohibit conduct that is prejudicial to the administration of justice. There is no doubt that Administrative Law Judge Lesniak found the Respondent's conduct to be a misrepresentation, not only to Mr. Daugherty, but also to other medical experts. There is also no doubt that he believed the Respondent's conduct was prejudicial to the administration of justice.

A. The Respondent's conduct constituted a misrepresentation under Rule 8.4(c).

Mr. Smoot's conduct violated Rule 8.4(c). Nonetheless, the Report from the Hearing Panel appeared to reject a Rule 8.4(c) violation because of alleged confusion over the "nondiscoverability of AME (sic) reports." (Report, Finding 44, p. 28-29). In reaching this conclusion, the Report erred because it misconstrued the issue. The issue was not whether the Zaldivar report was discoverable, but rather whether an attorney who submits a report to an ALJ and pro se litigant is permitted to alter the report and then represent the altered report as the complete report. This was not the case of an attorney withholding an entire document and claiming that the document was prepared by a consulting expert and therefore entitled to work product protection. To the contrary, the conduct at issue involved removing the physician's diagnoses and conclusions, and submitting the remainder to an ALJ and a *pro se* opponent

representing it as the physician's "exam report." (Report, Finding 12, p.6). As a result, this was "conduct involving dishonesty, fraud, deceit or misrepresentation" as set forth in Rule 8.4(c).

Judgments from other states support the conclusion that this sort of conduct violates the Rule. In *Kentucky Bar. Ass'n v. Yocum*, 294 S.W.3d 437, 440 (Ky. 2009), an attorney submitted two documents in a workers' compensation case which he represented were medical reports. In fact, he had prepared the documents and knowingly and intentionally filed those documents. The court found this conduct violated Rule 8.4(c), meriting suspension. Although Mr. Smoot did not prepare the document in this case, he nonetheless significantly altered its meaning by removing the physician's assessment and conclusions that favored the claimant and then submitted the remainder without disclosing what he had done.

Similarly, an Idaho attorney was reprimanded under Rule 8.4(c) for intentionally altering medical reports and submitting those reports to opposing counsel. *Idaho State Bar v. Gantenbein*, 986 P.2d 339, 341 (Idaho, 1999). Gantenbein intentionally altered a medical report and then submitted the altered report to opposing counsel in a personal injury case and obstructed the plaintiff's lawyers in their efforts to determine who had altered the document. The Idaho Supreme Court found this conduct violated Rule 8.4(c), and the court further stated, "in determining what discipline is appropriate under the circumstances, courts reviews the attorney's violations in light of all relevant factors, including the nature of the violation, mitigation and aggravating circumstances, the need to protect the public, the courts and the legal profession and the moral fitness of the attorney." *Id.* at 342 (Citation omitted). Removing the critical conclusions from a report and then submitting the remainder should not be treated differently

from other forms of altering a physician's report. In both cases, the effect is to submit a document that misrepresents the physician's actual conclusions and opinions.

The Oregon Supreme Court reversed a Disciplinary Review Board finding no misrepresentation, where two attorneys misrepresented a sale and reconveyance of real property for purposes of obtaining a judgment in their favor. *In re Conduct of Hiller*, 694 P.2d 540 (Or. 1985). The court distinguished fraud and deceit from a misrepresentation: "The fact that they did not intend to deceive or commit a fraud on the court does not acquit them of misrepresentation. [M]isrepresentation can include nondisclosure." *Id.* at 543. Misrepresentation does not require any element of deception, as does fraud or deceit. The Oregon Supreme Court stated: "A person must be able to trust a lawyer's word as the lawyer should expect his word to be understood, without having to search for equivocation, hidden meanings, deliberate half-truths or camouflaged escape hatches. That trustworthiness is the essential principle in [the Rule]." *Id.* at 544. "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 Conduct of Hoffman*, 13 P. 3d 994, 998 (Or. 2000).

