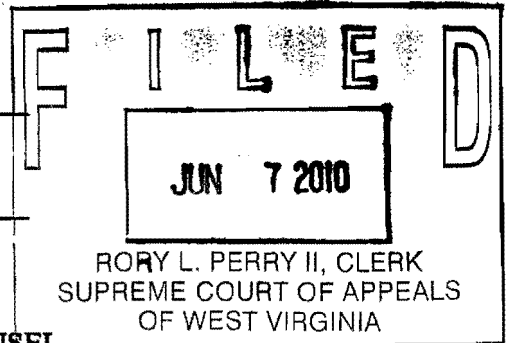


IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

No. 34724



OFFICE OF DISCIPLINARY COUNSEL,
Complainants

vs.

DOUGLAS A. SMOOT,
Respondent

FROM THE HEARING PANEL SUBCOMMITTEE
OF THE LAWYER DISCIPLINARY BOARD

BRIEF OF *AMICUS CURIAE*
UNITED MINE WORKERS OF AMERICA

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The March 30, 2010 Report of the Hearing Panel Subcommittee of the Lawyer Disciplinary Board of West Virginia (hereafter "Panel Report") is set forth in the record on review.

RULES INVOLVED

Respondent, Douglas A. Smoot, is charged with violation of the following Rules of Professional Conduct of the State of West Virginia:

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;

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.

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.

See Panel Report at 13, ¶2 citing Statement of Formal Charges at ¶¶ 29, 30, 31.

INTRODUCTION

The issue in this case is whether Black Lung claimants in the State of West Virginia, many of whom seek benefits without the assistance of professional representation, will be protected from deceptive acts of attorneys subject to the Rules of Professional Conduct administered by this Court. The Court's decision will determine whether attorneys in the state of West Virginia are permitted under the Rules to furnish a *pro se* complainant and administrative

law judge a copy of the claimant's medical examination report, describing it as the "exam report" without notifying the claimant or judge that the attorney has altered the report by removing portions supportive of the claim. If the Court adopts the Panel Report's recommendation approving such conduct in the context of the Black Lung litigation at issue, its precedential decision will weaken the standards of reliability and integrity expected from West Virginia attorneys in all practice areas and severely undermine the administration of justice in this state.

The facts that bring this matter before the Court are largely undisputed. Westmoreland Coal Company retained experienced attorney Douglas A. Smoot to defend a Black Lung benefits claim brought *pro se* by an elderly and uneducated retired coal miner, Elmer Daugherty. Attorney Smoot instructed Daugherty to submit to an adverse medical examination by Dr. George Zaldivar. After examining Daugherty, Dr. Zaldivar sent his examination report to Attorney Smoot, which included a history and physical examination report, test results and a narrative containing the doctor's medical opinion that Daugherty suffered from simple and complicated coal workers' pneumoconiosis - Black Lung. The instant proceedings commenced when the United States District Court for the Southern District of West Virginia learned Attorney Smoot had provided the *pro se* claimant and an administrative law judge a deceptively altered version of Dr. Zaldivar's medical examination report and referred him to the Office of Disciplinary Counsel of West Virginia (hereafter "ODC"). The ODC formally charged Attorney Smoot with violation of the above-referenced Rules of Professional Conduct in connection with his misleading removal of the narrative portion of the medical report setting forth Dr. Zaldivar's medical opinion that clearly established the *pro se* claimant's entitlement to benefits.

The Hearing Panel Subcommittee (hereafter "Panel") of the Lawyer Disciplinary Board

presided over a hearing on the merits of the ODC's charges at which the primary focus of the examination of Smoot's witnesses and the thrust of Smoot's arguments was an asserted absence of an obligation under the federal Black Lung regulations to disclose the medical examination report, which is ultimately irrelevant to the allegation that he engaged in prohibited misconduct when he provided the claimant and judge an altered medical examination report under cover describing it as "the exam report." Following its hearing, the Hearing Panel Subcommittee issued its Panel Report in which it set forth its mistaken application of the Rules of Professional Conduct supporting its recommended dismissal of the charges addressing Attorney Smoot's actions - the same actions the Southern District of West Virginia concluded in its referral order were "deeply disturbing" and had done "a great disservice to our legal system..." *In Re Jackson Kelly PLLC*, No. 2:05-0853 (S.D.W.V.) (Judge David A. Faber) August 30, 2006 Order at 8, 12.

The Panel's failure to find these acts in violation of the Rules of Professional Conduct stems from its confused interpretation of the Rules as requiring nothing more than compliance with the discovery and disclosure obligations in the regulations governing the federal Black Lung claims process. The Panel Report also reveals the Panel's mistaken belief that it is empowered to effectively pardon Attorney Smoot's misleading conduct in light of his otherwise clean disciplinary record and its unsupported finding that Smoot's deceptive conduct was in conformity with a common practice among Black Lung litigators. Finally, the Panel erred because it focused on the disassembly of the report and failed to consider the importance of not only removing critical information from Dr. Zaldivar's report, but also sending that report to the claimant and judge with a cover letter identifying it as the exam report.

