

# ARGUMENT DOCKET

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

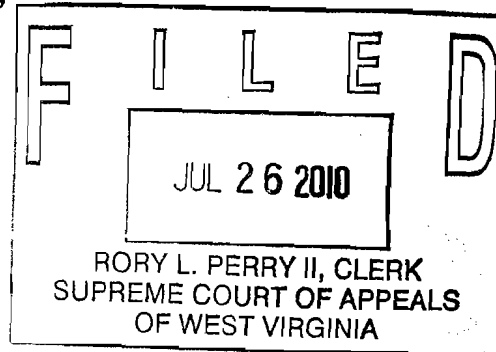
**LAWYER DISCIPLINARY BOARD,**

**Complainant,**

**v.**

**DOUGLAS A. SMOOT,**

**Respondent.**



**No. 34724**

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

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
I. REPLY .....	1
II. RECOMMENDATION OF THE OFFICE OF DISCIPLINARY COUNSEL .....	17

## TABLE OF AUTHORITIES

### Cases:

<u>Cline v. Westmoreland Coal Company</u> 21 BLR 1069 (1997) .....	9
<u>Committee on Legal Ethics v. Gallaher</u> 180 W.Va. 332, 376 S.E.2d 346 (1988) .....	16
<u>Committee on Legal Ethics v. Morton</u> 186 W.Va. 43, 410 S.E.2d 279, 281 (1991) .....	2
<u>Committee on Legal Ethics v. Pence</u> 161 W.Va. 240, 240 S.E.2d 668 (1978) .....	16
<u>Committee on Legal Ethics v. Walker</u> 178 W.Va. 150, 358 S.E.2d 234 (1987) .....	1
<u>Committee on Legal Ethics v. Tatterson</u> 173 W.Va. 613, 319 S.E.2d 381 (1984) .....	2
<u>Florida Bar v. Fredericks</u> 731 So.2d 1249 (Fla. 1999) .....	12
<u>G.F. v. Elk Run Coal Company</u> 2007-BLA-5984 .....	10
<u>Gum v. Dudley</u> 202 W.Va. 477, 487, 505 S.E.2d 391 (1997) .....	16
<u>Gum v. Dudley</u> 202 W.Va. 477, 487, 505 S.E.2d 391 (1997) <i>quoting</i> <u>United States v. Shaffer Equipment Co.</u> 11 F.3d 450, 457 (4 <sup>th</sup> Cir. 1993) .....	8
<u>Hall v. Director</u> 10 BLR 1-107 (1987) .....	10

<u>In re Ruffalo</u>	
390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) .....	12
<u>In the Matter of James W. Coder</u>	
35 P.2d 853 (Kan. 2001) .....	12
<u>Island Creek Coal Co. v. Compton,</u>	
211 F.3d 203, 207 (4 <sup>th</sup> Cir. 2000) .....	8
<u>Lawyer Disciplinary Board v. Ball</u>	
219 W.Va. 296, 633 S.E. 2d 241 (2006) .....	15
<u>Lawyer Disciplinary Board v. Barber</u>	
211 W.Va. 358, 566 S.E.2d 245 (2002) .....	11, 12, 13, 15
<u>Lawyer Disciplinary Board v. Battistelli (Battistelli II)</u>	
206 W.Va. 197, 523 S.E.2d 257 (1999) .....	15
<u>Lawyer Disciplinary Board v. Coleman</u>	
219 W.Va. 790, 639 S.E. 2d 882 (2006) .....	15
<u>Lawyer Disciplinary Board v. Scott</u>	
213 W.Va. 209, 579 S.E. 2d 550 (2003)	
<i>quoting Dudley</i>	
202 W.Va. at 487	
<i>quoting United States v. Shaffer Equipment Co.</i>	
11 F.3d 450, 457 (4 <sup>th</sup> Cir. 1993) .....	16, 17
<u>Lawyer Disciplinary Board v. Taylor</u>	
192 W.Va. 139, 451 S.E.2d 440 (1994) .....	1
<u>Office of Disciplinary Counsel v. Jordan</u>	
204 W.Va. 495, 513 S.E.2d. 722 (1998) .....	2

