

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

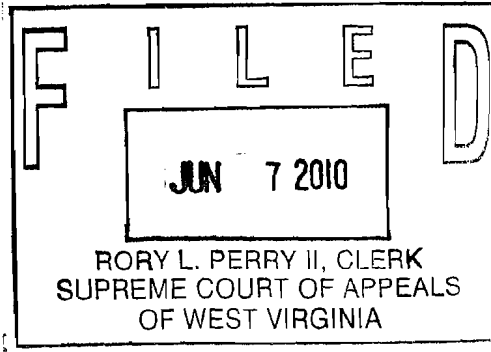
**LAWYER DISCIPLINARY BOARD,**

**Complainant,**

**v.**

**DOUGLAS A. SMOOT,**

**Respondent.**



**No. 34724**

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**BRIEF OF THE OFFICE OF  
THE OFFICE OF DISCIPLINARY COUNSEL**

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## I. PROCEDURAL BACKGROUND

Formal charges in this matter were filed against Respondent Douglas A. Smoot (hereinafter “Respondent”) with the Clerk of the Supreme Court of Appeals of West Virginia on or about February 3, 2009, and served upon his counsel, Stephen R. Crislip, Esquire, by certified mail on or about February 5, 2009. “Respondent Douglas A. Smoot’s Motion to Dismiss Statement of Formal Charges, or in the Alternative, Respondent’s Answer to Statement of Formal Charges” was filed on or about February 19, 2009. Disciplinary Counsel filed a response to the Motion to Dismiss on March 5, 2009. In or about May 2009, the Hearing Panel Subcommittee issued its “Findings of Fact and Conclusions of Law of Douglas A. Smoot’s Motion to Dismiss Statement of Formal Charges”, which denied the motion.<sup>1</sup>

A telephonic prehearing was held on June 1, 2009. Pending before the Hearing Panel Subcommittee were: (1) “Respondent Douglas A. Smoot’s Prehearing Motion *In Limine*”; and (2) Disciplinary Counsel’s “Motion *In Limine* Regarding Forest Bowman’s Testimony” By Order entered on or about June 9, 2009, the Hearing Panel Subcommittee denied Disciplinary Counsel’s “Motion *In Limine* Regarding Forest Bowman’s Testimony” and deferred ruling on “Respondent Douglas A. Smoot’s Motion *In Limine*” until the parties met to discuss exhibits to be presented at hearing. The Hearing Panel Subcommittee also denied Respondent’s request to take the deposition of Robert F. Cohen, Jr., Esquire, but granted Respondent’s request to take the deposition of John Cline, Esquire.<sup>2</sup>

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<sup>1</sup>Respondent renewed his Motion to Dismiss at the commencement of the June 18, 2009 hearing in this matter and again at the conclusion of ODC’s case in chief. [6/18/09 Transcript p. 6; 6/19/09 pp. 23-32]. At the hearing, the Hearing Panel Subcommittee Chairman Disciplinary Board “declined to change its ruling” on Respondent’s Motion to Dismiss. [6/18/09 Transcript p. 7; 6/19/09 Transcript pp. 31-32].

<sup>2</sup>The deposition of John Cline, Esquire, did not take place for reasons pertaining to agreements made by the parties regarding proposed exhibits shortly after the June 1, 2009 hearing.

On or about June 2, 2009, ODC and Respondent's counsel met to discuss their proposed exhibits to be submitted at the June 18, 2009 hearing pursuant to the Hearing Panel Subcommittee's instructions from the June 1, 2009 hearing. Thereafter, on June 4, 2009, a telephonic hearing was held on an exhibit proposed by the Office of Disciplinary Counsel (hereinafter "ODC"), Bates stamped nos. 1128 through 1371, which had been the subject of Hearing Panel Subcommittee's deferred ruling on "Respondent's Douglas A. Smoot's Motion in *Limine*". By Order entered June 18, 2009, the Hearing Panel Subcommittee denied "Respondent Douglas A. Smoot's Motion *In Limine*", subject to reconsideration at the hearing set for June 18, 2009.<sup>3</sup>

Thereafter, this matter proceeded to hearing in Charleston, West Virginia, on June 18 and 19, 2009. The Hearing Panel Subcommittee was composed of David A. Jividen, Esquire, Chairperson; Charlene A. Vaughan, Esquire; and Dr. Bonnie Ritz, layperson. Respondent appeared in-person and by counsel, Stephen R. Crislip, Esquire, Alvin L. Emch, Esquire and Benjamin M. McFarland, Esquire. Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel, Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel, Renée N. Frymyer and Jessica H. Donahue, Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. The Hearing Panel Subcommittee heard testimony from Robert F. Cohen, Jr., Esquire, Respondent Douglas A. Smoot, Esquire, Rudolph L. Jansen, Esquire, Forest J. Bowman, Esquire, William S. Mattingly, Esquire, Ron Carson, Frederick Kline Muth, Esquire, Gregory C. Hook, Esquire. In addition, ODC Exhibits 1-8, and Respondent's Exhibit 1-38 and 41 were admitted into evidence.

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<sup>3</sup> On June 12, 2009, Respondent submitted proposed Exhibits 19 through 25, 29 through 33, and 36 through 39. ODC objected to these exhibits as untimely. Respondent argued that these exhibits were submitted in response to ODC proposed Exhibit 4. [6/18/09 Transcript pp. 10-12]. After hearing argument again at the hearing after ODC's case in chief, the Hearing Panel Subcommittee admitted ODC's Exhibit 1 through 8 in their entirety. [6/19/09 Transcript pp. 10-22].

On or about September 10, 2009, the parties filed respective proposed findings of fact, conclusions of law and recommended sanctions. On or about April 8, 2010, the Hearing Panel Subcommittee issued its decision in this matter and filed with the Supreme Court of Appeals of West Virginia its "Report of the Hearing Panel Subcommittee" (hereinafter "Report"). The Hearing Panel Subcommittee recommended that the matter be dismissed.

Based upon the evidence and the law, pursuant to the provisions of Rule 3.11 of the Rules of Lawyer Disciplinary Procedure, the Office of Disciplinary Counsel filed its Objection to the disposition recommended by the Hearing Panel Subcommittee of the Lawyer Disciplinary Board on or about April 30, 2010. On or about May 3, 2010, Stephen R. Crislip, Esquire, filed Respondent's Consent to the Report of the Hearing Panel Subcommittee with this Honorable Court.

## **II. STANDARD OF REVIEW**

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, 207 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 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, 192 W. Va. at 290, 452 S.E.2d at 381.

Substantial deference is to be 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. McCorkle, Id.; Lawyer Disciplinary Board v. Cunningham, 195 W. Va. 27, 464 S.E.2d 181 (1995). At the Supreme Court 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, 192 W. Va. at 290, 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*, Syl. Pt. 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995).

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. Syl. Pt. 3, Committee on Legal Ethics v. Blair, 174 W. Va. 494, 327 S.E.2d 671 (1984); Syl. Pt. 7, Committee on Legal Ethics v. Karl, 192 W. Va. 23, 449 S.E.2d 277 (1994).

### III. FINDINGS OF FACT

In addition to the findings of fact of the Hearing Panel Subcommittee, the Office of Disciplinary Counsel urges the Court to make the following findings of facts and conclusions of law:

1. Douglas A. Smoot (hereinafter "Respondent") is a lawyer practicing in Charleston, Kanawha County, West Virginia, and, as such, is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. Respondent was admitted to The West Virginia State Bar on September 15, 1981.
2. The United States District Court for the Southern District of West Virginia entered an Order on August 30, 2006, and forwarded the same to the Office of Disciplinary Counsel requesting that the Office of Disciplinary Counsel investigate whether Respondent's actions in a black lung case violated applicable Rules of Professional Conduct. The Order was received by ODC on or about September 1, 2006. The complaint was docketed and styled as ODC v. Respondent Douglas A. Smoot, Esquire, and subsequently forwarded to Respondent by letter dated February 16, 2007. After receiving an extension of time to respond, Respondent filed a formal response to ODC's complaint by letter dated April 9, 2007.

3. Elmer Daugherty filed a *pro se* claim for federal black lung benefits on or about May 30, 2000.<sup>4</sup> Respondent represented his employer, Westmoreland Coal Company.
4. Mr. Daugherty was initially awarded benefits on or about January 26, 2001, but his employer then requested a formal hearing before an Administrative Law Judge (“ALJ”) by letter dated January 30, 2001. On March 19, 2001, the case was transferred to the Office of Judges.
5. Meanwhile, pursuant to the employer’s request which had been made on December 15, 2000, Mr. Daugherty was examined by Dr. George L. Zaldivar, on or about February 7, 2001.
6. On or about May 22, 2001, Dr. Zaldivar sent Respondent a packet which included Mr. Daugherty’s history and physical examination report, test results, and a narrative report dated May 16, 2001.
7. On or about November 12, 2001, Respondent provided to Mr. Daugherty a copy of a letter addressed to ALJ Daniel L. Leland which purported to include the “Exam Report of Dr. George L. Zaldivar dated February 7, 2001.”<sup>1</sup> However, this “Exam Report” only included the history and physical examination report and the test results. It did not include the May 16, 2001 narrative report in which Dr. Zaldivar diagnosed Mr. Daugherty with complicated pneumoconiosis.<sup>2</sup>

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<sup>4</sup>The Black Lung Act was enacted on December 30, 1969, to provide benefits to coal miners who were totally disabled by pneumoconiosis. *See, Elm Grove Coal Company v. Director, Office of Workers’ Compensation Programs, et al.*, 480 F.3d 278 (4<sup>th</sup> Cir. 2007) *citing* 30 U.S.C. § 901. However, in 2000, the rules governing federal black lung claims were significantly revised. *Elm Grove*, 480 F.3d at 283. The revised rules, including the “Evidence-Limiting Rules” went into effect on January 19, 2001. *Id.* Because Mr. Daugherty’s case was filed prior to January 2001, his claim was governed under what are commonly referred in these proceedings as the “old regulations.” Therefore, the “Evidence-Limiting Rules” are not applicable to the Daugherty proceeding.

<sup>1</sup>The November 12, 2001 cover letter sent to ALJ Leland and copied to Mr. Daugherty was signed by a legal assistant on behalf of Respondent.

<sup>2</sup>In an Order dated October 21, 2005, ALJ Michael P. Lesniak determined that the official file at the Office of Administrative Law Judges did not contain either the November 21, 2001 letter from Respondent or the report attached thereto.