Amicus curiae, the UMWA, urge the Court to reject the Panel's recommendation and

recognize Attorney Smoot's deceptive actions as professional misconduct without regard to his prior record, his compliance with the particulars of federal regulations governing disclosure in Black Lung cases or whether there even exists a common practice of misleading *pro se* claimants. The very simple issue is whether a member of this state's bar whose professional conduct is ultimately governed by this Court is permitted to engage in deceptive conduct, particularly where the attorney's adversary is a retired miner appearing *pro se*. This case carries implications that transcend Black Lung practice and go to the fundamental integrity of the judicial process in West Virginia and whether justice in this state is administered equally without regard to age, education or the ability to afford professional representation.

ARGUMENT

The Supreme Court of Appeals "is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671, 674 (W.Va. 1984), *cert. denied*, 470 U.S. 1028 (1985). In this capacity, the Court defers to reliable fact-finding the Panel supports with substantial evidence, but applies a "*de novo* standard... as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions." *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377, 381 (W.Va. 1994). In the exercise of its function as final arbiter of legal ethics problems, the Court "gives respectful consideration to the Committee's recommendations while ultimately exercising its own independent judgment." *Id.* But, where as in the instant case the Panel's recommendations are the result of legal error and misapplication of the law to the facts found, the Court will exercise independent judgment or remand the matter for fact-finding in accordance

with the correct legal standard.

I. The Panel Failed to Adequately Consider the Issue of Misconduct Under Rule 8.4.¹

The Panel applies the wrong legal standard to its analysis of whether Attorney's Smoot's conduct amounts to a violation of Rules of Professional Conduct 8.4(c) and (d). The Panel concludes that the ODC failed to meet its burden of proving a violation of Rule 8.4 only by: (A) erroneously requiring the ODC to prove the "unlawfulness" of Attorney Smoot's conduct in the context of regulations governing Black Lung litigation, and (B) erroneously requiring the ODC to prove Attorney Smoot was motivated by an intent to mislead.

Essentially, the incorrect standard applied by the Panel permits attorney misrepresentation that does not violate some specific disclosure requirement. The Panel's incorrect standard would also exonerate attorneys responsible for acts of misrepresentation in discipline cases where the respondent attorney's specific intent cannot be proved - that is, where there is no evidence of the attorney's subjective state of mind. Where the Panel's dismissal recommendation is premised on its mistaken application of the wrong legal standard to the facts found, the Court should disregard the recommendation and render an independent judgment consistent with the appropriate standard.

¹ *Amicus Curiae*, United Mine Workers of America, agrees that there is a violation of 3.4(a) and that Attorney Smoot's conduct was unlawful because, by misleading the *pro se* claimant to believe he had received the complete exam report from Dr. Zaldivar, Attorney Smoot eliminated any incentive for the claimant to request the report from the coal company pursuant to his right under Rule 35(b) of the Federal Rules of Civil Procedure as incorporated into the regulations governing federal Black Lung claims by 29 C.F.R. 18.19(c)(4). However, the UMWA will focus on the Panel's erroneous analysis of the Rule 8.4 charges.

A. The Panel Erroneously Applied An “Unlawfulness” Requirement to Its Analysis of the Rule 8.4 Charges

The Panel Report acknowledges that allegations of misconduct under Rule of Professional Conduct 8.4 are directed to Attorney Smoot’s alteration of Dr. Zaldivar’s medical report. Panel Report at 16, ¶¶ 8, 10. After finding facts establishing that the doctor’s report was one document from which information beneficial to the claimant had been removed, the Panel inexplicably states:

That brings this Panel to what seems to be the single issue that needs to be decided, that being whether or not pursuant to Federal Black Lung law, this report or packet of information in this unique set of circumstances is required to be provided to an unrepresented claimant.

Panel Report at 17, ¶ 14. This one sentence paragraph in the Panel Report demonstrates clearly and concisely the serious legal mistake underlying the Panel’s dismissal recommendation. The Panel, by its own admission, focused its analysis on the “single issue” of whether “Federal Black Lung law” required *disclosure* of the medical examination report, rather than the real issue that goes to the Rule 8.4 professional misconduct charges at issue; namely, whether Rules of Professional Conduct 8.4(c) and 8.4(d) prohibit the misrepresentation committed by Attorney Smoot when he removed portions of the medical examination report favorable to the claimant and then provided that document to the unrepresented claimant and the administrative law judge describing it in his cover letter as the “exam report” of Dr. Zaldivar.²

The Panel confirms its adoption of the wrong legal standard in its analysis of the Rule 8.4

² The Panel makes a similar mistake when it finds based on the testimony of “all of Respondent’s witnesses” that there is a “common practice” in Black Lung litigation of removing portions of medical reports provided to claimants. Panel Report 28, ¶ 42. As discussed more fully in Section I.B.2, most of this testimony as to common practice in Black Lung litigation concerned a party’s obligations to disclose one or more reports and not whether a party may permissibly alter a report to remove unfavorable information.

charges where it states further that “The issue to be decided is whether or not the withheld information should have been turned over to Claimant and, if so, does the non-disclosure constitute an ethics violation?” Panel Report at 17, ¶ 16. Because the Panel’s recommendation is premised on its application of the wrong legal standard, it should be disregarded.