**West Virginia Statutes and Rules:**

R. Law Disc. Proc.	Rule 2.4 .....	14
R. Law Disc. Proc.	Rule 2.14 .....	14, 16

R. Law Disc. Proc.	Rule 3.15	17
R. Law Disc. Proc.	Rule 3.16	2
R. Professional Conduct	Rule 3.4	12, 13
R. Professional Conduct	Rule 8.4	13
R. Professional Conduct	Rule 8.4(c)	12, 13
R. Professional Conduct	Rule 8.4(d)	12, 13

**Other:**

20 C.F.R. § 718.202(a)	8
20 C.F.R. § 725.414	9
20 C.F.R. § 725.456(d)	10

## I. REPLY

This matter is before the Court pursuant to the Office of Disciplinary Counsel's objection to the Hearing Panel Subcommittee's recommendation that the Statement of Charges filed against Respondent be dismissed in its entirety. 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). Respondent's misconduct in this case should not be condoned and dismissal of this case fails to protect the public, fails to reassure the public as to the reliability and integrity of attorneys, and fails to adequately safeguard the administration of justice.

After a review of the evidence introduced in this case, the Office of Disciplinary Counsel respectfully requests that this Honorable Court to adopt the recommendation of the Office of Disciplinary Counsel because as this Court has previously stated, 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), this Honorable 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.

Furthermore, the recommendation of the Office of Disciplinary Counsel comports with the stated principle purposes of the disciplinary process. 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, 186 W.Va. 43, 410 S.E.2d 279, 281 (1991). In this case, Respondent is charged with violating the Rules of Professional Conduct because he demonstrated conduct which has fallen below the minimum standard for attorney conduct. Thus, discipline must be imposed.

The 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).

The Office of Disciplinary Counsel's proposed findings contain citations to the record and are supported by reliable, probative, and substantial evidence. Respondent is correct that this issue in this case is whether Respondent violated the Rules of Professional Conduct when he withheld a portion of Dr. George Zaldivar's May 16, 2001 medical report when on or about November 12, 2001, he submitted the disassembled medical report into evidence to the tribunal George Daugherty's federal black lung case. Furthermore, Respondent is also correct in that the "critical evidence remains essentially undisputed & unchanged." However, Respondent is not correct in asserting that the evidence does not support a finding that he violated the Rules of Professional Conduct.

Respondent seeks to explain his actions by arguing that he considered Dr. Zaldivar's May 16, 2001 "letter" or narrative report to be "separate and distinct" from the "factual or objective data." As Respondent has pointed out, the Hearing Panel Subcommittee of the West Virginia Lawyer Disciplinary Board is the only entity to hear all of the testimony and considered all of the evidence. Therefore, Respondent's continued insistence that the May 16, 2001 medical report he received from Dr. Zaldivar consisted of separate and distinct items which he could separate and conceal from both a *pro se* claimant and the tribunal is not appropriate. In this case, the Hearing Panel Subcommittee specifically made a finding of fact that that "Dr. Zaldivar's packet of information is to be considered as one document that was generated from the employer's Adverse Medical Examination." [Report of the Hearing Panel Subcommittee, p. 16]. The record supports the Hearing Panel Subcommittee's finding as Dr. Robert J. Crisalli, who also submitted a medical report on Mr. Daugherty similar to Dr. Zaldivar's medical report on behalf of Respondent's client, noted in own his narrative report 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]. In addition, Respondent could not name any other lawyer in West Virginia who disassembled medical report when specifically asked by the Chair of the Hearing Panel Subcommittee. [6/18/09 Transcript pp. 355-56]. Finally, ALJ Lesniak stated at that the October 19, 2004 hearing in which Respondent testified that "[w]ell, . . . 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]. Therefore, it is difficult to understand Respondent's continued assertion that the Dr. Zaldivar's May 16, 2001 medical report consisted of separate reports which he could disassemble and withhold from the tribunal and a *pro se* federal black lung claimant.