8. On or about March 30, 2004, Robert F. Cohen, Jr., submitted a notice of representation on behalf of Mr. Daugherty.
9. On or about September 9, 2004, Mr. Daugherty's attorney, Mr. Cohen, filed Interrogatories and Requests for Production of Documents.
10. In response, Kathy L. Snyder, Esquire, an attorney at Jackson & Kelly PLLC, provided the "Supplemental Report of Dr. George L. Zaldivar dated September 20, 2004" which included the narrative report dated May 16, 2001, not previously disclosed to Mr. Daugherty.<sup>3</sup>
11. On or about October 15, 2004, Mr. Daugherty's attorney, Mr. Cohen, filed a Motion to Compel Discovery requesting Respondent provide descriptions and copies of all medical evidence in its possession which had not previously been disclosed to Mr. Daugherty.
12. The first hearing on Mr. Daugherty's claim took place on October 19, 2004, before ALJ Lesniak.<sup>4</sup> At the October 19, 2004 hearing, Mr. Cohen argued that Respondent had disassembled the May 2001 medical report before providing it to Mr. Daugherty, who was unrepresented at the time, in or about November 2001. In addition, Mr. Cohen also alleged that Respondent provided to their own medical experts only that information which was favorable to their clients' position.
13. At the hearing, Ms. Clark admitted that the narrative portion of Dr. Zaldivar's report was removed in November 2001 before providing the same to Mr. Daugherty. Respondent

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<sup>3</sup>Respondent is employed at Jackson Kelly, PLLC. Ms. Snyder is employed at the Morgantown office of Jackson Kelly. In April of 2004, Respondent forwarded Mr. Daugherty's file to the Morgantown office of Jackson Kelly because Dorothea J. Clark, Esquire, an associate in the Morgantown office, was scheduled to appear at the October 19, 2004 hearing. Ms. Clark worked under the supervision of Ms. Snyder.

<sup>4</sup>It appears that part of the delay in having an initial hearing in the underlying matter was due to six continuances granted to Mr. Daugherty for the purpose of finding counsel to represent him during this stage of the proceedings.

appeared at the hearing and also acknowledged a portion of Dr. Zaldivar's report was removed before providing it to Mr. Daugherty.

14. After the hearing and by Order entered October 22, 2004, ALJ Lesniak granted the Motion to Compel and scheduled a second hearing on November 10, 2004.
15. By letter dated October 27, 2004, Ms. Snyder notified ALJ Lesniak that her client had decided to accept the District Director's January 26, 2001 Initial Determination Awarding Benefits. Accordingly, her client withdrew its request for a hearing before the Office of Administrative Law Judges. Finally, Ms. Snyder requested that ALJ Lesniak issue an Order remanding the claim to the District Director for processing of the pay order.
16. By Order entered November 9, 2004, ALJ Lesniak rescheduled the November 9, 2004 hearing for December 16, 2004, and directed Respondent to deliver to Mr. Cohen by November 19, 2004, "all medical records and/or reports in its possession regarding [Mr. Daugherty]."<sup>5</sup>
17. On or about November 17, 2004, Ms. Snyder filed a Motion to Cancel Hearing and Remand Claim to District Director asserting that ALJ Lesniak no longer had jurisdiction to decide the matter.

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<sup>5</sup>In its report, the Hearing Panel Subcommittee raised the issue of whether the alleged violation of Rule 8.4 extended to the refusal by counsel for Westmoreland Coal Company to comply with ALJ Lesniak's order to produce the non-testifying expert reports in the underlying federal black lung claim. The Hearing Panel Subcommittee found that the confusion might have related to the references to Respondent in ¶¶ 15-22 of the Statement of Charges. The Hearing Panel Subcommittee specifically found that "the allegations of misconduct in the Statement of Charges is limited to the act of withholding or disassembling the May 16, 2001 report of Dr. George L. Zaldivar." Hearing Panel Subcommittee Report, ¶ 8. It is acknowledged that at the time of the entry of the orders to compel by ALJ Lesniak beginning in or about October 2004, Respondent did not appear to be counsel of record for Westmoreland Coal Company. Furthermore, in his Orders, ALJ Lesniak generally referred to the "Employer" and not counsel and directed the "Employer" to "deliver to Claimant's counsel all medical records and/or reports in its possession regarding Claimant." For example, ODC Exhibit 2, Bates Nos. 0128-0130.

18. ALJ Lesniak denied Ms. Snyder's motion by Order entered December 6, 2004. In this Order, ALJ Lesniak again directed Respondent to comply with his November 9, 2004 directive to immediately produce all medical records and reports in their possession.
19. William S. Mattingly, another attorney at Jackson Kelly, and Ms. Snyder appeared at the December 16, 2004 hearing and Ms. Snyder stated, after direct questioning by ALJ Lesniak, that Respondent had not complied with ALJ Lesniak's Orders of October 22, November 9, and December 6, 2004, to turn over all requested discovery documents because it was their client's position that as they had accepted liability on or about October 27, 2004, ALJ Lesniak no longer had jurisdiction in the matter.
20. Furthermore, the only remaining documents not turned over were non-testifying expert reports which, in their opinion, were not discoverable.
21. After the hearing, ALJ Lesniak issued an Order on March 21, 2005, remanding the case to the District Director. In addition, while ALJ Lesniak declined at that time to certify the case to the United States District Court for consideration of Respondent's conduct, ALJ Lesniak found that Respondent disobeyed a lawful order and admonished Respondent "not to tamper with exhibits, potential exhibits and/or any type of documents which may be entered into evidence in the future."
22. On or about April 20, 2005, Mr. Cohen filed a motion for reconsideration of the March 21, 2005 Order and specifically requested that ALJ Lesniak reconsider his decision not to certify the case to the United States District Court for consideration of Respondent's actions in the underlying matter.
23. By Order entered June 27, 2005, ALJ Lesniak again denied Mr. Cohen's motion to certify the matter to the United States District Court for consideration of Respondent's conduct.

However, ALJ Lesniak suggested that the attorneys involved attempt to reconcile the matter on an informal basis.

24. On or about August 18, 2005, Mr. Cohen again wrote to ALJ Lesniak stating that Respondent had not contacted him to discuss the disassembly of Dr. Zaldivar's May 16, 2001 report and again requested that the matter be certified to the United States District Court for consideration.
25. Thereafter, despite noting that Mr. Cohen's request for reconsideration was filed out of time, by Order entered October 21, 2005, ALJ Lesniak found good cause to certify the matter to the United States District Court for consideration of sanctions against Respondent for his conduct in the underlying case.
26. By Order entered August 30, 2006, the United States District Court for the Southern District of West Virginia granted Respondent's Motion to Dismiss on several grounds, namely that the Court considered the certification to be a criminal contempt action which was not properly before the Court.
27. Nonetheless, the Court discussed Respondent's disassembly of the May 16, 2001 medical report and the actions of Respondent's co-counsel in failing to comply with ALJ Lesniak's discovery orders. The Court stated that while actions of Respondent's co-counsel in failing to comply with the discovery orders was "clearly contrary to law and subject to contempt sanctions[,]” the Court was without power to impose any sanction because “[t]he time for civil sanctions had passed since such sanctions are designed solely to force a recalcitrant litigant to act in compliance with a previous court order.”<sup>6</sup> With regard to the disassembly of the May 16, 2001 medical report, the Court cited 20 C.F.R. § 725.414(c) and Court found

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<sup>6</sup>See August 30, 2006 Order at p. 10.

that Respondent's "excuses and arguments flimsy at best."<sup>7</sup> The Court concluded by stating that "a great disservice [had been done] to our legal system . . . ."<sup>8</sup>

#### IV. CONCLUSIONS OF LAW

28. Respondent disassembled the May 16, 2001 report of his client's examining expert, Dr. George L. Zaldivar, and subsequently withheld and concealed a portion of the medical opinion of Dr. Zaldivar, specifically, the "reasoned medical opinion" from Mr. Daugherty, who at the time was a *pro se* claimant. The incomplete submission to Mr. Daugherty was purported to be Dr. Zaldivar's complete medical report. The withheld "reasoned medical opinion" portion of the report indicated that Respondent's examining expert believed that Mr. Daugherty suffered from complicated pneumoconiosis. By disassembling Dr. Zaldivar's medical report, Respondent violated Rules 3.4(a) of the Rules of Professional Conduct, which provides as follows:

**Rule 3.4. Fairness to opposing party and counsel.**

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;

29. Under the Black Lung Benefits Act, Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended 30 U.S.C. § 901 *et seq.*, and 20 C.F.R. § 718.304, there is an irrebuttable presumption that a miner found to have complicated pneumoconiosis is totally disabled. Respondent contends that he provided a portion of Dr. Zaldivar's report that when properly interpreted by an educated "B-reader" indicated that Mr. Daugherty had complicated

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<sup>7</sup>Id. at p. 12.

<sup>8</sup>Id.

pneumoconiosis and therefore implied that under the applicable regulations, he had fulfilled his obligation to Mr. Daugherty. However, the disassembled and withheld portion of Dr. Zaldivar's May 16, 2001 medical report clearly diagnosed Mr. Daugherty with complicated pneumoconiosis in language a *pro se* claimant could reasonably understand. By purporting to Mr. Daugherty that his submissions complied with the applicable regulations, Respondent has violated Rule 4.3 of the Rules of Professional Conduct, which provides in pertinent part:

**Rule 4.3. Dealing with unrepresented persons.**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

30. Respondent engaged in misconduct by knowingly, intentionally, and improperly withholding and concealing material having evidentiary value from a claimant, an opposing party, his client's retained medical experts, and ultimately, the tribunal. This intentional conduct consequently had a significant effect on the Daugherty black lung proceedings. Respondent violated Rules 8.4(c) and 8.4(d) of the Rules of Professional Conduct, which provide as follows:

**Rule 8.4. Misconduct.**

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.

## V. DISCUSSION

In this case, the Hearing Panel Subcommittee found that ODC failed to establish by clear and convincing evidence that Respondent's act of withholding Dr. Zaldivar's May 16, 2001 "reasoned medical opinion" was in violation of AN applicable federal black lung statute, rule or regulation.

Thus, the Hearing Panel Subcommittee found that ODC failed to establish that Respondent's misconduct violated Rule 3.4(a) of the Rules of Professional Conduct. With regard to the allegation that Respondent's misconduct in withholding a portion of Dr. Zaldivar's medical report violated Rule 4.3 of the Rules of Professional Conduct, the Hearing Panel Subcommittee's report appears to be silent. The Hearing Panel Subcommittee also found that the practice of disassembling medical reports was a common practice in black lung proceedings and but stated that it was "bothered by the practice." Thus, the Hearing Panel Subcommittee found that Respondent had not violated Rules 8.4(c) and 8.4(d) of the Rules of Professional Conduct when he withheld Dr. Zaldivar's May 16, 2001 narrative report.

However, with all due respect to the Hearing Panel Subcommittee, the evidence clearly establishes that Respondent violated the Rules of Professional Conduct when he disassembled the May 16, 2001 narrative portion from Dr. Zaldivar's medical report before providing the incomplete medical report to Mr. Daugherty, an elderly *pro se* claimant for black lung benefits, and to ALJ Leland by letter dated November 12, 2001, and identified the submission as if it contained the complete medical report Respondent had received from Dr. Zaldivar in May 2001. Furthermore, evidence was obtained at the hearing in this matter to demonstrate that the practice of disassembling medical reports was not as common of a practice as Respondent would have this Honorable Court believe.