Unlike Rule 3.4(a) which provides that an attorney shall not “*unlawfully* obstruct” another party’s access to evidence or “*unlawfully* alter, destroy or conceal a document or material”, the text of Rules 8.4(c) and 8.4(d) do not contain an “unlawfully” element. Conduct that amounts to misrepresentation or is prejudicial to the administration of justice is prohibited by Rule 8.4 regardless of whether it is unlawful by reference to some other statute or regulation.

After the Panel first announces on page 17 of its Panel Report its application of the wrong legal standard to its consideration of the charges brought against Attorney Smoot under Rules 8.4(c) and 8.4(d), the Panel uses the next ten pages of its Panel Report to discuss whether Attorney Smoot was required by law to disclose Dr. Zaldivar’s medical examination report, eventually reaching its conclusion as to the Rule 3.4(a) charge that

the ODC has failed to establish by clear and convincing evidence that the act of withholding Dr. Zaldivar’s May 16, 2001 letter was “unlawful”, the ODC obviously has failed to establish by clear and convincing evidence that the Respondent violated Rule 3.4(a) of the West Virginia Rules of Professional Conduct.

Panel Report at 26-7, ¶ 39. On the same page of its report, the Panel returns again to the alleged 8.4(c) and 8.4(d) violations, confirming once more its mistaken application of the wrong standard where it states

The Panel heard testimony that in Black Lung cases, reports of experts are disassembled and in Black Lung cases the opinions of experts are withheld and not disclosed until required by rule or regulation. *This Panel is bothered by this practice but is constrained by the evidence in this case, including all Respondent’s witnesses who testified that the actions*

of this Respondent were consistent with Black Lung practice.

Panel Report at 27, ¶ 42 (emphasis supplied.) Whether or not Smoot's witnesses testified that his misleading disassembly of the medical examination report, and subsequent representation of the altered report as the "exam report," is in conformity with Black Lung practice, the disclosure requirements under Federal Black Lung regulations or a select few attorneys' opinions with regard to the same have absolutely no bearing on whether Smoot's actions are "conduct involving dishonesty, fraud, deceit, or misrepresentation", in violation of Rule 8.4(c), or "conduct that is prejudicial to the administration of justice" in violation of Rule 8.4(d). The Panel allowed the "unlawfulness" element it applied to its Rule 3.4(a) analysis to spill over into its Rule 8.4 analysis, thereby improperly requiring the ODC to prove in support of its Rule 8.4 charges that Smoot's actions were inconsistent with Black Lung practice. In so doing, the Panel applied the wrong legal standard.

B. The Panel Improperly Considers Respondent's Motivation, Common Practice and the 'Complexity' of Black Lung Practice.

The Panel made findings of fact necessary and sufficient to conclude Attorney Smoot had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation and/or conduct prejudicial to the administration of justice, yet failed to conclude he violated Rule 8.4. The Panel finds that the adverse medical report of Dr. Zaldivar, including the history and physical examination report, test results and a narrative containing the doctor's medical opinion, was *one document*, explicitly rejecting Attorney Smoot's argument that Dr. Zalidvar provided him two separate reports.³ Panel Report at 16, ¶ 11. The Panel further acknowledges the information

³ Attorney Smoot's counsel argued that Dr. Zaldivar's examination report was actually two separate reports in an effort to set up its argument that Smoot simply declined to turn over a

Attorney Smoot removed from Dr. Zaldivar's medical examination report was "beneficial to the claimant." Panel Report at 16, ¶ 12. Finally, the Panel acknowledges Attorney Smoot provided the altered medical examination report to the *pro se* claimant and the administrative law judge identified as the "[e]xam report of Dr. George L. Zaldivar."⁴ Panel Report at 6, ¶ 12.

Despite these findings of conduct that, standing alone, is a violation of Rule 8.4, the Panel stated that its finding of a "common practice" of providing incomplete records and the opinion of one of Smoot's witnesses that "there was no impropriety in disassembling the Report and providing a portion to the A.L.J. and the claimant... leaves [it] in the position of judging the motive of the Respondent when he disassembled and provided only part of the Report." Panel Report at 29, ¶ 44. The Panel declined to find a violation, stating it "is giving the Respondent the benefit of the doubt on his intent based on all of the above." Panel Report at 29, ¶ 44.