Respondent also continues to assert that the “best evidence” in Mr. Daugherty’s case was the ILO-UC form in which Dr. Zaldivar indicated by an “X” that Mr. Daugherty had “A Large Opacities” and that the ILO-UC form was “as easy to understand as an ‘X’ could be.” Respondent also asserts that Mr. Daugherty should not be considered by this Court to be unrepresented in his federal black lung claim when the disassembled medical report was submitted in November 2001 because Respondent maintains that Mr. Daugherty was represented by a “Black Lung Benefits Counselor at Rainelle Medical Center.” A Black Lung Benefits Counselor at a medical office is not an attorney. Respondent’s November 12, 2001 submission was submitted to Mr. Daugherty only and not to any Black Lung Benefits Counselor and it is speculation on Respondent’s part to suppose that the Black Lung Benefits Counselor reviewed the ILO-UC form to interpret the “X” for Mr. Daugherty.<sup>1</sup> Moreover, Respondent argues that he was under no duty to produce withheld evidence “unless properly asked for . . . in a discovery request.” A Black Lung Benefits Counselor at a medical office probably would not know how to “properly request” such other discoverable information (Respondent’s description for the the withheld portion of Dr. Zaldivar’s medical report) in a discovery request being that one could argue that the term “discovery request” is a legal term of art. This is, in fact, what happened in the underlying black lung claim. Respondent’s concealment of Dr. Zaldivar’s narrative, “reasoned medical opinion,” or whole medical report was only revealed, when after three years, Mr. Daugherty obtained an attorney to

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<sup>1</sup> Likewise, Respondent’s evidence submissions of December 11, 2001; January 3, 2002; May 23, 2002; August 7, 2002; and September 19, 2002. These submissions were produced pursuant to the twenty day deadline for submission of evidence before a scheduled hearing dates - January 5, 2002; May 24, 2002; and September 21, 2002. Mr. Daugherty was *pro se* at the time and because he had not “properly asked” for “other discovery information” in anticipation of a hearing, Respondent had not disclosed the fact that he had failed to produce part of Dr. Zaldivar’s May 15, 2001 medical report to both Mr. Daugherty and the tribunal.

represent him and his attorney submitted what Respondent identifies as a “proper request.” As ALJ Lesniak declared during the proceedings, “we really have no assurance that [Respondent was] ever going to submit it.” [ODC Ex. 2, Bates No. 0284]. Even Respondent’s own voluntary 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]. Respondent’s assertions in this regard again ignore a specific finding made by the Hearing Panel Subcommittee that the information withheld by Respondent in his November 12, 2001 evidence submission to Mr. Daugherty and to the tribunal was beneficial to Mr. Daugherty. Moreover, the Hearing Panel Subcommittee did not accept Respondent’s position that the information contained on the ILO-UC form was “obvious to someone not educated in the area of black lung” such a *pro se* claimant making a claim for federal black lung benefits.

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 provides several reasons as to why he withheld a portion of Dr. Zaldivar's from Mr. Daugherty and the tribunal. His reasons included: (1) his standard practice was to submit, at a minimum, the "purely factual or objective evidence; (2) he had no intention of using Dr. Zaldivar as his expert or in any way relying upon the May 16, 2001 medical report when he submitted the other part of the medical report in November 2001 because it had not been reviewed by other physicians (but was going to use Dr. Zaldivar's "objective findings" because those had been reviewed by other physicians); (3) he only has to submit evidence he intended to use during the hearing unless the same is "properly requested" in a discovery request; and (4) under the applicable federal black lung regulations, a party does not submit or identify that which it does not intend to rely upon at a hearing. However, at the October 2004 hearing before ALJ Lesniak, Respondent specifically 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.*]. These two explanations are the most contemporaneous statements by Respondent as to the reasons why he withheld a portion of Dr. Zaldivar's medical report from both Mr. Daugherty and the tribunal.

Respondent acknowledged at the June 18, 2009 hearing 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]. With regard to Respondent's statements that he found the withheld portion of the medical report to be equivocal and contradictory 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]. 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]. Respondent was not able to explain why these statements seemed equivocal and contradictory. Moreover, he now argues that "best evidence" was the objective findings that also diagnosed Mr. Daugherty with pneumoconiosis because of an "X" marked in a box. However, Dr. Zalidvar's medical report which was disassembled by Respondent is a single document known in federal black lung practice as a reasoned medical opinion consisting of an opinion which based upon a review of objective data. Even at the October 2004 hearing, Respondent referred to the document in question as a "medical report" and that "I know lawyers on both sides who routinely get medical information and they wait until twenty days before the formal hearing and submit it to the parties." [ODC Ex. 2, Bates No. 0249-050].