**A. The Black Lung Act**

"In order to obtain federal black lung benefits, a claimant must prove by a preponderance of the evidence that: '(1) he has pneumoconiosis; (2) the pneumoconiosis arose out of his coal mine employment; (3) he has a totally disabling respiratory or pulmonary condition; and (4)

pneumoconiosis is a contributing cause to his total respiratory disability.” Island Creek Coal Co. v. Compton, 211 F.3d 203, 207 (4<sup>th</sup> Cir. 2000)(quoting Milburn Colliery Co. v. Hicks, 138 F.3d 524, 529 (4<sup>th</sup> Cir. 1998)). *See also*, 20 C.F.R. § 718.204(a). Under the “old regulations,” a finding of the existence of pneumoconiosis could be made through a chest X-ray or a biopsy or autopsy. *See*, 20 C.F.R. § 718.202(a)(1) and (2). 20 C.F.R. §718.202(a)(3) incorporates 20 C.F.R. § 718.304 which provides, in part, that “[t]here is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, . . .if such miner is suffering or suffered from a chronic dust disease of the lung which: (a) When diagnosed by chest X-ray . . .yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C ....” The regulations also provided that “a determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis . . . . Any such finding shall be based on objective medical evidence . . . and shall be supported by a reasoned medical opinion.” *See*, 20 C.F.R. § 718.202(a)(4).

The miner must then establish that his or her pneumoconiosis was the result of coal mine employment. Among other considerations, the “old regulations” provide for a rebuttable presumption that the pneumoconiosis arose out coal mine employment if the coal miner was employed for ten years or more in one or more coal mines. *See*, 20 C.F.R. § 718.203(b). The miner’s next requirement to establish in order to receive benefits is to prove that he or she is totally disabled due to pneumoconiosis. “A miner shall be considered totally disabled if the irrebuttable presumption in § 718.304 applies. . . .” *See*, 20 C.F.R. § 718.204(b). If the irrebuttable presumption does not apply, then a miner shall be considered totally disabled if pneumoconiosis prevented the miner: (1) from performing his or her usual coal mine work; and (2) from engaging in gainful

employment in the immediate are of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time. *See*, 20 C.F.R. § 718.204(b)(1) and (2).<sup>9</sup> The Court of Appeals for the Fourth Circuit has held that the proper method for determining the existence of pneumoconiosis under 20 C.F.R. § 718.202(a) is to “weigh the different types of evidence together to determine whether a preponderance of all of the evidence establishes the existence of pneumoconiosis.” Compton, 211 F.3d at 208.

**B. Mr. Daugherty’s Black Lung Claim**

Mr. Daugherty filed his *pro se* claim for federal black lung benefits on or about May 30, 2000. [ODC Ex. 2, Bates Nos. 0010-0011]. Mr. Daugherty was initially awarded benefits on or about January 26, 2001, by the District Director but his employer requested a formal hearing before an Administrative Law Judge (“ALJ”) by letter dated January 30, 2001. [ODC Ex. 2, Bates Nos. 13, 15].<sup>10</sup> On March 19, 2001, the claim was transferred to the Office of Administrative Judges. However, pursuant to a December 15, 2000 request by the employer and while the claim was still pending before the District Director, Mr. Daugherty was examined by Dr. George L. Zaldivar , on or about February 7, 2001. The “old regulations” provided that the employer contesting a claim may

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<sup>9</sup>Mr. Cohen testified generally that “[i]n black lung cases, you have to prove essentially four elements. . . . You have to prove that the miner has the disease pneumoconiosis. You have to prove it arose out of coal mine work. You have to prove that he is totally disabled from a respiratory/pulmonary standpoint. And you have to prove that the impairment is a least in part substantially related – and what this – you know, the definition of this, you can argue over and all – but there has to be a pretty substantial relationship of that impairment to the miner’s previous coal mine dust exposure.” [6/18/09 Transcript at p. 49].

<sup>10</sup>In the “old regulations” the District Director was known as the “Deputy Commissioner.” However, Disciplinary Counsel will use “District Director” as that is the title used by ALJ Leland in his numerous orders in the underlying black lung claim.

have the miner examined by a physician selected by the employer. *See*, 20 C.F.R. § 725.414.<sup>11</sup> Respondent testified at the hearing that the employer's request to have Mr. Daugherty examined by Dr. Zaldivar had been made "[o]nce [Mr. Daugherty's claim] was put on award status, [and] we decided that we needed to have him examined by our own expert." [6/18/09 Transcript pp. 256-257].<sup>12</sup> In its August 30, 2006 Order, the United States District Court specifically found that Respondent availed himself of the employer's right to have Mr. Daugherty examined by a physician of its choice under 20 C.F.R. § 725.414.

It is not disputed that the February 7, 2001 medical examination took place while the claim was still pending before the District Director, as the claim was not transferred to the Office of Judges until March 19, 2001. It is also not disputed that 20 C.F.R. § 725.414 is the only one provision under the "old regulations" which permit the employer to have the claimant examined and Respondent acknowledged the same at the June 18, 2009 hearing and stated that "[w]ell, the employer is entitled under the regulations to one full-blown examination." [6/18/09 Transcript p. 257]. Furthermore, it is not disputed that the packet Dr. Zaldivar forwarded to Respondent on or about May 22, 2001, included Mr. Daugherty's history and physical examination report from the February 7, 2001 examination, test results, and a narrative report (or "reasoned medical opinion") dated May 16, 2001. [6/18/09 Transcript p. 323]. Finally, it is not disputed that Respondent failed to include Dr.

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<sup>11</sup>20 C.F.R. 725.414(a) and (b) permit the employer to have the miner examined by a physician of its choice under different factual scenarios.

<sup>12</sup>Respondent testified that the request to Dr. Zaldivar for the examination and report would have been made by in writing. However, the letter requesting the examination is not part of the record in these proceedings. [6/18/09 Transcript at 357].

Zaldivar's "reasoned medical opinion" dated May 16, 2001, in his November 12, 2001 submission of evidence to Mr. Daugherty, to the ALJ, and to his other experts.<sup>13</sup>

Respondent argued that because Dr. Zaldivar's May 16, 2001 narrative report, or "reasoned medical opinion", was generated after March 19, 2001, and because he distinguished "between [Dr. Zaldivar's] subjective report versus his objective report," he was under no duty to submit "the reasoned medical opinion" when he submitted the other portion of Dr. Zaldivar's packet to Mr. Daugherty. [6/18/09 Transcript pp. 323-324]. However, it appears that under a plain reading of the applicable regulations, Respondent was clearly under an obligation to submit Dr. Zaldivar's entire medical report to Mr. Daugherty because Respondent's client availed itself of the only opportunity under the regulations to have Mr. Daugherty examined. To suggest that when an employee is required by law to present himself for a physical examination by the employer's hand chosen expert physician and then not be entitled to the complete results of that examination is without merit. The applicable regulation as found the United States District Court in is August 30, 2006 Order is 20 C.F.R. § 725.414(c), which provides, in part, that:

The report of any medical examination or test conducted under this section, or any other evidence submitted, shall be submitted to the deputy commission and sent to the other parties to the claim within the applicable period set forth in this section. .

[ODC Ex. 2, Bates No. 1089]. After reviewing the arguments put forth by Respondent's law firm as to why the 20 C.F.R. § 725.414 submission requirements did not apply, the United States District Court noted that it "[found Respondent's] excuses and arguments flimsy at best." [ODC Ex. 1,

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<sup>13</sup>Dr. Zaldivar's May 16, 2001 "reasoned medical opinion" was addressed to Respondent and began "[e]nclosed you will find the History and Physical Examination and laboratory information obtained from Mr. Daugherty whom I examined in my office at your request on February 7, 2001." [ODC Ex. 2, Bates No. 66].

Bates No. 1090]. There is simply nothing in this rule that provides that Respondent be permitted to withhold and conceal portions of unfavorable medical reports when Respondent and his client had availed itself of the only rule permitting examinations of the miner.<sup>14</sup>

The first notice of hearing after Respondent's advised Mr. Daugherty and the District Director that his client contested Mr. Daugherty's black lung claim was sent out on or about May 25, 2001, and set a hearing date of September 27, 2001. [ODC Ex. 1, Bates No. 0076; Respondent's Ex. 21, Bates No. 00445]. The hearing was rescheduled to October 4, 2001, by ALJ Leland and then later continued at Mr. Daugherty's request. [Respondent's Ex. 21, Bates Nos. 00449, 00452]. On September 20, 2001, a notice of hearing was sent out re-scheduling the hearing for January 25, 2002. This Notice of Hearing, citing to 20 C.F.R. § 725.456(b), provided that "[a]ll documentary evidence, . . ., should be sent to all parties no later than 20 calendar days prior to the date of the hearing." [ODC Ex. 1, Bates No. 0076; Respondent's Ex. 21, Bates Nos. 00454].<sup>15</sup> Therefore, assuming *arguendo* that Respondent was under no duty to submit Dr. Zaldivar's complete medical report he received in May 2001, under 20 C.F.R. § 725.414, Respondent was certainly under a duty to submit the complete report under 20 C.F.R. § 725.456(b).

Prior to the scheduled January 25, 2002 hearing, Respondent submitted evidence on two occasions. On or about November 12, 2001, Respondent provided to Mr. Daugherty the disassembled "Exam Report of Dr. George L. Zaldivar dated February 7, 2001." This "Exam

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<sup>14</sup>The Hearing Panel Subcommittee also noted that 29 C.F.R. § 18.19(c)(4) also applied to reports of medical examinations. This section states, in part, that "a report of an examining physician shall be made in accordance with Rule 35(b) of the Federal Rules of Civil Procedure, title 28 U.S.C., as amended. Federal Rule of Civil Procedure 35(b) provides, in part, that "[t]he party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition." *See*, Hearing Panel Committee Report, ¶ 22.

<sup>15</sup>20 C.F.R. § 725.456(b)(1) provides, in part, that "[a]ny other documentary material, including medical reports, which was not submitted to the deputy commissioner, may be received in evidence . . ., if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim."

Report” did not include Dr. Zaldivar’s May 16, 2001 narrative report, or “reasoned medical opinion”, which in plain language diagnosed Mr. Daugherty with complicated pneumoconiosis. [ODC Ex. 2, Bates Nos. 0017-0050]. Respondent then submitted additional evidence on December 12, 2001, and January 3, 2002, in anticipation of the January 25, 2002 hearing. [ODC Ex. 2, Bates Nos. 0500-0505, 0506-0538]. Mr. Daugherty requested a continuance on or about January 11, 2002, and the hearing was continued by notice dated January 16, 2002. [Respondent’s Ex. 00459]. Respondent did not submit Dr. Zaldivar’s May 16, 2001 narrative report, or “reasoned medical opinion,” within twenty (20) days of the January 25, 2002 hearing.