1. The Panel Improperly Required Proof of Attorney Smoot's Intent In Its Analysis of Whether He Violated Rule 8.4.

To the extent the Panel required proof of Attorney Smoot's intent or motivation, the standard it applied is inconsistent with the text of Rule 8.4 and cases from this and other jurisdictions addressing attorney misrepresentation, discussed more fully below. Assuming

report he had no legal obligation to disclose. This argument fails where the Hearing Panel concludes Dr. Zaldivar's medical examination report is "one document", leading necessarily to the conclusion that Smoot's removal of the narrative portion of the report was a prohibited alteration of that document. *See also* ODC ex 18, P 17, ALJ Lesniak's Order Remanding Case to District Director (explaining that Dr. Zaldivar examined the Claimant on February 7, 2001, then wrote a report dated May 16, 2001 containing a narrative, history, physical examination and laboratory information which "was one integrated report sent to [Attorney Smoot] in one envelope.")

⁴ The cover letter accompanying the altered exam report Attorney Smoot sent to the judge and *pro se* claimant does not indicate portions of the report have been removed.

arguendo that motivation is at all relevant, the Panel's consideration of Attorney Smoot's motivation or intent by reference to "all of the above" was improper, where in considering "all of the above" the Panel considered only his prior disciplinary record, his putative conformity with "common practice" in Black Lung practice, and its own impression of the 'complexity' of Black Lung practice. *Id.* The Panel ignored the significance of Attorney Smoot's having sent the document to a *pro se* claimant and a judge as if it were the "exam report" without disclosing that he had deleted medical conclusions that were favorable to that claimant.

a. Proof of motivation is not required to establish misconduct.

The motivation of a party charged with violating West Virginia's Rules of Professional Ethics at issue is *only* relevant to assessment of sanctions *after* the existence of a violation is established. Nowhere is motivation referenced in the text of the Rules cited in the Office of Disciplinary Counsel's Complaint. *See* Rule 3.4(a); Rule 4.3; Rule 8.4(c), (d). By contrast, motivation is referenced in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure, which sets forth "[f]actors to be considered in imposing sanctions":

In imposing a sanction *after* a finding of lawyer misconduct, unless otherwise provided in these rules, the Court or Board shall consider the following factors: (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.

Rule 3.16 of the Rules of Lawyer Disciplinary Procedure. A reading of the plain language of the Rules of Professional Conduct and the Rules of Lawyer Disciplinary Procedure demonstrates motive is to be considered in a determination of the appropriate sanction to be applied only after misconduct is found.

Case law from this Court and courts of last resort in other jurisdictions establishes that motive is not an element in the analysis of whether an attorney has committed sanctionable misrepresentation. A particularly instructive case involved this Court's use of its "inherent" authority to enforce an attorney's "general duty of candor" by sanctioning an attorney for a misrepresentation perpetrated through his silence, which it did "independent of West Virginia Rules of Professional Conduct." *Gum v. Dudley*, 202 W.Va. 477, 488, 505 S.E.2d 391, 402 (W.Va. 1997). In *Gum*, the Court analyzed whether an attorney's misrepresentation through silence violates the general duty of candor, by applying the test for "[c]onstructive fraud, [which] does not require scienter or intent to mislead; it can be established whether the representation is innocently or knowingly made." *Id.* (quoting *Spence-Parker v. Maryland Ins. Group*, 937 F.Supp. 551, 561 (E.D.Va. 1996)).

More recently, this Court held that an attorney's intent was not relevant to its analysis of whether he had violated Rules 8.4(c) and (d) by altering the name of a party in a sugestee execution by adding the phrase "and dba AJM Corporation" to the party's name. *Lawyer Disciplinary Bd. v. Losch*, 219 W.Va. 316, 633 S.E.2d 261 (W.Va. 2006). Rejecting the attorney's argument that his conduct should not be sanctioned because the party against whom he had obtained a judgment actually was doing business as "AJM Corporation" and his actions, therefore, were not motivated by an intent to deceive, the Court found his actions violated Rules 8.4(c) and (d), stating "[r]egardless of the respondent's intentions, this Court will not ignore actions of a lawyer which reflect adversely on the legal system." *Losch*, 219 W.Va. at 319, 633 S.E.2d at 264. The attorney's motive was only taken into consideration as a mitigating factor in the Court's determination of the appropriate sanction. *Id.*; *See also Lawyer Disciplinary Bd. v.*

Markins, 222 W.Va. 160, 167, 663 S.E.2d 614, 621 (W.Va. 2008) (violation found without regard to absence of wrongful motive, but when determining sanction Court states it is "mindful of the *mitigating factors* presented by Respondent *including* the unique circumstances which *motivated* his misconduct in the first place." (emphasis supplied)).