Mr. Smoot admits to knowingly disassembling Dr. Zaldivar's IME and submitting only part of the IME, without the physician's assessment and diagnosis of complicated pneumoconiosis, to his *pro se* opponent and identifying the document as Dr. Zaldivar's medical report. This intentional conduct violates Rule 8.4(c) of the West Virginia Rules of Professional Conduct. The ALJ said this was akin to taking Dr. Zaldivar's deposition and removing pages 5

through 10 of the transcript because they contained unfavorable testimony.¹ The Panel admitted that it found Mr. Smoot's actions concerning, but was apparently persuaded by witness testimony that the practice of disassembling documents was consistent with Black Lung practice. The Panel avoided answering the question of whether this conduct violated Rule 8.4, regardless whether it was common practice. The Panel stated it would need to judge the motive of the Respondent when he disassembled and provided only part of the report [of Dr. Zaldivar]. This is incorrect.

Rule 8.4(c) specifically prohibits dishonesty, fraud, deceit or misrepresentation. Two of the types of conduct specified – dishonesty and misrepresentation – do not require motive to deceive. Dishonesty consists of a non-truth. Misrepresentation consists of representing something as other than what it is. A finding that the conduct was dishonest or that the conduct was a misrepresentation does not require judgment as to motive or intent. It does not require a finding of motive to deceive. Although fraud and deceit do involve motive, in this case, the motive for fraud or deceit can be easily inferred, since the withheld finding of complicated pneumoconiosis by Dr. Zaldivar is evidence supporting Mr. Daugherty's claim and is therefore adverse to Mr. Smoot's client's interest.

The *amici* do not accept that the finding that the conduct involved in this matter – disassembling an IME and removing part of the IME before submitting it as the physician's report - is consistent with Federal Black Lung practice, and under no circumstances should the

¹ JUDGE LESNIAK: Didn't you see [Dr. Zaldivar's] report, which you submitted on November 12th, '01, as one report? *Isn't this like taking a deposition, and because you don't like what the doctor has to say on pages 5 through 10, just tearing them out and submitting the rest?*

MR. MATTINGLY: No. (Transcript 2: Transcript of December 16, 2004 hearing before ALJ Lesniak, p. 0279(emphasis added)).

conduct be condoned. The Panel found facts sufficient to prove the Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. The Court should express its disapproval of this type of conduct. It should find a violation of Rule 8.4(c). The Court should set a standard based on the principle that a lawyer must conduct himself by what is in the interest of honesty and candor.

B. The Respondent's conduct was prejudicial to the administration of justice.

Rule 8.4(d) prohibits conduct prejudicial to administration of justice, and is typically limited to conduct that concerns court proceedings. A violation of rule 8.4(d) requires that there be some nexus between the conduct charged and the unjust effect. *People v. Jaramillo*, 35 P.3d 723 (Colo. 2001). Generally, states have interpreted this to require something more than mere or minimal harm to judicial proceedings.

In Maryland an attorney who destroyed evidence and gave false testimony violated state ethics rule 8.4(c-d). *Attorney Grievance Com'n v. White*, 731 A.2d 447 (Md.,1999). The court declined to narrowly interpret Rule 8.4(d), instead stating, "conduct that impacts on the image or the perception of the courts or the legal profession and that engenders disrespect for the courts and for the legal profession may be prejudicial to the administration of justice. Lawyers are officers of the court and their conduct must be assessed in that light." *Id.* at 457. Enforcement of Rule 8.4(d) is perceived as central to maintaining public confidence in the judicial system. *Id.* at 457.

In this case, Respondent's conduct toward a pro se litigant, if upheld as consistent with the Code of Professional Conduct, is likely to engender disrespect for the legal profession and for the disciplinary bodies and courts that approve of it.

C. The Respondent unlawfully obstructed Mr. Daugherty's access to evidence and concealed documentary evidence.

The Report found no violation of Rule 3.4(a). This finding turned on the mistaken conclusion that the Respondent's conduct was not unlawful because it did not violate an expressly worded provision of the Federal Black Lung Program. However, in reaching this conclusion, the panel failed to address the impact of removing the part of a report adverse to one's client and then providing the remainder of the report to a *pro se* claimant as if it were the full report. By doing so, the Respondent fraudulently and unlawfully concealed the fact that Dr. Zaldivar had actually reached medical conclusions that were highly favorable to the *pro se* claimant.