The next hearing was scheduled for June 12, 2002. [ODC Ex. 2, Bates No. 76]. On May 23, 2002, approximately twenty (20) days prior to the June 12, 2002 hearing date, Respondent submitted evidence and again, he did not disclose Dr. Zaldivar’s narrative report, on May 23, 2002. [ODC Ex. 2, Bates Nos. 0539-0569].<sup>16</sup> The hearing was continued on May 24, 2002. [ODC Ex. 2, Bates No. 0075]. By notice dated June 18, 2002, the hearing was next scheduled for October 10, 2002. [ODC Ex. 2, Bates No. 0075]. Approximately twenty (20) days prior to that hearing, Respondent submitted additional evidence on September 19, 2002. [ODC Ex. 2, Bates No. 0574-0601]. Again, this submission to Mr. Daugherty and to the tribunal did not disclose Dr. Zaldivar’s May 16, 2001 narrative report. Despite the fact that the hearing was set and continued on three more occasions, Respondent did not submit any additional evidence in regard to Mr. Daugherty’s black lung claim.<sup>17</sup> However, at least by March 2003, Respondent had been notified by Mr. Daugherty that he had an

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<sup>16</sup>May 24, 2002, was twenty (20) days prior to the June 12, 2002 hearing.

<sup>17</sup>Respondent asserts that the federal black lung regulations provide for a penalty for not submitting evidence. *See*, 20 C.F.R. § 725.456(c) which provides that “[d]ocumentary evidence which is obtained by any party during the time a claim is pending before the deputy commissioner, and which is withheld by such party until the claim is forwarded to the Office of Administrative Law Judges shall, notwithstanding paragraph (b) of this section, not be admitted into the hearing record in the absence of extraordinary circumstances, . . . .”

attorney reviewing his case and Mr. Cohen submitted a notice of representation on or about March 30, 2004. [ODC Ex. 2, Bates Nos. 0075, 0078; Respondent's Ex. 21, Bates No. 00463].

By notice dated June 2, 2004, the hearing on Mr. Daugherty's claim was scheduled for October 19, 2004. [ODC Ex. 2, Bates No. 74]. On or about September 9, 2004, Mr. Daugherty's attorney, Mr. Cohen, served Interrogatories and Requests for Production of Documents. [ODC Ex. 2, Bates Nos. 0081-0088, 0090-0100]. In response, Kathy L. Snyder, Esquire, also an attorney at Jackson & Kelly PLLC, submitted, as evidence, the "Supplemental Report of Dr. George L. Zaldivar dated September 20, 2004" which, after nearly three years, finally included Dr. Zaldivar's narrative report dated May 16, 2001. [ODC Ex. 2, Bates Nos. 0602-0604; Respondent's Ex. 6, Bates Nos. 00224-00240].

On or about October 15, 2004, Mr. Daugherty's attorney, Mr. Cohen, filed a Motion to Compel Discovery requesting Respondent provide descriptions and copies of all medical evidence in its possession which had not previously been disclosed to Mr. Daugherty. [ODC Ex. 2, Bates Nos. 0102-0117]. At the October 19, 2004 hearing, Mr. Cohen alleged that Respondent had disassembled the May 2001 medical report before providing it to Mr. Daugherty, who was unrepresented at the time, in or about November 2001. In addition, Mr. Cohen also alleged that Respondent had provided to their own medical experts only that information which was favorable to their clients' position. [ODC Ex. 2, Bates Nos. 0212-0215].<sup>18</sup>

At the October 19, 2004 hearing, Ms. Clark, co-counsel with Respondent, admitted that the narrative portion of Dr. Zaldivar's report was removed in November 2001 before providing the same

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<sup>18</sup>Respondent acknowledged that counsel for a claimant would have wanted to see Dr. Zaldivar's "reasoned medical opinion" which found that Mr. Daugherty ". . . has a combination of simple and complicated coal miners' pneumoconiosis, emphysema, and old tuberculosis . . ." [6/18/09 Transcript p. 365].

to Mr. Daugherty. [ODC Ex. 2, Bates Nos. 0221-0222, 0225-0226].<sup>19</sup> Respondent also appeared at the October 19, 2004 hearing and acknowledged a portion of Dr. Zaldivar's report was removed before providing it to Mr. Daugherty. [ODC Ex. 2, Bates Nos. 0249-0250]. Respondent also stated that "... I don't think there's a rule that says when you have a medical report, you – and the minute you get it, that you have to submit it. There's a twenty-day rule. As long as this information is submitted twenty days before the hearing. . . ." [*Id.*]. ALJ Lesniak responded by stating that "Well, . . . in my mind, it's a medical report. But I've never heard of, really, is submitting part of it and withholding part of it." [ODC Ex. 2, Bates No. 0250].

After the hearing and by Order entered October 22, 2004, ALJ Lesniak granted Mr. Cohen's Motion to Compel and scheduled a second hearing for November 10, 2004. [ODC Ex. 2, Bates Nos. 0119-0121]. Shortly thereafter, by letter dated October 27, 2004, Ms. Snyder notified ALJ Lesniak that her client had decided to accept the District Director's January 26, 2001 Initial Determination Awarding Benefits. Accordingly, her client withdrew its request for a hearing before the Office of Administrative Law Judges. Finally, Ms. Snyder requested that ALJ Lesniak issue an Order remanding the claim to the District Director for processing of the pay order. [ODC Ex. 2, Bates No. 0123].

By Order entered November 9, 2004, ALJ Lesniak rescheduled the November 9, 2004 hearing for December 16, 2004, and directed the Employer to deliver to Mr. Cohen by November 19, 2004, "all medical records and/or reports in its possession regarding [Mr. Daugherty]." [ODC Ex. 2, Bates Nos. 0128-0131]. On or about November 17, 2004, Ms. Snyder filed a Motion to

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<sup>19</sup>Another colleague of Respondent's, William Mattingly, acknowledged at a later hearing on December 16, 2004, that "[Dr. Zaldivar's medical report] all came in together. . . ." [ODC Ex. 2, Bates No. 0273]. He also stated that while "[i]t wasn't attached to it. It all came in the same envelope." [ODC Ex. 2, Bates No. 0274]. Mr. Mattingly also acknowledged, in response to ALJ Lesniak's questioning, "[w]e did not send in [Dr. Zaldivar's] impression statement, that 5-page written report." [*Id.*].

Cancel Hearing and Remand Claim to District Director asserting that ALJ Lesniak no longer had jurisdiction to decide the matter. [ODC Ex. 2, Bates Nos. 0133-0151]. ALJ Lesniak denied Ms. Snyder's motion by Order entered December 6, 2004. In this Order, ALJ Lesniak again directed the Employer to comply with his November 9, 2004 directive to immediately produce all medical records and reports in their possession. [ODC Ex. 2, Bates Nos. 0172-0175].

Another hearing took place on December 16, 2004. [ODC Ex. 2, Bates No. 0257]. William S. Mattingly, another attorney at Jackson Kelly, and Ms. Snyder appeared at the December 16, 2004 hearing and Ms. Snyder stated, after direct questioning by ALJ Lesniak, that Respondent had not complied with ALJ Lesniak's Orders of October 22, November 9, and December 6, 2004, to turn over all requested discovery documents because it was their client's position that as they had accepted liability on or about October 27, 2004, ALJ Lesniak no longer had jurisdiction in the matter. [ODC Ex. 2, Bates Nos. 0264-0265].

After the December 16, 2004 hearing, ALJ Lesniak issued an Order on March 21, 2005, remanding the case to the District Director. In addition, while ALJ Lesniak declined at that time to certify the case to the United States District Court for consideration of the misconduct, ALJ Lesniak found that his lawful order had been disobeyed and admonished "the attorneys not to tamper with exhibits, potential exhibits and/or any type of documents which may be entered into evidence in the future." [ODC Ex. 2, Bates Nos. 0177-0185]. On or about April 20, 2005, Mr. Cohen filed a motion for reconsideration of the March 21, 2005 Order and specifically requested that ALJ Lesniak reconsider his decision not to certify the case to the United States District Court for consideration of the misconduct in the underlying matter. [ODC Ex. 2, Bates Nos. 0187-0190]. By Order entered June 27, 2005, ALJ Lesniak again denied Mr. Cohen's motion to certify the matter to the United States District Court for consideration of the misconduct. However, ALJ Lesniak suggested that the attorneys involved attempt to reconcile the matter on an informal basis. [ODC Ex. 2, Bates Nos.

0192-0194]. On or about August 18, 2005, Mr. Cohen again wrote to ALJ Lesniak stating that neither Respondent nor any of the other attorneys involved had contacted him to discuss the disassembly of Dr. Zaldivar's May 16, 2001 report and again requested that the matter be certified to the United States District Court for consideration. [ODC Ex. 2, Bates Nos. 0197-0199]. Thereafter, despite noting that Mr. Cohen's request for reconsideration was filed out of time, by Order entered October 21, 2005, ALJ Lesniak found good cause to certify the matter to the United States District Court for consideration of sanctions. [ODC Ex. 2, Bates Nos. 0001-0008].

By Order entered August 30, 2006, after considering the parties arguments, the United States District Court for the Southern District of West Virginia granted Motion to Dismiss filed by Jackson & Kelly PLLC on several grounds, namely that the Court considered the certification to be a criminal contempt action which was not properly before the Court.

However, in its Order, the United States District Court made specific findings about the misconduct that occurred and provided an analysis of the applicable regulations and forwarded this matter to the Office of Disciplinary Counsel for consideration of whether Respondent's conduct violated the Rules of Professional Conduct. The Office of Disciplinary Counsel received the District Court's Order and the record on September 1, 2006, and by letter dated February 16, 2007, the Office of Disciplinary Counsel advised Respondent that a complaint had been opened in the name of the Office of Disciplinary Counsel and requested that Respondent respond to the allegations of violations of the Rules of Professional Conduct as raised in the August 30, 2006 Order. [ODC Ex. 2, Bates No. 1077; ODC Ex. 5, Bates No. 1375].

## **VI. ARGUMENT**

The Supreme Court of Appeals of West Virginia has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but also to protect the public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard its interests in

the administration of justice. Lawyer Disciplinary Board v. Taylor, 192 W.Va. 139, 451 S.E.2d 440 (1994). Factors to be considered in imposing appropriate sanctions are found in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure. These factors consist of: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. *See also* Syl. Pt. 4, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998).

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

Lawyers owe duties of candor, loyalty, diligence and honesty to their clients. Lawyers should also represent their clients zealously. However, lawyers also owe duties to the opposing party and to the public, the legal system and to the legal profession. Lawyers are officers of the Court, and as such, must operate within the bounds of the law and abide by the rules of procedure which govern the administration of justice. Furthermore, lawyers having a license to practice law from the State of West Virginia must abide by the Rules of Professional Conduct in all aspects of their practice, regardless of the forum.

The Preamble to the Rules of Professional Conduct begins by stating that “[a] lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibilities for the quality of justice.” By failing to provide Dr. Zaldivar’s complete “reasoned medical opinion” to Mr. Daugherty during the time Mr. Daugherty’s claim was being contested, Respondent violated his duty to the legal system and to the legal profession. The “reasoned medical opinion” withheld by Respondent was an important piece of evidence which is used in support of either proving one’s entitlement to benefits or in contesting an award of benefits. Respondent readily

acknowledged that he withheld Dr. Zaldivar's narrative report, or "reasoned medical opinion." [6/18/09 Transcript p. 323-325]. Respondent's conduct in concealing this evidence from a *pro se* claimant in a federal black lung proceeding for nearly three years clearly violated his obligations under the Rules of Professional Conduct. Respondent's misconduct in first, submitting an incomplete medical report as if it was whole to Mr. Daugherty, to the ALJ and then to his own client's medical experts violated his duties owed to the legal system and to the legal profession and resulted in nearly three years worth of expert medical evidence based upon conclusions formed on misinformation.