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]. 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.” Island Creek Coal Co. v. Compton, 211 F.3d 203, 208 (4<sup>th</sup> Cir. 2000).

Clearly, the facts of this case demonstrate that Respondent was not following his own interpretation of the applicable regulations. Dr. Zalidvar’s May 16, 2001 letter was not equivocal, it was not contradictory, it was not submitted within twenty days of any of the four scheduled hearings, and a portion of the medical report was clearly not submitted to Mr. Daugherty and to the tribunal in November 2001. The evidence establishes that Respondent withheld medical evidence that was clearly favorable to Mr. Daugherty and then spent the next three years amassing medical evidence to refute what he already knew, that Mr. Daugherty had complicated pneumoconiosis acquired as a result of 35 years of employment in a coal mine. Respondent was not in the case when Mr. Cohen served interrogatories on the employer which necessitated returning to Dr. Zaldivar to obtain the supplemental report to refute his earlier May 16, 2001 medical report. Therefore, it is clear that Respondent did not return to Dr. Zaldivar to obtain a supplemental report or that he was going to disclose Dr. Zaldivar’s complete May 16, 2001 while the case was still within his control. As this Court noted in Gum v. Dudley, 202 W.Va. 477, 486, 505 S.E.2d 391, 400 (1997), “[t]he [judicial] system can provide no harbor for clever devices to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end.” *quoting United States v. Shaffer Equipment Co. (Shaffer I)* 11 F.3d 450, 457-58 (4<sup>th</sup> Cir. 1993).

With regard to Respondent's argument that the Office of Disciplinary Counsel failed to address certain Benefits Review Board Decisions and apply the same to this disciplinary proceeding, the Office of Disciplinary Counsel would assert that Respondent's reliance on the same is misplaced in these proceedings and that Cline v. Westmoreland Coal Company, 21 BLR 1-69 (1997) can be distinguished from the situation in Mr. Daugherty's federal black lung claim. In Cline, the claimant was arguing for the reopening of his first claim as well as pursuing a new claim. When his first claim was pending before the ALJ, the employer scheduled an examination with a physician. However, the medical report was never provided to the claimant apparently because it was not requested in discovery. Furthermore, the employer did not submit the report (disassembled or otherwise) into evidence in Cline. In addition to the fact that a portion of Dr. Zaldivar's medical report was disclosed by Respondent in evidence in this case, another difference between the two is that the employer elected to have Mr. Cline examined during his first claim while the case was pending before the ALJ. In Mr. Daugherty's case, the employer elected to have Mr. Daugherty examined while the claim was still under the district director which can only be done under 20 C.F.R. § 725.414 and then the employer must provide a copy of the medical examination to the claimant pursuant to that section. This is an interpretation with which the United States District Court for the Southern District of West Virginia also agreed.<sup>2</sup>

In this case, it is clear that Respondent intended to use Dr. Zaldivar's medical report as evidence because he submitted it pursuant to the twenty (20) day rule. Respondent,

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<sup>2</sup> However, it is noted that the Benefits Review Board in Cline rejected the proposition that the requirement in 20 C.F.R. § 725.414 that the medical reports obtained under the district direct and all parties extended to submitting the same to ALJ. See, Cline v. Westmoreland Coal Company, 21 BLR 1-69, at 1-76 (1997).

however, only wanted to use that portion of the medical report which was favorable to his client's position. By only submitting the portion of Dr. Zaldivar's medical report into evidence which was favorable to Respondent's position, any future medical reports which examined the part of Dr. Zaldivar's medical report which was in evidence would be provided with more weight by the ALJ because they were based on evidence already part of the record. Respondent withheld the complete medical report to influence the evidence and to ensure that any future medical evidence he obtained would be further support by the previously submitted evidence. It is not acceptable that Respondent disassembled a medical report and submit the same into evidence and to make it appear that the complete report had been submitted. None of the cases proposed by Respondent address the specific issue of submitting only a partial medical report to a *pro se* claimant, other medical experts or to a tribunal.<sup>3</sup>