Moreover, Respondent's conduct was likely to interfere with Mr. Daugherty's rights under the black lung regulations applicable to a black lung IME. Under those regulations, Mr. Smoot, whose client had requested the IME of Mr. Daugherty, was obligated to provide Mr. Daugherty with "a detailed written report...setting out the examiner's findings, including results of all tests made, diagnoses and conclusions...", *i.e.* the entire report, pursuant to Rule 35(b) of the Federal Rules of Civil Procedure (emphasis added).² However, by sending a *pro se* claimant what Respondent described as the "Exam report of Dr. George Zaldivar dated February 7, 2001," the Respondent effectively led that claimant to rely on Respondent's misrepresentation and to conclude that he had received the entire report. There was no indication that the accompanying "exam report" was incomplete, and an unsuspecting *pro se* claimant was unlikely to know the

² Rule 35(b) of the Federal Rules of Civil Procedure is incorporated into the rules governing federal black lung claims by 29 C.F.R. §18.19(c)(4).

difference.³ As a result, Mr. Daugherty, a 70+ year old with an 8th grade education, was unlikely to request Dr. Zaldivar's exam report since he likely believed that he already had received what Mr. Smoot described as the "exam report" of Dr. Zaldivar.⁴ Thus, Respondent's submission of an incomplete report, as if it were the entire report fraudulently concealed Dr. Zaldivar's medical opinion of complicated pneumoconiosis and simultaneously reduced, if not eliminated, the likelihood that Mr. Daugherty would exercise his right to request a copy. This conduct may not have expressly violated a specific black lung regulation, but it was nonetheless unlawful under Rule 3.4.

Finally, Respondent's conduct was fraudulent and therefore unlawful because it was intended to aid Respondent's client in defeating Mr. Daugherty's claim. Although Mr. Daugherty was provisionally receiving benefits pending a final decision on Respondent's protest, he would have had a substantial overpayment had Respondent's strategy succeeded. Had Mr. Cohen not agreed to take Mr. Daugherty's case, Respondent's strategy might well have proved successful.

D. The record does not support the Panel's conclusion that misrepresenting an incomplete exam report is a common practice in Federal Black Lung practice.

³ Mr. Daugherty and the ALJ received a copy of Dr. Zaldivar's History and Physical report, pulmonary test results, and x-ray interpretation, which would appear to an unsuspecting reader to be his complete report without realizing that his narrative assessment and finding of complicated pneumoconiosis was missing. The deceptive nature of Respondent's conduct is evident by a comparison of the "exam report" as submitted by Respondent in 2001 and the actual report as prepared by Dr. Zaldivar, which Mr. Daugherty did not obtain until an experienced black lung attorney, Robert Cohen, entered the case over 3 years later.

⁴ Amici do not have the records regarding Mr. Daugherty's education. However, it appears he only had an 8th grade education. *See* Hearing, 6/19/09, p. 429 wherein Disciplinary Counsel asks a question which assumes that Mr. Daugherty had an 8th grade education.

The hearing panel was appropriately “bothered” by the practice of turning over an adverse medical examination report without disclosing that it was disassembled and incomplete but felt “constrained by the evidence...including all Respondent’s witnesses who testified that the actions of this Respondent were consistent with Black Lung practice.” Report p. 27-28, No. 42. However, there are two significant errors in the panel’s assessment of the record. First, the fact that others may engage in misleading conduct does not, in any case, excuse the Respondent any more than the speeder who protests that he was not going any faster than others who were also speeding. No matter how many attorneys send out incomplete “exam reports,” particularly to *pro se* litigants, the conduct still involves misrepresentation.

Second, the finding is factually incorrect. When Mr. Smoot was asked if he could name a single other West Virginia attorney who engaged in this practice, the only person he could name was Bill Mattingly, another attorney in his firm:

CHAIRPERSON JIVIDEN: Okay, The question was: Can you name a single lawyer in West Virginia who has ever followed your same practice [regarding the disassembly of medical reports and the submission of the report without the physician’s conclusions]?

THE WITNESS: Because I can’t think of any specific inference, I would have to say no.

CHAIRPERSON JIVIDEN: How about Mr. Mattingly? Are you aware that he has followed that practice of disassembling adverse or independent medical exams when providing to the director or to the opposition?

THE WITNESS: Prior to 2001?

CHAIRPERSON JIVIDEN: Well, let’s go prior to 2004.

THE WITNESS: Yes. (Hearing, 6/18/09, Tr. at 356).