During those three years, Respondent submitted approximately 35 "reasoned medical opinions" to other experts and to the ALJ which were based, in part, on Dr. Zaldivar's incomplete medical report submitted on November 12, 2001. After accumulating a "preponderance of evidence" suggesting that Mr. Daugherty did not have complicated pneumoconiosis, Respondent's successor counsel returned to Dr. Zaldivar to obtain a supplemental report, after Mr. Daugherty had retained counsel who submitted discovery requests. In the supplemental report, Dr. Zaldivar reviewed the accumulated "reasoned medical opinions" which had determined that the medical evidence did not support a finding of complicated pneumoconiosis and submitted a supplemental report contradicting his earlier May 16, 2001 "reasoned medical opinion" which had diagnosed Mr. Daugherty as suffering from complicated pneumoconiosis. Respondent's conduct in manipulating the evidence submitted to a *pro se* claimant, his own medical experts, and to the federal black lung tribunals undermines the public's confidence in attorneys and in our legal system.<sup>20</sup>

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<sup>20</sup>See also, ODC Exhibits 4 and 8.

**B. Respondent acted intentionally and knowingly.**

The overwhelming evidence in this case demonstrates that Respondent acted intentionally and knowingly when he disassembled Dr. Zaldivar's May 16, 2001 medical report before forwarding it to the ALJ, Mr. Daugherty and his own medical experts in November 2001. "Intent" is defined in the *ABA Standards for Imposing Lawyer Sanctions* as "the conscious objective or purpose to accomplish a particular result."

During the course of these proceedings, Respondent offered more than one explanation as to why he disassembled and withheld Dr. Zaldivar's narrative, or "reasoned medical opinion," from both Mr. Daugherty and his 35 other medical experts. At an October 2004 hearing, Respondent testified that "... based upon litigation strategy in this particular case, it was decided to wait and go back to Dr. Zaldivar after more information is available for the record to get a more complete picture from him." [ODC Ex. 2, Bates No. 0249]. As another explanation made at the October 2004 hearing, Respondent stated that "at that time those initial documents were sent to him, we did not know about this fungal infection that [Mr. Daugherty] had back in the '60's." [Id.]. At the June 18, 2009 hearing, Respondent again attributed his decision to "the litigation strategy that I conducted I had decided not to use [Dr. Zaldivar's] narrative report." [6/18/09 Transcript p. 289]. However, Respondent also acknowledged that his earlier statement at the October 2004 hearing that he had not known about Mr. Daugherty's 1960s fungal infection was incorrect as Respondent had received notice of that infection in medical reports dated April 20, 2002. [6/18/09 Transcript p. 377; Respondent's Ex. 6, Bates No. 00226-00227]. At the June 18, 2009 hearing in this matter, Respondent also testified that Dr. Zaldivar's narrative report, or "reasoned medical opinion," was withheld because he believed that Dr. Zaldivar's opinion was "not only equivocal, but contradictory from one page to the next" and that he did not want to confuse either Mr. Daugherty or ALJ Lesniak by providing information that was not "consistent." [6/18/09 Transcript p. 259, 366-367].

Nonetheless, it is clear that Respondent recognized the significance of the conclusions drawn by Dr. Zaldivar in his narrative report, or “reasoned medical opinion” that Mr. Daugherty had complicated pneumoconiosis as that it was that part of Dr. Zaldivar’s medical report which was withheld when Respondent submitted it to Mr. Daugherty, the ALJ and to his own medical experts. Dr. Zaldivar’s May 16, 2001 narrative report stated in two places: “Radiographic evidence of emphysema, old tuberculosis, and simple and complicated pneumoconiosis” and “There is evidence, in this case, of coal workers’ pneumoconiosis, which [Mr. Daugherty] has acquired through his employment as a coal miner.” [ODC Exhibit 2, Bates Nos. 0463, 0465].

Furthermore, in this case, more than one witness testified that they were familiar with both Respondent’s manner of practice and with the structure of Dr. Zaldivar’s reports. Mr. Cohen, who said he represented claimants in federal black lung litigation since 1974, testified that when he reviewed Mr. Daugherty’s file, he noticed that Respondent had sent Mr. Daugherty to Dr. Zaldivar to be examined and that Dr. Zaldivar’s report had been disclosed by Respondent. [6/18/09 Transcript p. 41, 50]. Moreover, based upon his experience in the practice of federal black lung litigation, he was familiar with Dr. Zaldivar’s manner of structuring his reports and he noticed that a portion of Dr. Zaldivar’s report had not been produced by Respondent with his disclosure made in November 2001. Mr. Cohen explained in extensive detail the structure of Dr. Zaldivar’s medical reports:

I was familiar with other reports that Dr. Zaldivar had authored, and that he had a very definite way of structuring his reports. And the structure was that he would furnish a history and physical, which would be several pages long, which would contain the information about the miner’s occupational history, his smoking history, his medical history, his family medical history, anything else that Dr. Zaldivar found relevant, and then it would also contain the results of Dr. Zaldivar’s own physical examination of the miner . . . .

The second piece of the way Dr. Zaldivar would structure his submissions would be his X-ray report. A third piece would be the report of his pulmonary

function studies. A fourth piece would be the report of the blood gas studies. . . . And then Dr. Zaldivar would write a narrative opinion, and in his narrative opinion he would consider all of his own testing, all of the information he obtained from the miner by way of his interview, his examination, . . . , the histories he obtained. . . . He would integrate into his narrative the results of his objective testing . . . . and he'd state his final conclusions, which would be in terms of whether the miner had pneumoconiosis, whether it was simple or complicated pneumoconiosis or both, the degree of the miner's impairment, the causes of the impairment, whether the miner was totally disabled from performing his usual coal mine work, which is the standard of total disability under the Black Lung Act . . . .

[6/18/09 Transcript pp. 50-3]. Mr. Cohen testified that the medical reports are structured in that manner "because adjudications under the [Black Lung] Act are primarily determined by what are referred to in the regulations and the case law as 'reasoned medical opinions.'" [6/18/09 Transcript p. 53]. Mr. Cohen stated that he also obtained "reasoned medical opinions" because "ultimately we would be arguing to the administrative law judges that – my argument is that my reasoned medical opinions are more probative than the operator's reasoned medical opinions, and their argument is that their reasoned medical opinions are more probative than the claimant's reasoned medical opinions. And that's what virtually all of these cases come down to." [6/18/09 Transcript pp. 53-4]. Even one of Respondent's own medical experts, Dr. Robert J. Crisalli, who was obtained to submit a reasoned medical opinion on Mr. Daugherty, noted in own his reasoned medical opinion letter dated September 17, 2002, that Dr. Zaldivar's packet did not contain Dr. Zaldivar's "usual summary letter." [ODC Exhibit 2, Bates No. 580].

At the hearing on June 19, 2009, Respondent's own witness, Fred Muth, Esquire, an attorney with more than 35 years of experience in representing claimants in federal black lung litigation, testified that Respondent usually provided a medical report after an employer sent a claimant to a doctor for an examination, if he did not then "that put off a red flag, and that said, 'Muth, you better find out what they're withholding.'" [6/19/09 Transcript pp. 229-230]. Mr. Muth also testified that

“[t]here were some doctors that were known to be a lot more favorable to the claimants and some that weren’t, and you had to know who they were.” [6/19/09 Transcript p. 210.]. He also testified that until the new regulations were put in place in 2001, “it was possible to purchase a preponderance of evidence.” [6/19/09 Transcript p. 220]. Furthermore, it was the witness’ belief that the new regulations were put in place to “limit the number of items of evidence each party could sponsor.” [Id., p. 221].

Respondent knew that Dr. Zaldivar’s May 16, 2001 “reasoned medical opinion” was important to Mr. Daugherty’s case because it was evidence that Mr. Daugherty had complicated pneumoconiosis due to his employment as a coal miner. The withheld portion of Dr. Zaldivar’s medical report would have established that Mr. Daugherty was entitled black lung benefits because of the irrebuttable presumption which was supported by the “reasoned medical opinion.” Respondent knowingly withheld this portion of the “reasoned medical opinion” to Mr. Daugherty, the ALJ and his own subsequent medical experts. By not providing this part of the medical report, Respondent was attempting to obtain a “preponderance of evidence” to show that Mr. Daugherty did not have complicated pneumoconiosis and therefore, not entitled to black lung benefits.

The duty of the ALJ in black lung cases is to weigh the evidence, which includes medical reports, and to determine which evidence is most persuasive to give. Recognizing that the sheer volume of evidence submitted in black lung cases, almost always by the employer, the Court of Appeals for the Fourth Circuit noted that “[t]he Secretary proposed the Evidence-Limiting Rules ‘in order to ensure that eligibility determinations are based on the best quality evidence submitted rather than on the quantity of evidence submitted by each side.’” Elm Grove Coal Company v. Director, Office of Workers’ Compensation Program, et al., 480 F.2d 278, 283 (2007)(citing Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended 62 Fed.Reg. 3338, (proposed January 22, 1997)(to be codified at 20 C.F.R. pts. 718, 722, 725,727.)) The Court further

explained and quoted the Secretary, who had observed that “[c]urrently, . . . claimants must confront the vastly superior or economic resources of their adversaries . . . . Often, these parties generate medical evidence in such volume that it overwhelms the evidence supporting entitlement claimants can procure. The proposed changes limiting evidentiary development attempt to make more equitable the adjudication of black lung claims . . . .” Elm Grove Coal Company, 480 F.2d at 283 (citing Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended 62 Fed.Reg. 3338, (proposed January 22, 1997)(to be codified at 20 C.F.R. pts. 718, 722, 725-727)).

The record in this case shows that employers and their counsel, including Respondent, were exploiting a coal miner’s lack of resources to fight for his benefits. It has been noted that “the purpose of the Black Lung Benefits Act is remedial and . . . is to be construed to assure benefits to miners disabled from black lung disease.” See, Cabral v. Eastern Associated Coal Corporation, 18 BLR 1-25, 1993 WL 544241. Attorneys, like Respondent, should not be permitted to utilize methods of representing their clients by submitting to the miner, the ALJ, and their own medical experts disassembled medical reports which concealed evidence that conclusively and in plain English diagnosed the miner with complicated pneumoconiosis as a result of his coal mine employment and passing the disassembled medical report off as if it was whole. The evidence is clear that Respondent’s intent was to confuse a *pro se* claimant and the tribunal about the extent of Mr. Daugherty’s medical condition as a result of his coal mine employment.