Hall v. Director, 10 BLR 1-107 (1987), is also distinguishable from this case. In Hall, the ALJ excluded two medical reports prepared in 1973 and in late 1980 and early 1981 pursuant to 20 C.F.R. § 725.456(d) because the evidence was obtained before the matter was transferred from the deputy commissioner (now known as the district director) to the ALJ and the Benefits Review Board supported that position and stated that ALJ was within his discretion with regard to the 1973 reports but held that the ALJ improperly excluded the 1980

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<sup>3</sup> *But see*, the Office of Disciplinary Counsel's Exhibit 8, G.F. v. Elk Run Coal Company, 2007-BLA-5984, in which ALJ Thomas Blake addressed this issue and concluded that "[e]mployer breached a duty of notification to Claimant; breached a duty to its medical experts by requesting a medical opinion while withholding the most probative medical evidence; and breached a duty to the court by withholding the results of the pathology interpretations . . . and instead offering reports of reports of medical experts that were not probative . . . because the experts were not provided with the most probative evidence. . . . Employer's 'zealous' representation strategy instills uncertainty and cynicism into a program intended to compensate miners disabled from black lung disease . . ." *Id.* at p. 17 [ODC Ex. 8, Bates No. 1938].

and 1981 reports.<sup>4</sup> The Benefits Review Board stated that “[i]t would serve no purpose for claimant to submit evidence to the deputy commissioner developed during the interim which occurs before the case is physically referred to the [ALJ] for a hearing, yet after the deputy commissioner has already rendered his final decision.” *Id.*, at p. 1-110. Therefore, Hall does not address the issue of withholding a report from a claimant regardless of whether the claim was pending before the district director or the ALJ. In this case, Mr. Daugherty was examined by the employer’s medical expert at the employer’s request under the only provision in the Code of Federal Regulations which permitted the employer to have the claimant examined. Assuming *arguendo* that Respondent may not have to provide the medical report to the district director because the medical report was not received until after the claim was transferred to the ALJ, there is nothing in Hall that provides that Respondent did not have to submit a complete and intact medical report to a claimant. It is evident in this case that Respondent was not going to make Mr. Daugherty, the tribunal, or his own additional medical experts aware of Dr. Zaldivar’s complete medical report.

Respondent argues that his due process rights were violated when the Office of Disciplinary Counsel argued in its brief that Respondent also improperly withheld Dr. Zaldivar’s complete May 16, 2001 medical report from his own experts in addition to Mr. Daugherty and the tribunal. Respondent asserts that this Court previously indicated in Lawyer Disciplinary Board v. Barber, 211 W.Va. 358, 566 S.E.2d 245 (2002), that “it is impermissible to use conduct that is not sufficiently related to the conduct charged in the statement of formal to form the basis of an ethics violation.” The Office of Disciplinary

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<sup>4</sup> In Hall, the claimant had requested his formal hearing on July 9, 1980, but the deputy commissioner (now known as the district director) physically held onto the case file until June 14, 1983. *Id.*, at p. 1-109.

Counsel's proposed conclusions of law does not add any additional violations of the Rules of Professional Conduct. The evidence is clear that Respondent disassembled Dr. Zaldivar's May 16, 2001 medical report and only provided the objective medical data to Mr. Daugherty and to the tribunal. The Statement of Charges clearly stated that this misconduct was a violation of Rule 3.4 and Rules 8.4(c) and 8.4(d) and that this significantly impacted legal proceedings. The evidence produced at the hearing elicited the evidence that the same portion of the report was also withheld by Respondent from his other medical experts for nearly three years. This Court, in Barber, cited with approval language in The Florida Bar v. Fredericks, 731 So.2d 1249 (Fla. 1999), wherein the Supreme Court of Florida determined that no due process violation had occurred when “. . . although the specific conduct or specific rule violation at issue was not alleged in the original bar complaint, it was related to or was within the scope of the conduct and rule violations specifically charged.” The Office of Disciplinary Counsel's proposed findings of facts, conclusions of law, and sanction is not solely based on Respondent's misconduct in withholding Dr. Zaldivar's complete May 16, 2001 medical report from his own medical experts. This specific misconduct is related to the misconduct charged and Respondent was given notice that he was being charged with withholding Dr. Zaldivar's complete May 16, 2001 from Mr. Daugherty and the tribunal pursuant to Rule 3.4 and Rules 8.4(c) and 8.4(d). Therefore, Respondent had sufficient notice of the misconduct for which he was being charged to be able to adequately defend himself. In Barber, this Court also cited, with approval, the Supreme Court of Kansas which stated in In the Matter of James W. Coder, 35 P.2d 853, 856 (Kan. 2001), that