Likewise, when Chairperson Jividen asked Judge Jansen if he ever required a party to turn over the narrative reports and records from an independent medical exam, Judge Jansen said, "Never had to deal with the problem. Not once." (Hearing, 6/18/09, Tr. at 465). Moreover, as noted above, Judge Lesniak said that he had "never before 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." (Decision on motion for Reconsideration, June 27, 2005, ODC, Ex. Number 20).

The other two witnesses, Attorney Fred Muth and Attorney Gregory Hook, provided no actual examples of misrepresentation comparable to Mr. Smoot's actions in this case, i.e. submitting an altered version of an IME report to a *pro se* claimant as though it were the entire report. Fred Muth represented claimants with federal black lung claims for 35 years (Hearing, 6/19/09, p. 202. 204) and testified that he only submitted an incomplete IME "a time or two," but even then, there was no deception because he explained to the judge "right up front" why he was only submitting the x-ray report:

"Your Honor, we have but one theory for recovery in this case, and that's complicated pneumoconiosis. We are not specifically alleging the existence of a disabling respiratory impairment." Most judges appreciated you doing that because it saved a lot of ink when it came time to write a decision."

(Hearing, 6/19/09, Tr. p. 206-07). Thus, Mr. Muth did not misrepresent a portion of the IME report as if it were the entire report.

Mr. Hook testified that he reviewed a limited portion of the record, *i.e.* the complaint and "some of the case work," and "truly found that what Mr. Smoot did was nothing unusual, was nothing out of the ordinary, certainly nothing that I felt was in violation of the federal black lung

practice as I knew it.” (Hearing 6/19/09, Tr. p. 240-41). However, Mr. Hook’s explanation suggests that he did not appreciate the significance of Mr. Smoot’s deception:

I’ve gotten many medical records myself in representing claimants, and would pull hospital reports, doctors’ reports, would send claimants to get doctors’ reports. And only that evidence that I would offer into evidence – those reports that I wanted to enter into evidence would I share with the other side. So I certainly do not see anything in this case that would indicate that what Mr. Smoot did was unusual or certainly not unethical. (Hearing, 6/19/09, p. 241).

Selecting and submitting portions of medical treatment records that are readily available to both parties is nothing like what Mr. Smoot did to Mr. Daugherty in this case, *i.e.* presented him with selected portion of an IME as though it were the entire report in order to conceal the findings of the IME physician that supported Mr. Daugherty’s claim for benefits. Thus, the testimony of Mr. Hook and the other witnesses does not support the Hearing Panel’s impression that Mr. Smoot’s conduct was common practice in federal black lung claims or was employed by anyone other than Mr. Smoot and other lawyers in his firm.⁵

III. ADOPTION OF THE PANEL’S REPORT WILL ADVERSELY AFFECT THE ADMINISTRATION OF THE BLACK LUNG BENEFITS PROGRAM.

A. It is the Court’s role is to guarantee effective administration of justice and maintain public confidence in the judicial system.

In reviewing the Hearing Panel Subcommittee’s Report, the Supreme Court of Appeals must not only determine whether the attorney violated a rule of conduct, if it finds a violation it must determine a remedy which “is adequate to serve as an effective deterrent to other members

⁵ There is evidence that others in Respondent’s firm engage in similar conduct, but the fact that others in his firm have been known to also disassemble Dr. Zaldivar’s IMEs does not make the practice either common or ethical. In Caldwell v. Hobet Mining, Inc., another lawyer who worked with the Respondent not only withheld Dr. Zaldivar’s narrative report and x-ray reading but also failed to respond to written requests for the report and films by Mr. Caldwell’s lay representative. (ODC, Ex. 4, p. 1138-41).

of the Bar.” *Lawyer Disciplinary Bd. v. Ansell*, 210 W.Va. 139 (W.Va., 2001) (quoting *Committee on Legal Ethics v. Walker*, 178 W.Va. 150 (1987)). Disassembly and misrepresentation of documents in an IME is conduct that the West Virginia courts should deter. Attorneys should be required to act as advocates who respect the complete record and who do not misrepresent IME’s to the tribunal, other counsel or the parties. A rule contrary will undermine public confidence in the justice system.