**C. The amount of potential and real injury is great.**

“Potential injury” is defined in the *ABA Standards for Imposing Lawyer Sanctions* as “the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct.” [*Id.*] “Injury” is defined as “harm to a client, the public, the legal system, or the profession which results from a lawyer’s misconduct.” [*Id.*]

Respondent's conduct in disassembling the "reasoned medical opinion" portion of Dr. Zaldivar's report from his complete medical report and withholding the same from Mr. Daugherty for nearly three years harmed both Mr. Daugherty and the legal system. Respondent's misconduct produced a body of evidence in Mr. Daugherty's case which was skewed from its inception. Respondent obtained a significant benefit by withholding from his own experts and Mr. Daugherty the original reasoned medical opinion supporting the irrebuttable presumption of total disability for Mr. Daugherty. Respondent provided Dr. Zaldivar's incomplete report to over 30 medical experts in an attempt to secure other "reasonable medical opinions" to reverse the initial award of black lung benefits to Mr. Daugherty. As ALJ Lesniak stated during the proceedings, "we really have no assurance that [Respondent was] ever going to submit it." [ODC Ex. 2, Bates No. 0284]. Even if, as Respondent asserts, that Mr. Daugherty was not harmed because he was receiving benefits during this time, that does not mean that the legal system and legal profession was also not harmed by Respondent's misconduct in this matter. Under the Rules of Professional Conduct, Respondent owes a duty not only to his client and to opposing parties, he also owes a duty to the legal system and to the legal profession.

In addition, Mr. Daugherty was facing potential injury from Respondent's withholding of Dr. Zaldivar's complete medical report because of its value in future litigation regarding his claim. Mr. Cohen testified that a party may seek the reopening of a final decision within one year of when the decision becomes final. [6/18/09 Transcript p. 227-8]. Mr. Cohen testified that he was concerned that in Mr. Daugherty's case there was a potential that Mr. Daugherty's claim might be reopened as he was still alive. [*Id.* p. 229]. Therefore, Mr. Cohen stated that he specifically requested all of the medical evidence in Mr. Daugherty's case because he wanted to make sure that "all of this evidence which I'm thinking is going to be very favorable to Mr. Daugherty which I haven't gotten, which would be very useful if there was an attempt to reopen the claim." [*Id.*] Mr. Cohen testified that in

one of his earlier cases, a claim had been reopened and new evidence had been introduced and that in another case, two X-rays that were read by B-readers as positive for complicated [sic] were no longer in existence when the time came – when those – when that evidence was turned over to me. . . . the actual document wasn't in existence anymore, . . . .” [Id.] The possibility that a document diagnosing Mr. Daugherty with complicated pneumoconiosis could be lost would greatly diminish any future claims made by a coal miner or even his widow and carries with it the potential for great harm.

Another example of potential injury was the possibility that Mr. Daugherty may have to pay back the benefits he had been initially awarded. Mr. Muth testified that “[r]emember in these cases if a claimant makes his case initially before the district director and the employer refuses to pay and requests a hearing, the claimant would go into interim payment . . . . If the thing went to hearing and the case was reversed, then the claimant had to repay all of that money back to the Trust Fund.” [6/19/09 Transcript pp. 211-12]. Mr. Daugherty’s claim was in the exact position explained by Mr. Muth and Mr. Cohen. If Mr. Daugherty’s initial award was reversed by the ALJ and Mr. Cohen had not served the interrogatories when he did and evidence favorable to Mr. Daugherty might be lost, Mr. Daugherty would have to repay the benefits he had been receiving. It can be argued that but for the intervening event of Mr. Daugherty obtaining experienced counsel to review his case and serve interrogatories on Respondent’s client, Respondent’s misconduct might not have been have come to light in Mr. Daugherty’s case. Even Mr. Mattingly, Respondent’s co-counsel, acknowledged that he knew the portion of Dr. Zaldivar’s report which Respondent had withheld was “going to come to evidence” because of Mr. Cohen’s discovery request. [Id. pp 143-44]. Using Respondent’s own terminology, it can also be argued that Dr. Zaldivar changed from being a “non-testifying expert” to a “testifying expert” as soon as Mr. Cohen served interrogatories and when Respondent’s co-counsel “went back” to Dr. Zaldivar to obtain his supplemental medical opinion which, in the end,

was based upon additional medical evidence obtained from his earlier 2001 incomplete medical report.<sup>21</sup>

Mr. Daugherty had looming over him the very real possibility of repayment of the initial award. So for three years during his attempt to obtain counsel to represent him, Respondent continued to provide multiple submissions to him and the tribunal challenging the initial award of benefits. The employer's challenge to Mr. Daugherty's initial award of benefits was initiated with Respondent's first submission of evidence after the employer exercised its right to a hearing. Respondent very first submission of evidence was the November 12, 2001 submission of Dr. Zaldivar's "exam report" wherein Respondent removed the "reasoned medical opinion" diagnosing Mr. Daugherty with complicated pneumoconiosis. The injury to Mr. Daugherty and to the legal system was Respondent's misconduct in disassembling Dr. Zaldivar's "reasoned medical opinion." The potential for harm to the legal system and to the public in Respondent employing this type of manipulative legal strategy is immense.

**D. There are several aggravating factors present.**

Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Court to examine when considering the imposition of sanctions. Elaborating on this rule, the Court held "that aggravating factors in a lawyer disciplinary proceeding 'are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.'" Lawyer Disciplinary Board v. Scott, 213 W.Va. 216, 579 S.E. 2d 550, 557 (2003) quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.21 (1992).

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<sup>21</sup>The Hearing Panel Subcommittee noted in its report that Respondent and his successor counsel differed in their consideration of Dr. Zaldivar and that the statements of Respondent's successor counsel at the October 19, 2004 hearing before the ALJ was not consistent with Respondent's position that he did not intend to use Dr. Zaldivar as an expert. See, Hearing Panel Subcommittee Report, ¶ 15.

Several aggravating factors listed in Rule 9.22 of the *ABA Model Standards for Imposing Lawyer Sanctions* are present in this case. Respondent has practiced law since September 15, 1981, and thus has substantial experience in the practice of law and the same is an aggravating factor pursuant to Rule 9.22(I) of the *ABA Model Standards for Imposing Lawyer Sanctions*. See also Lawyer Disciplinary Board v. Ball, 219 W.Va. 296, 633 S.E.2d 241 (2006). Furthermore, Mr. Daugherty was an elderly *pro se* claimant at the time of Respondent's misconduct. Under Rule 9.22(h) of the *ABA Model Standards for Imposing Lawyer Sanctions*, the vulnerability of the victim is a consideration under aggravating factors. Mr. Daugherty was 74 years old when he filed his claim for federal black lung benefits in May 30, 2000.<sup>22</sup> Respondent's own expert regarding federal black lung procedure, former ALJ Rudolph Jansen, testified that a *pro se* claimant with only an eighth grade education, similar to Mr. Daugherty, would not have been able to interpret the x-ray portion of Dr. Zaldivar's medical report submitted on November 12, 2001, which Respondent maintains indicated that Mr. Daugherty had evidence of pneumoconiosis in his lungs. [6/18/09 Transcript pp. 429-430; 432-433]. As Respondent's expert, Forest J. Bowman, Esquire, stated, "[y]ou just can't mislead, and you can't – with a *pro se* litigant, you cannot give the impression that you're disinterested." [6/19/09 Transcript p. 44].

Furthermore, Respondent refused to acknowledge the wrongful nature of his conduct which also is considered an aggravating factor under Rule 9.22(g) of *ABA Model Standards for Imposing Lawyer Sanctions*. At the hearing in this matter, Respondent was asked "[i]s it your testimony that you don't believe you had to provide anything from Dr. Zaldivar back in 2001?" [6/18/09 Transcript p. 268]. Respondent replied, "[t]hat's correct." [*Id.*]. In response to the question, "[i]s it still your position as of – you know, looking back to January/February 2001, that you still had that right to

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<sup>22</sup>Mr. Daugherty passed away on December 2, 2005, during the pendency of the case at the United States District Court for the Southern District of West Virginia. [ODC Ex. 2, Bates Nos. 0344-0345].

withhold [Dr. Zaldivar's narrative]?", Respondent stated "[y]es. There wasn't a duty to submit it until asked." [6/18/09 Transcript p. 378]. When asked if ALJ Lesniak was wrong in stating that he had a duty to turn over Dr. Zaldivar's report under the applicable federal black lung, Respondent replied that "I believe that he is." [6/18/09 Transcript pp. 367-368]. In addition, Respondent also testified that he believed that the United States District Court was wrong in finding that he had a duty to submit the entire medical report pursuant to 20 C.F.R. § 725.414(c) and that the Court "... does not understand the whole runnings of the federal black lung program." [Id. p. 367].

Respondent also testified that it was his belief that ALJ Lesniak took the action he did in certifying the matter to the United States District Court because of ALJ Lesniak's animosity towards him. [6/18/09 Transcript p. 368]. However, Respondent offered no other explanation other than to state that the October 2004 hearing was the first time in two years he had appeared before ALJ Lesniak after requesting that ALJ Lesniak recuse himself in another claim. [6/18/09 Transcript pp. 281, 368]. Moreover, Respondent's witnesses, who were familiar with ALJ Lesniak from their practice in federal black lung claims testified that he was a reasonable and fair judge. [6/19/09 Transcript pp. 234-235]. In fact, one of Respondent's witnesses, Gregory C. Hook, Esquire, testified that he had many cases before ALJ Lesniak and that "[he] never found him to be unreasonable." [6/19/09 Transcript p. 252]. There is no evidence to support Respondent's claim of animosity.

The Scott court also adopted mitigating factors in a lawyer disciplinary proceeding and stated that mitigating factors "are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Lawyer Disciplinary Board v. Scott, 213 W.Va. 216, 579 S.E.2d 550, 557 (2003). Other than his absence of a prior disciplinary record, Respondent has not raised any mitigating factors identified in Rule 9.31 of the *ABA Model Standards for Imposing Lawyer Sanctions*.

## VII. SANCTION

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syllabus Pt. 3, *in part*, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), *cited in* Committee on Legal Ethics v. Morton, 410 S.E.2d 279, 281 (1991). In addition, discipline must serve as both instruction on the standards for ethical conduct and as a deterrent against similar misconduct to other attorneys. In Syllabus Point 3 of Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987), the Court stated:

In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.

Moreover, a principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999).