The Court's decisions in *Gum* and *Losch* are consistent with the law of professional ethics in other jurisdictions that do not require proof of intent to deceive or defraud to demonstrate a violation of rules of professional conduct analogous to West Virginia Rule of Professional Conduct 8.4. See e.g., *Attorney Grievance Comm'n of Md. v. Reinhardt*, 892 A.2d 533 (Md. 2006) ("specific intent [i.e., motive] is not a necessary ingredient of dishonesty or misrepresentation" under Rule 8.4(c); lawyer violated Rule by telling client he was working on her case when he was not); *State ex. rel. Special Counsel v. Shapiro*, 665 N.W.2d 615 (Neb. 2003) (misrepresentation does not require proof of intent to deceive or defraud); *In re Dann*, 960 P.2d 416 (Wash. 1998) (en banc) (in determining whether lawyer violated Rule 8.4(c), "the question is whether the attorney lied"; motive "goes to mitigation and not to the truth of the underlying charges"); *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Visser*, 629 N.W.2d 376 (Iowa 2001) (defense lawyer's letter to newspaper containing "partially true" statement about judge's ruling on plaintiff's claims violated rule prohibiting misrepresentation, even though lawyer attached copy of court order to letter); *Office of Disciplinary Counsel v. Anonymous Attorney A*, 552 Pa. 223, 233, 714 A.2d 402, 407 (Pa. 1998) (addressing its Rule 8.4 and stating "no actual knowledge or intent to deceive on the part of the Respondent is necessary... the element of scienter is made out if Respondent's conduct was reckless, to the extent that he can be deemed to have knowingly made the misrepresentation.")

b. To the extent motivation is relevant, the Panel failed to consider evidence demonstrating Smoot's motivation.

Despite the absence of a motive element in the legal standard applied to analyze violations of Rule 8.4, the Panel exonerates Attorney Smoot by giving him the "benefit of the doubt on his intent" without adequately considering ample evidence in its fact finding that is actually probative of his improper motive. Even though proof of motive is not necessary to establish a violation of Rule 8.4, the Panel's findings and the hearing record are replete with such proof. In fact, it is hard to imagine any motive for Mr. Smoot's conduct other than an intent to gain a strategic advantage over a *pro se* litigant who wouldn't realize that Mr. Smoot had altered Dr. Zaldivar's report.

Notwithstanding its finding that Dr. Zaldivar's written diagnosis was "beneficial to the claimant", the Panel failed to make a specific finding in its Panel Report that Smoot's decision to remove the narrative from the medical exam report and then describe the altered document as the "exam report" was motivated by his desire to gain a strategic advantage in the case. See Panel Report at 16, ¶ 12. As explained by Robert F. Cohen, Jr., who became Mr. Daugherty's attorney in the later stages of his claim and is now a commissioner on the Federal Mine Safety, Health and Review Commission, Dr. Zaldivar's narrative provided two bases for establishing entitlement to federal black lung benefits:

What Dr. Zaldivar's narrative report did was it gave an explanation - did two things, major things, that were not in the simple check box [on the form for interpreting x-rays that was provided to Mr. Daugherty]. It gave an explanation of why he felt that the X-ray showed complicated pneumoconiosis. He analyzed that in considerable detail. And he also stated that Mr. Daugherty was totally disabled due to pneumoconiosis, which is the separate way of proving entitlement.

Tr. 6-18-09 at 143. Attorney Smoot *knew* Dr. Zaldivar's diagnosis of complicated

pneumoconiosis was conclusive and, in removing it from the report, he certainly understood that Mr. Daugherty, a retired miner with an 8th grade education, was unlikely to realize that the “exam report” he received from an attorney was not, in fact, the entire exam report.

To find, as the Panel does, that Attorney Smoot altered Dr. Zaldivar’s medical report because he was following a “common practice” or was somehow confused by the “complexity” of Black Lung practice is absurd, especially in light of the fact that Attorney Smoot submitted to the same ALJ in the same case the *complete* medical exam report of Dr. Robert Crisalli, which *included* the narrative portion favorable to Attorney Smoot’s client.⁵ See Tr. 6-18-09 at 265⁶; *September 19, 2002 letter from D. Smoot to Judge Lesniak*, ODC Bates No. 574. Attorney Smoot is an experienced Black Lung practitioner who has made a name for himself and his firm defeating coal miners’ Black Lung claims.⁷ The Panel’s decision to give him “the benefit of the doubt on his intent” is not only inconsistent with the applicable legal standard, it ignores facts tending to show Smoot altered Dr. Zaldivar’s exam report to gain an unfair advantage over the *pro se* claimant.

Attorney Smoot’s improper motive is demonstrated by the implausibility of his asserted justification for his actions. Addressing Attorney Smoot’s justification for disassembling Dr. Zaldivar’s report, the District Court for the Southern District of West Virginia found Attorney

⁵ Incidentally, Dr. Crisalli’s report favorable to Westmoreland Coal Co. was based in part on his review of the altered version of Dr. Zaldivar’s report that Attorney Smoot had provided to over 30 medical experts.

⁶ Transcripts were taken of the hearing on June 18 and 19th, 2009. Citations to the transcript (“Tr.”) reference a hearing date and transcript page number.

⁷ Attorney Smoot testified that he “may do 8,000 to 12,000 [Black Lung] claims” over the course of his career. Tr. 6-19-09 at 9.