Decisions subsequent to [In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968)] have refined the concept of due process as it applies to lawyer disciplinary hearings, and suggest

that the notice to be provided be more in the nature of that provided in civil cases. The weight of authority appears to be that, unlike due process provided in criminal actions, there are no stringent or technical requirements in setting forth allegations or descriptions of alleged offenses. . . . Due process requires only that the charges must be sufficiently clear and specific to inform the attorney of the misconduct charged[.]

Barber, 211 W.Va. at 365, 566 S.E.2d at 252 .

Respondent argues for the first time in his response brief to this Court that the charges against him alleging a violation of Rules 8.4(c) and 8.4(d) of the Rules of Professional Conduct is vague. Respondent was charged with violating of Rules 8.4(c) and 8.4(d) by asserting that his misconduct, by improperly withholding material having evidentiary value, consequently had a significant effect on a legal proceeding. Rule 8.4 provides as follows:

- It is professional misconduct for a lawyer to:
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
  - (d) engage in conduct that is prejudicial to the administration of justice.

Respondent argues he was not the one directed to turn over the non-testifying expert information as ordered by ALJ Lesniak. However, the Hearing Panel Subcommittee determined that Respondent was not charged with that conduct. It is clear from the Statement of Charges and the evidence submitted at the hearing that Respondent's misconduct dealt with his improper withholding of Dr. Zaldivar's complete May 16, 2001 medical report from Mr. Daugherty and ultimately, the tribunal. Furthermore, it is clear from Respondent's subsequent evidentiary submissions in Mr. Daugherty's federal black lung claim that he also did not submit Dr. Zaldivar's complete May 16, 2001 medical report to his own additional medical experts. That is fact. It is not supposition. Furthermore, the Office

of Disciplinary Counsel asserts that this misconduct had a significant impact on Mr. Daugherty's federal black lung claim and that the misconduct was prejudicial to the administration of justice.

Respondent next asserts that the Office of Disciplinary Counsel and the Lawyer Disciplinary Board did not act in a timely manner in the initiation, investigation, and prosecution of the Statement of Charges filed against Respondent. Respondent asserts that the events outlined in the Statement of Charges took place in 2001 and that the complaint in this matter was not initiated against Respondent until on or about February 16, 2007. Respondent argues that all of the "adverse witnesses" in this matter knew of these events no later than September 29, 2004; thus, Respondent argues that the complaint should have been opened no later than September 29, 2006, which is the date of the discovery responses filed by another member of Jackson & Kelly PLLC (or December 16, 2006 pursuant to the date when the last hearing in Mr. Daugherty's took place before the ALJ in December 2004). However, the evidence is clear that the complaint against Respondent was filed with the Office of Disciplinary Counsel by the United States District Court on or about September 1, 2006, well within the time frame of the two year time frame of Rule 2.14 of the Rules of Lawyer Disciplinary Procedure.

In this case, the United States District Court for the Southern District of West Virginia can be considered the complainant because it forwarded the information forming the basis of the complaint against Respondent to the Office of Disciplinary Counsel by Order entered August 30, 2006. [*See*, Exhibit 1]. The same was received by the Office of Disciplinary Counsel on or about September 1, 2006. Rule 2.4 of the Rules of Lawyer Disciplinary Procedure provide, in part, that "[t]he Office of Disciplinary Counsel shall evaluate all