The *ABA Model Standards for Imposing Lawyer Sanctions* provide that absent any aggravating or mitigating circumstances, the following sanctions are generally appropriate in cases where the lawyer engages in conduct that prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:

6.12 Suspension is generally appropriate when a lawyer knows that . . . material information is improperly withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Respondent's violations in this case are extremely egregious and strike at the very essence of the public's perception of the legal profession. While it is acknowledged that this is Respondent's first offense in his lengthy and distinguished legal career, it cannot be stressed enough that these violations are serious. Respondent's assertion that he had no duty under the federal regulations to disclose Dr. Zaldivar's complete report and that he was only zealously representing his client is not credible. Neither ALJ Lesniak nor the United States District Court found Respondent's explanations credible. Furthermore, ALJ Jansen's statement in his written opinion that Respondent's submission of Dr. Zaldivar's disassembled medical report on November 12, 2001, was "... strictly gratuitous and voluntary and was not done to satisfy any regulatory requirement" is also not credible. [Respondent's Ex. 1, Bates No. 00014]. In fact, Judge Jansen later acknowledged that "[I]f the clock was running and they were approaching the 20-day period, I'd say chances are it probably was mailed to comply with the 20-day rule." [6/18/09 Transcript pp. 439-440]. It was clear that Respondent had a duty to submit Dr. Zaldivar's complete and unified report. Mr. Cohen testified that Dr. Zaldivar's narrative report, or "reasoned medical opinion" was the most significant portion of his packet. Mr. Daugherty's case turned on whether the doctors who examined him and reviewed his records found medical evidence that supported a finding of complicated pneumoconiosis in a "reasoned medical opinion." [6/18/09 Transcript pp. 86-96].

In this case, Respondent received a single unified medical report from Dr. Zaldivar dated May 16, 2001, in which he reported the results from his February 2001 examination and submitted a "reasoned medical opinion." Evidence was produced establishing that the May 16, 2001 packet Respondent received was a single unified report which Respondent disassembled when he submitted that portion of Dr. Zaldivar's medical report containing only the results of the medical examination. Respondent's November 12, 2001 cover letter addressed to the ALJ and to Mr. Daugherty submitting the incomplete "Exam report of Dr. George Zaldivar dated February 7, 2001" was exactly the

language used in cover letter he sent on September 19, 2002, when Respondent submitted the complete “Exam report of Dr. Robert J. Crisalli.” [ODC Exhibit 2, Bates Nos. 0473, 0574-601].

Furthermore, the disassembling of medical reports cannot be so common in federal black lung practice as Respondent would have this Court believe if even Respondent’s own doctors notice when the narrative portion of a medical report is missing. Dr. Robert J. Crisalli, who was obtained by Respondent to submit a reasoned medical opinion on Mr. Daugherty, noted in own his reasoned medical opinion letter dated September 17, 2002, that “[t]he **usual summary letter from Dr. Zaldivar** is not in the packet.” [ODC Exhibit 2, Bates No. 580 - emphasis added]. The Chair of the Hearing Panel Subcommittee also specifically asked Respondent “[d]o you know any other lawyer that was involved in that practice [of disassembly of medical reports]?” Respondent answered “[n]umerous lawyers.” The Chair then asked Respondent “[c]an you name a single lawyer in West Virginia who has ever followed your same practice?” Respondent stated “[b]ecause I can’t think of any specific inference, I would have to say no.” [6/18/09 Transcript pp. 355-56].

The Hearing Panel Subcommittee found that Respondent’s disassembly of Dr. Zaldivar’s medical report and subsequent failure to submit the report in its entirety, until Mr. Cohen filed interrogatories, was not in violation of any federal rule, regulation, or statute, and thus not unlawful for purposes of finding a violation of Rule 3.4(a) of the Rules of Professional Conduct. Assuming that this finding results in the dismissal of the violation of Rule 3.4(a) charge, it does not necessarily follow that the allegations regarding Respondent’s violation of Rules 8.4(c) and 8.4(d) should also be dismissed. In the same rule regarding professional misconduct, Rule 8.4(b) of the Rules of Professional Conduct provides that “[i]t is professional misconduct for a lawyer to: (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects[.]” This Court has considered acts that were criminal in nature even though the attorney had not been charged at the time of the disciplinary proceedings and found the alleged

criminal acts sufficient enough to annul an attorney's license. Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989). *See also*, Lawyer Disciplinary Board v. Markins, 222 W.Va. 160, 663 S.E.2d 614 (2008) (law license suspended for 2 years because he unlawfully accessed another firm's computer system and therefore he violated Rules 8.4(b) by committing an uncharged criminal act that reflected adversely on his honesty, trustworthiness, or fitness as a lawyer and 8.4(c) because he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation); Lawyer Disciplinary Board v. Coleman, 219 W.Va. 790, 639 S.E.2d 882 (2007) (law license annulled an attorney who diverted and converted approximately \$170,000.00 in legal fees paid by clients for bond work performed by his law firm into his personal bank account without his law firm's knowledge and then spent the money for his own personal benefit). In Coleman, the Court stated that "[t]he fact that Mr. Coleman has not been charged criminally for his actions does not lessen their severity or the ramifications thereof." Coleman, 639 S.E.2d at 891-2. Respondent's misconduct is not criminal in nature but the argument in this case is similar to those past cases wherein this Court found a violation of Rule 8.4(b) even though the respondent in those cases cited above had not been charged criminally for the same conduct. Thus, if this Court should find that Respondent did not violate any federal law or regulation that does not necessarily preclude the Court from still finding that Respondent violated other Rules of Professional Conduct.

Respondent's engaged in misconduct by withholding the portion of Dr. Zalidvar's medical report which was not favorable to his position. This type of misconduct clearly demonstrates dishonesty, deception, fraud, and misrepresentation. As the evidence shows, the portion of Dr. Zaldivar's medical report withheld by Respondent was irrefutable proof that Mr. Daugherty was entitled to benefits under the federal black lung act. Mr. Daugherty, a *pro se* claimant at the time, was only provided with a portion of the report dealing with the X-ray reading which was indecipherable to any person outside of an experienced B-reader. Further, by only providing the

partial report to other medical experts, Respondent's misconduct produced a body of evidence based on a fraudulent misconception. Respondent's entire case was built upon deceit and skewed evidence from the beginning and his purpose was to hide a "reasoned medical opinion" which diagnosed Mr. Daugherty with complicated pneumoconiosis and which he used to bolster future medical reports which found that Mr. Daugherty's medical condition was not complicated pneumoconiosis. Such misconduct is a violation of the West Virginia Rules of Professional Conduct.

Respondent's misconduct is prejudicial to administration of justice. Under the Black Lung Act, Mr. Daugherty was entitled to black lung benefits if he could demonstrate that he suffered from complicated pneumoconiosis as a result of his coal mine employment. Respondent's act of withholding evidence the Mr. Daugherty suffered from complicated pneumoconiosis as a result of his coal mine employment in his initial submission of evidence to Mr. Daugherty and the tribunal on November 12, 2001, is in direct contradiction of purpose of the Black Lung Act and is conduct prejudicial to the administration of justice. The recognized purpose of the Black Lung Act is to provide benefits to coal miners who have been totally disabled by pneumoconiosis and Respondent's conduct deprived Mr. Daugherty of his right to justice through the Black Lung Act. Furthermore, Respondent's misconduct manipulated evidence that was provided to the ALJ and which the ALJ would have used to base his decision on whether Mr. Daugherty's initial award of benefits would stand. It should also be noted that the initial award of benefits was upheld in this case because the employer conceded liability after the ALJ granted Mr. Daugherty's Motion to Compel. It is unclear whether justice would have obtained for Mr. Daugherty if it had not been discovered that Respondent had withheld Dr. Zaldivar's "reasoned medical opinion."

As a member of the West Virginia State Bar, Respondent must balance his duty of zealous representation to his client against his duty to represent his client within the bounds of the Rules of Professional Conduct. The Preamble of the West Virginia Rules of Professional Conduct recognizes

that “[v]irtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system, and to the lawyer’s own interest in remaining an upright person while earning a satisfactory living. . . . Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.” The Supreme Court of Appeals of West Virginia has held that “lawyer who engage in the practice of law in West Virginia have a duty to know the Rules of Professional Conduct and to act in conformity therewith.” Lawyer Disciplinary Board v. Ball, 219 W.Va. 296, 633 S.E.2d 241 (2006). In addition, the Supreme Court has stated that “the Rules reflect the high standards by which all lawyers must abide regardless of the wishes of a client.” Id., 633 S.E.2d at 252.

In terms of issuing sanction against an attorney in a disciplinary proceeding for withholding evidence, this issue appears to be one of first impression in West Virginia. However, a similar issue has been raised as an abuse of the discovery process and reviewed under the attorney’s duties under the Rules of Civil Procedure. For example, in Beto v. Stewart, 213 W.Va. 355, 582 S.E.2d 802 (2003), the Supreme Court discussed the issue of whether an attorney’s act of withholding of several letters for four months in medical malpractice case before disclosing the same violated Rule 37(b)(2) of the Rules of Civil Procedure. The West Virginia Supreme Court affirmed the lower court’s Order which had found that the attorney’s conduct in not producing certain letters during discovery was “not aimed at the court or its processes” and that the plaintiff had not been prejudiced by the attorney’s actions. However, in his dissent, Justice Warren McGraw noted that the record suggested that the attorney knew he was doing something wrong and that his assertion of the work product doctrine was an attempt to “gloss over their actions.” Id., 213 W.Va. at 364, 582 S.E.2d at 810. Justice McGraw stated that “[a]n attorney should zealously advocate a client’s position, but must do so in accordance with our Rules of Professional Conduct. While the attorney must represent the client, that representation should not rise to the level of covering up information. If the attorney does

so, the he or she goes beyond the boundaries of advocacy . . . . By not complying with the discovery requests and failing to promptly provide the letters, defense counsel went beyond the boundaries of advocacy.” Id.

However, in The Mississippi Bar v. John W. (Jack) Land, 653 So.2d 899 (1995), while noting that the issue might be a “discovery dispute,” the Supreme Court of Mississippi, nonetheless, suspended an attorney for one year finding that attorney had deliberately concealed evidence from opposing counsel which prevented the opposing side from pursuing another theory of recovery in the underlying personal injury case in violation of Rules 3.3, 3.4 and 8.4. The plaintiff was driving his car down a street and had been injured by an object flying into his vehicle. The plaintiff had stated that he heard a lawn mower immediately before being hit and this was theory alleged in the complaint against the homeowner. However, the investigation by the insurance company revealed that children on the homeowner’s lawn had also been shutting a BB gun at approximately the same time as the lawn mower was in use. Depositions were conducted wherein it became clear that neither the plaintiff nor his counsel had any knowledge of the BB gun incident. Defense counsel’s responses to interrogatories, which were filed after the depositions, did not mention of BB gun incident or the fact that the insurance file contained pictures of the BB gun. Mr. Land then filed a Motion for Protective Order to prevent the deposition of the homeowner and his son, and to preclude the plaintiff from obtaining the insurance representative’s claim file. Plaintiff’s counsel discovered the BB gun incident shortly thereafter when he reviewed Mr. Land’s file containing notes on the BB gun incident which Mr. Land had mistakenly left behind.<sup>23</sup> Plaintiff’s counsel then filed a Motion to Amend Complaint to add the theory that his client had been injured by the BB gun. In finding that Mr. Land violated the Rules of Professional Conduct, the Court noted that Mr. Land had knowledge

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<sup>23</sup>The Court was silent regarding the action of Plaintiff’s counsel in reviewing Mr. Land’s file which had been mistakenly left with him.

of the BB gun incident prior to his filing responses to interrogatories and that he had knowingly concealed the same. The Mississippi Supreme Court also cited to § 6.12 of *ABA Model Standards for Imposing Lawyer Sanctions* in support of its decision to suspend Mr. Land for a period of one year. The Court noted that “Land’s handling of this case when far beyond what could be considered a discovery dispute.” Land, 653 So.2d. at 910.