Smoot's "excuses and arguments flimsy as best." *In Re Jackson Kelly PLLC*, No. 2:05-0853 (S.D.W.V.) (Judge David A. Faber) August 30, 2006 Order at 12. The essence of Attorney Smoot's defense (and the seemingly coordinated testimony of all his witnesses) is that he was under no legal obligation to turn over any part of Dr. Zaldivar's report, including the narrative portion, and since he violated no legal obligation he therefore could not have violated a Rule of Professional Conduct. He was pressed on this point at hearing:

Q: Why did you provide any of the documents to Mr. Daugherty then if everything was gratuitous?

A: Well we kept thinking that it was going to be set for hearing, and so you want to be sure your documents are submitted before the 20 day, the 20-day rule so that they can come in... We could have held on to all of the documents and submitted them 20 days before the hearing in 2004, including Dr. Zaldivar's report.

Q. But there had been several hearings since throughout the years [in the Daugherty matter] where you submitted documents and then the continuances came after you submitted documents.⁸ So, I mean, that's – withholding them until 2004 is not exactly what happened, is it?

A. But that's all we're required to do under the regulation.⁹

Tr. 6-18-09 at 282-83. This "flimsy" defense Smoot offered at hearing - that he did not violate the Rules of Professional Conduct by not turning over *all* of Dr. Zaldivar's report because he was

⁸ Claimant Daugherty's case had been set for hearing seven (7) times between 2001 and 2004 and on each of these occasions the rule under 20 C.F.R. 725.456(b) triggered a duty to disclose all documentary evidence 20 days before each scheduled hearing date, but Attorney Smoot never provided Daugherty or the ALJ a copy of Dr. Zaldivar's narrative.

⁹ Attorney Smoot was required to provide Mr. Daugherty with Dr. Zaldivar's "written report... setting out [his] findings... diagnoses and conclusions" *if requested*. FRCP 35(b), which applies to federal Black Lung claims pursuant to 29 C.F.R. 18.19(c)(4). What is obviously missing from Attorney Smoot's defense is an explanation of his decision to give Mr. Daugherty (a *pro se* claimant) an incomplete report, thereby encouraging him not to make a formal request for the entire report, triggering this specific disclosure obligation. Mr. Daugherty would not (and did not) request a report he believed he had already been provided.

never under an obligation to turn over *any* of the Report - is the same defense that led the Panel to erroneously give him “the benefit of the doubt on his intent.” Finally, the Panel’s deference to Mr. Smoot’s motive is even more surprising given its expression of concern that Mr. Smoot and his law firm provided inconsistent explanations for withholding part of Dr. Zaldivar’s report. Panel Report at 17, ¶ 15.

c. The Panel improperly considered Attorney Smoot’s clean disciplinary record in its assessment of his motivation.

In its decision to “give Respondent the benefit of the doubt on his intent”, the Panel considered Attorney Smoot’s disciplinary record, noting it is “without any prior complaints.” Panel Report at 28, ¶ 44. Whether Mr. Smoot’s conduct at issue was in violation of Rule 8.4 does not turn, however, on his past behavior or record. Like motivation, an attorney’s disciplinary history is only relevant to the type of sanction warranted, but not whether misconduct occurred.

Well-established principles of jurisprudence, incorporated into both the West Virginia and Federal rules of evidence, provide that evidence of a person’s general character is not an appropriate basis for inferring that particular conduct was in conformity with it. *See* Rule 404 of the Federal Rules of Evidence; Rule 404 of the West Virginia Rules of Evidence. Adherence to this basic principle prevents the resolution of a particular case by the use of evidence from the past that is legally unconnected to the present inquiry, ensuring that it turns instead on evidence directly related to its particulars. These principles are well expressed in the advisory committee notes on Rule 404 of the Federal Rules of Evidence, which provide:

Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular

occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

While the Panel may not be bound by formal rules of evidence, its consideration of Attorney Smoot's prior record in its analysis of whether he violated Rule 8.4 is directly contrary to the well-accepted principles and purpose underlying the nearly universally applied ban on character evidence. Here, the fact that Mr. Smoot had no prior complaints is not probative of whether he committed misconduct (only the severity of the appropriate sanction) and seems to have distracted the Panel's analysis of the same.

2. The Panel Improperly Considered Unsupported Findings Regarding Common Practice in Black Lung Litigation

The Panel mistakenly interpreted Rule of Professional Conduct 8.4 as requiring proof of subjective intent and gave Attorney Smoot the "benefit of the doubt" as to his intent, citing among other reasons its finding of "confusion over the non-discoverability of AME [Adverse Medical Examination] reports" and a "standard practice to submit incomplete reports of examination to the other side." Panel Report at 28, ¶¶ 43-44. Review of the record created at hearing clearly demonstrates the absence of substantial evidence in support of this finding.