The West Virginia Supreme Court of Appeals has expressed that “the conduct of a prosecutor is related to the character traits expected of attorneys by the public.” *Lawyer Disciplinary Bd. v. Hatcher*, 199 W.Va. at 235, (W.Va. 1997) (quoting *State v. Hays*, 64 W.Va. 45, 61 S.E. 355 (1908)). An attorney should reasonably be expected to acknowledge that the IME he submits as the physician’s report is the whole report. In this case Administrative Law Judge Lesniak described Mr. Smoot’s conduct as “unconscionable” and deserving reprimand. (Order Remanding Case to District Director issued March 21, 2005, ODC Ex. 18). Judge Lesniak also considered the conduct would be detrimental to Mr. Smoot’s client’s case because, if it was determined that other physicians relied on Dr. Zaldivar’s incomplete report, it would undermine the credibility of those physicians’ opinions. The conduct here could adversely affect Westmoreland’s case, and therefore also would affect the administration of justice to Westmoreland.

Adoption of the Panel’s recommendation will encourage gamesmanship in the Federal Black Lung Program that is not compatible with a fair pursuit of truth and justice. Submission of an incomplete or partial IME as the whole is misleading; this is a misrepresentation of doctor’s opinion. It shows lack of candor to court and other parties; it is misleading and deceitful

conduct. Adoption of the Panel's Report would encourage numerous undesirable defenses to unethical conduct.

A general duty of candor is recognized in the legal profession, requiring that attorneys be honest and forthright with opposing counsel. This duty of candor can be examined independently from the Rules of Professional Conduct. *See United States v. Shaffer Equipment Co. (Shaffer I)*, 11 F.3d 450 (4th Cir.1993). Failure to disclose information in a court proceeding violates the duty of candor.

B. The Panel's Report is particularly disadvantageous to *pro se* claimants.

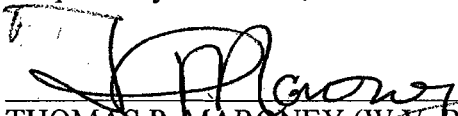
In Federal Black Lung Claims proceedings there is often a disparity between the parties. Many times claimants are unrepresented.⁶ They have little or no experience with legal proceedings. They often have a limited education. Employers on the other hand are represented by lawyers well-experienced in Federal Black Lung Claims proceedings. Many of the medical reports are highly technical. The statutes, regulations, court rules of procedure and court precedents are also complex and technical. Especially in these circumstances, deterrence of conduct involving misrepresentation is imperative to administration of justice.

⁶ The General Accounting Office recently conducted a study of the Federal Black Lung Program and reported: "There are few financial incentives for lawyers to take black lung claimants' cases, and claimant's generally do not have the financial resources to cover the costs associated with developing the evidence needed to support and defend their claims. According to DOL officials, attorneys are not inclined to take claimants' due to a low probability of success...[and] the process can be lengthy and costly." (GAO-10-7, *Black Lung Benefits Program - Administrative and Structural Changes Could Improve Miners' Ability to Pursue Claims*, p. 26 (October, 2009). The GAO also reported on the lack of counsel for claimants at hearings, stating: "Hearings can also be delayed because claimants lack legal representation. Administrative law judges said that in some cases, the first appearance by miners or their dependents at the OALJ hearing is without legal counsel. *Id.*, p. 19).

CONCLUSION

The National Black Lung Association and the Appalachian Citizens' Law Center submit that the practice of disassembling an IME and submitting only a part of the report is a misrepresentation. It is conduct that should be deterred. By knowingly excising a portion of the medical report the Respondent misrepresented Dr. Zaldivar's IME to the Administrative Law Judge, to opposing counsel, to Mr. Daugherty and to other physicians. The Respondent's misrepresentation was a violation of Rules 3.4 and 8.4 of the Rules of Professional Conduct. Further, his conduct was prejudicial to the administration of justice and undermined the public confidence in the judicial system in violation of Rule 8.4(d). The Court should not adopt the Hearing Panel Subcommittee's Report, but rather should find this conduct violated Rules 3.4 (a), (c) and (d) and 8.4(c) and (d).

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief of Amici Curiae National Black Lung Association and Appalachian Citizens Law Center, Inc. via U.S. first-class mail, postage prepaid, on this 7th day of June, 2010, upon the following:

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