The Supreme Court of South Dakota dealt with the issue of withholding and subsequent use of an incomplete drug report in a divorce case and found that the attorney’s conduct warranted public censure. See, In the Matter of Timothy J. Wilka, 638 N.W.2d 245 (S.D. 2001). Mr. Wilka represented the husband in a divorce matter in which the wife was seeking to limit the husband’s visitation of the parties’ child to supervised visitation based upon the husband’s alleged use of methamphetamines. Mr. Wilka recommended that his client undergo a urinalysis test for methamphetamines. A report was prepared which indicated that Mr. Wilka’s client tested negative for methamphetamines but tested positive for cannabinoids. Mr. Wilka contacted that lab technician and informed her that, because there were no allegations of marijuana use, he needed a report only indicating that his client tested negative for methamphetamines. The lab technician informed Mr. Wilka that she was unable to separate the screen reports but she could provide a second report without the cannabinoids result. The Court noted that the technician simply tore or cut off the cannabinoids result from the bottom portion of the drug screen results and provided the cut off report to Mr. Wilka. Mr. Wilka then made a copy of the second report and sent it to opposing counsel. However, opposing counsel was a former prosecutor who was familiar with drug screen reports. He noticed that the report was missing the cannaboids results and he decided to proceed with the hearing. At the hearing in the underlying matter, the Court asked Mr. Wilka “Is this cut off or is the entire - ” Wilka responded, “That’s was I was provided by the hospital, Your Honor. The Court eventually required Mr. Wilka’s client to undergo another drug screen, which came back negative

for all drugs. It appears that Mr. Wilka disclosed the entire report while the underlying case was still pending and the Court noted that there was no apparent harm to either party. Nonetheless, Mr. Wilka ultimately pled to a civil contempt charges and faced disciplinary charges.

The Referee, after finding that Mr. Wilka violated Rules 3.3(a)(2); 3.3(a)(4); 8.4(a); 8.4(c); and 8.4(d), recommended private censure. The South Dakota Supreme Court, after considering the totality of the circumstances, determined that Mr. Wilka's conduct warranted a public censure. The Court noted:

It is absolutely necessary that each member of the bar comprehends the great responsibility that every person who has the privilege to practice law must strive for: to be a person of unquestionable integrity as he or she deals with the rights of people before the bar. A practitioner of the legal profession does not have the liberty to flirt with the idea that the end justifies the means, or any other rationalization that would excuse less than complete honesty in the practice of the profession. Certainly, our Rules of Professional Conduct allow no such flirtation.

Wilka, 638 N.W.2d at 249 *quoting* Matter of Discipline of Mines, 523 N.W.2d 424, 427 (S.D. 1994). It is obvious that the West Virginia Rules of Professional Conduct also would not allow for such "flirtation," as well. This case is analogous to the situation in Wilka as to the disassembly of a report that was provided to the opposing party and to the tribunal. .

Rule 8.4(d) is usually charged in instances wherein an attorney has interfered in judicial proceedings. *See*, Lawyer Disciplinary Board v. Veneri, 206 W.Va. 384, 524 S.E.2d 900 (1999) (failure to notify opposing counsel and law master of an altercation of a proposed order); Scott, 213 W.Va. 209, 579 S.E.2d 550 (2003) (prosecutor appeared before grand jury as counsel for the state when his law license had been suspended); Lawyer Disciplinary Board v. Sims, 212 W.Va. 463, 574 S.E.2d 795 (2002) (prosecutor made extrajudicial statement about an active investigation). This Honorable Court, however, has also applied Rule 8.4(d) of the Rules of Professional Conduct and found a violation thereof in cases involving lawyer misappropriation and conversion of client funds

to the lawyer's own use. See Lawyer Disciplinary Board v. Kupec, 204 W.Va 643, 515 S.E.2d 600 (1999) (Kupec II); Lawyer Disciplinary Board v. Lusk, 212 W.Va. 788, 574 S.E.2d 788 (2002); Lawyer Disciplinary Board v. Wheaton, 216 W.Va. 673, 610 S.E.2d 8 (2004). Conduct prejudicial to the administration of justice is not limited to judicial proceedings, not only did Respondent's misconduct in this matter by withholding Dr. Zaldivar's complete medical report from the ALJ interfere with the judicial proceedings, his misconduct interfered with Mr. Daugherty's right to justice under a federal law designed to provide him with benefits.

This Honorable Court has previously sanctioned lawyers for deceitful and dishonest conduct in violation of Rules 8.4(c) and 8.4(d) of the Rules of Professional Conduct. See generally Lawyer Disciplinary Board v. Edward R. Kohout, No. 22629 (WV 4/14/95): law license suspended for two years for lying on Bar Application about law school expulsion and for being disciplined by United States Bankruptcy Court (Per Curiam Opinion); Lawyer Disciplinary Board v. Jeffrey A. Holmstrand, No. 22523 (WV 5/30/96): law license was suspended for one year for creating false pleadings to hide his failure to answer civil actions timely, making a false affidavit concerning the genuineness of a pleading and making false representations to a court concerning the same (Unreported Case); Lawyer Disciplinary Board v. Don A. Humberson, No. 25925 (WV 10/26/00): law license suspended for 90 days for violations of Rules 8.4(c) and 8.4(d) by swearing to a false affidavit to be used in a drug case (Unreported Case); Lawyer Disciplinary Board v. Ernest F. Hays, No. 28465 (WV 10/4/01): lawyer reprimanded for violation of Rule 8.4(c) for signing another attorney's name to two title letters for Respondent's personal transaction (Unreported Case); Lawyer Disciplinary Board v. David M. Ansell, 210 W.Va. 139, 556 S.E.2d 106 (2001): law license suspended for 60 days for violation of Rule 8.4(d) for altering a signed court order; Lawyer Disciplinary Board v. Paul A. Billups, No. 32572 (WV 10/6/05): law license suspended for 6 months because he falsely told his client that he had filed a lawsuit on his behalf, prepared false

documents and advised the client that a settlement was reached, the Supreme Court found that Respondent committed numerous violations of Rule 8.4(c) (Unreported Case); Lawyer Disciplinary Board v. Larry E. Losch, 219 W.Va. 316, 633 S.E.2d 261(2006): lawyer publicly reprimanded for violating Rules 8.4(c) and 8.4(d) when he altered a document after it was issued by the Circuit Court and then caused it to be served on an individual; and Lawyer Disciplinary Board v. Michael P. Markins, 222 W.Va. 160, 663 S.E.2d 614 (2008): law license suspended for 2 years because he unlawfully accessed another firm's computer system and therefore he violated Rules 8.4(b) by committing an uncharged criminal act that reflected adversely on his honesty, trustworthiness, or fitness as a lawyer and 8.4(c) because he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. Respondent's misconduct in disassembling and withholding Dr. Zaldivar's complete medical report was dishonest and deceitful to the tribunal, to Mr. Daugherty, to the legal profession, and to the legal system as a whole. Respondent's misconduct was not a single incident but conduct that occurred over the next couple of years when he continually submitted the incomplete medical report to his medical experts and then, in turn, submitted those medical experts' reports to Mr. Daugherty and to the ALJ. Such reoccurring misconduct in withholding the complete medical report during the course of Mr. Daugherty's proceedings supports the sanction of suspension.

It is clear from the evidence presented that Respondent engaged in the intentional misconduct of disassembling Dr. Zaldivar's medical report and submitting an incomplete portion of the medical report in November 2001 to a *pro se* black lung claimant and to an ALJ as if it were the whole medical report he had received from Dr. Zaldivar in May 2001. This misconduct reflects adversely on his fitness to practice law and significantly prejudiced the administration of justice. For the public to have confidence in our disciplinary and legal systems, the public must have faith that our system of justice and its lawyers are trustworthy and that justice, not victory, is the ultimate goal.

Respondent has engaged in deceitful conduct and the Scott Court noted in Gum v. Dudley, 202 W.Va. 477, 487, 505 S.E.2d 391, 401 (1997):

Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice.... Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.

[Scott, 579 S.E.2d at 558 *quoting* Dudley, 202 W.Va. at 487 (*quoting* United States v. Shaffer Equipment Co., 11 F.3d 450, 457 (4<sup>th</sup> Cir. 1993))]

Honesty must always be preeminent in West Virginia's legal system and its lawyers should not be permitted to unfairly manipulate the system of justice. A license to practice law is a revokable privilege and when such privilege is abused, the privilege should be revoked. Such sanction is also necessary to deter other lawyers from engaging in similar conduct and to restore the faith of the general public in the integrity of the legal profession.

### **VIII. RECOMMENDED SANCTIONS**

Rule 3.15 of the Rules of Lawyer Disciplinary Procedure provides that the following sanctions may be imposed in a disciplinary proceeding: (1) probation; (2) restitution; (3) limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment.

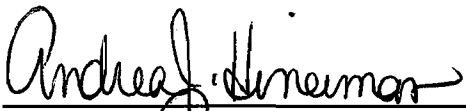
For the reasons set forth above, the Office of Disciplinary Counsel recommends the following sanction:

1. That Respondent be suspended;
2. That Respondent complete nine hours of CLE in ethics in addition to such ethics hours he is otherwise required to complete to maintain his active license to practice,

said additional nine hours to be completed in the current reporting period after Respondent is reinstated; and

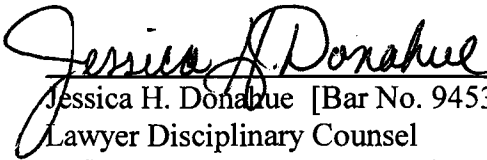
3. That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

*Respectfully submitted,*  
The Office of Disciplinary Counsel  
By Counsel



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Andrea J. Hinerman [Bar No. 8041]  
Senior Lawyer Disciplinary Counsel



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**CERTIFICATE OF SERVICE**

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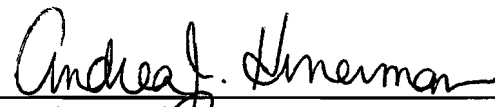
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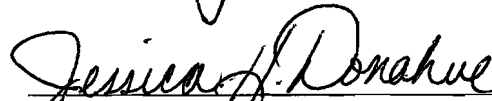
This is to certify that I, **Andrea J. Hinerman**, Senior Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 7<sup>th</sup> day of June, 2010, served a true copy of the foregoing "**Brief of the Office of Disciplinary Counsel**" upon Stephen R. Crislip, Esquire, counsel for Respondent Douglas A. Smoot, by mailing the same via United States Mail, both certified and regular, with sufficient postage, to the following address:

Stephen R. Crislip, Esquire  
Post Office Box 553  
Charleston, West Virginia 25322-0553

And upon the Chairperson of the Hearing Panel Subcommittee at the following address:

David A. Jividen, Esquire  
729 North Main Street  
Wheeling, West Virginia 26003

  
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Andrea J. Hinerman

  
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Jessica H. Donahue