It bears emphasis that the Panel Report demonstrates the Panel's confusion as to the issue presented by the charges brought under Rule 8.4(c) and (d) referencing Attorney Smoot's act of misrepresentation in his submission to the claimant and ALJ an altered copy of the claimant's adverse medical exam report. The Panel admits legal error in its Report when it states it was "constrained by the evidence in this case... that actions of this Respondent were consistent with Black Lung practice" which led it to find "that the ODC failed to establish by clear and

convincing evidence that the Respondent violated Rule 8.4(c) or (d) when he withheld” the narrative portion of Dr. Zaldivar’s medical examination report. Panel Report at 28, ¶ 42, 47. Giving the Panel the benefit of the doubt, its confusion is perhaps explained by the persistent and apparently successful efforts of Attorney Smoot’s defense counsel and his witnesses to confuse the issue of his compliance with Black Lung disclosure requirements and the entirely separate and distinct issue of compliance with the Rules of Professional Conduct prohibiting misrepresentation and conduct prejudicial to the administration of justice. Smoot argued, and the Panel mistakenly believed, that conformity with the former equates to conformity with the latter.

In its confusion, the Panel interpreted testimony from Attorney Smoot’s witnesses that a common practice among Black Lung attorneys of strategically withholding *entire* medical exam reports unless or until required to disclose them as evidence that there was a common practice of providing reports that have been altered by removal of portions beneficial to the claimant. The Panel noted that Smoot’s witness, “Judge Randolph Jansen, a former A.L.J. who handled thousands of Black Lung cases... testified that there was no impropriety in disassembling the report and providing a portion to the A.L.J. and claimant.” Panel Report at 28, ¶ 43. At no point did Judge Jensen provide testimony that he had personally observed a common practice of Black Lung litigants removing portions of a medical examination report prior to providing the report to another party. The Panel’s confusion precluded its recognition that Judge Jensen’s testimony consisted of his opinion as to whether “Mr. Smoot [could be] *in compliance with the law* if he submitted only a portion of Dr. Zaldivar’s report and whether such actions were “in full *compliance with the regulatory requirements and the law in federal Black Lung practice* at that time.” Tr. 6-19-09 at 405 (emphasis supplied.) When asked directly whether someone could act

in conformity with the federal Black Lung regulations and still violate the Rules of Professional Conduct, Judge Jensen responded, "You know, ma'am, I don't know that I'm the one that's in a position to voice an opinion on that." Tr. 6-19-09 at 417. Later, when pressed by the Panel Chairperson, Judge Jensen acknowledged that he was not an expert in professional ethics. Tr. 6-19-09 at 477. However, he was paid by Attorney Smoot's firm \$19,000 for his written expert opinion, \$300 per hour for his testimony at the hearing, and \$200 per hour portal-to-portal from his home in Cincinnati.¹⁰ Tr. 6-19-09 at 459, 474.

The Panel Report indicates that in addition to the above described testimony of Judge Jensen, the testimony of Attorney Smoot's witnesses, Attorneys Fred Muth and Gregory Hook, provide the basis for its erroneous finding of a "common practice" justifying its giving Attorney Smoot the "benefit of the doubt as to his intent." Panel Report at 28, ¶ 43.

It is unclear from the record how the Panel used Fred Muth's testimony to support its finding that "it was not uncommon to provide incomplete records to the other side" and "it was done in the Black Lung Field on a regular basis." *Id.* The only time in his testimony that Attorney Muth even comes close to addressing whether there is a common practice in Black Lung litigation of providing altered reports is when he is asked:

Q. What are your observations about those [Professional Conduct] charges as they relate

¹⁰ Testimony to the effect that Mr. Smoot's conduct was somehow consistent with black lung regulations misses the point. Admittedly, there is no specific black lung regulation that instructed Mr. Smoot that he could not remove conclusions he did not like from Dr. Zaldivar's report and then submit that report to the ALJ and a pro se claimant labeled as the "exam report." However, the absence of a prohibition on such obviously misleading and deceptive conduct does not mean that those who promulgated black lung regulations intended to condone Mr. Smoot's behavior. Neither Mr. Smoot nor any other West Virginia attorney should need someone to write a black lung regulation to remind him that the conduct at issue is unethical and contrary to the behavior expected of attorneys practicing in West Virginia.

to federal black lung practice for claimants?

A: Well, I suppose the first thing that hit me was that what was done *was a little unusual*, but not that unusual in federal black lung practice, and primarily since the matter never actually made it to a hearing before an administrative law judge, that whether what was offered was offered on a piecemeal basis, or all at once, became kind of a moot point...

Tr. 6-19-09 at 205-06 (emphasis supplied). Asked whether he ever submitted only part of a medical exam report, Muth responded "I did that a time or two" and explained in detail that on those rare occasions he "explain[ed] to the Judge right up front at the time of hearing" the reason the remainder of the report was unnecessary. Tr. 6-19-09 at 206. Speaking specifically to the 'common practice' of Attorney Smoot based on his prior experiences litigating against him, Fred Muth testified that Smoot "almost always" provided a "*complete*" copy of the claimant's adverse medical examination report and only "occasionally did not." Tr. 6-19-09 at 229-30. It seems beyond explanation as to how the Panel concluded from Attorney Muth's testimony that Attorney Smoot's conduct at issue was in conformity with a common practice in Black Lung litigation where his testimony actually demonstrates the opposite.