information coming to its attention by complaint or from other sources alleging lawyer misconduct or incapacity. . . . The Office of Disciplinary Counsel may initiate investigations on its own. . . .” After careful review of the information received from the District Court on September 1, 2006, the Office of Disciplinary Counsel informed Respondent that a complaint had been opened in the name of the Office of Disciplinary Counsel by letter dated February 16, 2007, thus accounting for the “07” identification number. Recent disciplinary proceedings which were initiated and pursued in the name of the Office of Disciplinary Counsel include Lawyer Disciplinary Board v. Coleman, 219 W.Va. 790, 639 S.E.2d 882 (2006) and Lawyer Disciplinary Board v. Ball, 219 W.Va. 296, 633 S.E.2d 241 (2006). This Court has also sustained several disciplinary proceedings and issued sanctions against attorneys wherein the complaint was not filed with the Office of Disciplinary Counsel within two years of the alleged misconduct. *See*, Lawyer Disciplinary Board v. Battistelli, 206 W.Va. 197, 523 S.E.2d 257 (1999) (Battistelli II); Lawyer Disciplinary Board v. Barber, 211 W.Va. 358, 566 S.E.2d 245 (2002). The Office of Disciplinary Counsel had no knowledge of the events asserted in the Statement of Charges until the United States District Court for the Southern District of West Virginia entered an Order on August 30, 2006, and had the same forwarded to the Office of Disciplinary Counsel for consideration of whether Respondent’s actions in a black lung case violated applicable Rules of Professional Conduct.

Respondent also argues that it would be unfair to him and unreasonable for the Office of Disciplinary Counsel to prosecute these charges some eight years after the conduct allegedly occurred. However, there is no time limitation in either the Rules of Professional Conduct or the Rules of Lawyer Disciplinary Procedure which sets a limit on the time it should take the Office of Disciplinary Counsel to investigate a complaint. There is no time

limitation in either the Rules of Professional Conduct or the Rules of Lawyer Disciplinary Procedure which sets a limit on how long a complaint can remain open. Furthermore, there is no limitation on how long a complaint may remain open before a Statement of Charges is issued. Committee on Legal Ethics v. Pence, Syl. pt. 1, 161 W.Va. 240, 240 S.E.2d 668 (1978). See also, Committee on Legal Ethics v. Gallaher, 180 W.Va. 332, 376 S.E.2d 346 (1988)(Eighteen month delay by Committee was not prejudicial to Respondent). The complaint against Respondent is not stale and was opened within the two year statute of limitations outlined in Rule 2.14 of the Rules of Lawyer Disciplinary Procedure.

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, to an ALJ, and to his own additional medical experts as if the report was 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, including one which regulates a federal black lung program, the public must have faith that our system of justice and all of its lawyers are trustworthy and that justice, not victory, is the ultimate goal. Respondent cannot disguise dishonest, fraudulent, and deceitful conduct under the guise of federal regulations. As 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.

[Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E.2d at 558 (2003) *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.

## **II. RECOMMENDATION OF THE OFFICE OF DISCIPLINARY COUNSEL**

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.

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**CERTIFICATE OF SERVICE**

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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 24<sup>th</sup> day of July, 2010, served a true copy of the foregoing "**Reply 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:

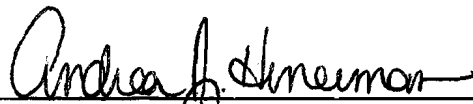
David A. Jividen, Esquire  
729 North Main Street  
Wheeling, West Virginia 26003


And upon the following persons:

Scott E. Johnson, Esquire  
Assistant Attorney General  
Building 1 – Room W435  
State Capitol Complex  
1900 Kanawha Boulevard East  
Charleston, West Virginia 25305

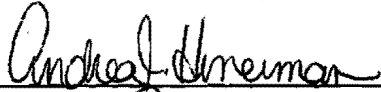
Grant Crandall, Esquire  
General Counsel  
United Mine Workers of America  
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Triangle, Virginia 25301

Thomas P. Maroney, Esquire  
Maroney, Williams, Weaver & Pancake, PLLC  
608 Virginia Street East  
Charleston, West Virginia 25301

  
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Andrea J. Hinerman

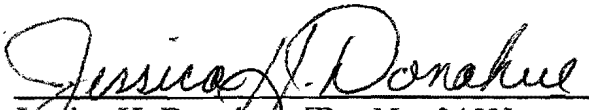
  
\_\_\_\_\_  
Jessica H. Donahue

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



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



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