The Panel Report states Attorney Gregory Hook "testified under oath that it was standard practice to submit incomplete reports of examinations to the other side." Panel Report at 28, ¶ 43. However, Mr. Hook's testimony does not reflect a clear understanding of the issue and therefore does not support a finding that there was a "common practice" of disassembling medical reports and presenting a sanitized version to a *pro se* claimant as if it were the complete report. First, Mr. Hook's opinion that Mr. Smoot did nothing unusual, out of the ordinary, or a violation of federal Black Lung practice was based on a limited and non-specific review of the record, *i.e.* the complaint and "some of the case work." Tr. 6-19-09 at 240-42.

Second, Mr. Hook's testimony reflects a poor understanding of the discovery rules and the type of misrepresentation at issue in this case. When asked if he got copies of the reports of adverse medical exams (a.k.a. independent medical exams or "IMEs") after his clients were sent for an adverse medical exam by coal company physicians, Mr. Hook's response was inconsistent:

Q: [By Chairperson Jividen] And did you get copies of the reports of the IME that was conducted?

A: I would request reports for the most part. I would mostly rely on the reports that they submitted into evidence, though.

6-19-09, TR at 248. He did not seem to know or care whether or not the employer was offering an edited version of the adverse medical exam report that did not include diagnoses and conclusions favorable to his client. His indifference does not indicate whether the practice was common or not. Moreover, as explained below, if Mr. Hook was requesting the adverse medical exam reports, then the employer's attorney was obligated to provide "a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions" pursuant to Rule 35(b) of the Federal Rules of Civil Procedure, and not just the disassembled and edited version that Mr. Smoot provided to Mr. Daugherty who was *pro se* at the time. Mr. Hook testified that he was not a member of the West Virginia Bar and could not testify as an expert on the West Virginia Rules of Professional Conduct. Tr. 6-19-09 at 252-53. Nor could Mr. Hook's personal conduct justify what would otherwise be a violation of the Rules.

To the extent there was testimony that medical reports are sometimes not disclosed or are withheld, such testimony concerned the withholding or non-disclosure of *entire* reports, which has nothing to do with the conduct of Mr. Smoot at issue. Whether there is a tradition of lawyers making a strategic decision as to whether or not they will disclose *whole* documents is irrelevant

to the question of whether there is a “common practice” that the Panel asserts could excuse misleading alteration of documents by deleting those portions of the document that the an attorney chooses not to disclose.

To the extent witnesses testified as to the propriety of Mr. Smoot’s actions, they addressed the legality of actions in light of the federal regulations governing Black Lung litigation. Forrest Bowman, a retired ethics professor and the *only* witness qualified to give expert testimony as to whether Mr. Smoot’s actions were in compliance with the Rules of Professional Conduct, stated “[An attorney] has a duty not to mislead, but traditionally... you don’t give everything to the other side unless it’s required.” Mr. Bowman is correct. Lawyers have a duty not to mislead. Removing part of a report supportive of a *pro se* claimants claim and providing him with a copy of the report identified as the “exam report” without disclosing your alteration of the document is misleading.

Moreover, Attorney Smoot chose to alter an exam report of the claimant obtained under rules that require him to provide the resulting report to the claimant upon request. Rule 35(b)(1) of the Federal Rules of Civil Procedure, which applies to federal Black Lung claims pursuant to Section 18.19(c)(4) of the Rules of Practice and Procedure for Administrative Hearings before the office of Administrative Law Judges, states

If requested by...the person examined, the party causing the examination to be made shall deliver to the requestor a copy of a detailed written report of the examiner setting out the examiner’s findings, including results of all tests made, diagnoses and conclusions...

Fed. R. Civ. P. 35(b)(1) By providing part of the report and leading the claimant to believe it was the entire report, Attorney Smoot inevitably led the claimant to believe he already had the full report in his hands and had no reason to request anything more.

Even Attorney Smoot could not identify a single West Virginia attorney who engaged in conduct similar to his:

Q: [By Chairperson Jividen] Okay. The question was: Can you name a single lawyer in West Virginia who has ever followed your same practice [regarding the disassembly of medical reports and the submission of the report without the physician's conclusions]?

A: Because I can't think of any specific inference [sic], I would have to say no.

Tr. 6-18-09 at 356. When pressed on this question by the Chairperson, the only other individual Smoot could identify was William Mattingly, his colleague at the law firm. *Id.*

3. The Panel's Deference to Smoot Premised On the 'Complexity' of Black Lung Litigation is Misplaced.

It bears emphasis that nothing unique to Black Lung practice or the federal regulations governing that practice is relevant to whether Attorney Smoot's conduct at issue is misconduct. Attorney Smoot's counsel successfully confused the Panel to the point where it condoned Smoot's deceptive actions as the product of complicated regulations and timeliness for document disclosure. However, nothing suggests Attorney Smoot was in any way confused with regard to his conduct at issue. He never claims negligence or confusion to defend his removal of portions of the exam report favorable to the *pro se* claimant before providing the altered report under cover describing it as the "exam report." Attorney Smoot claims he knowingly provided only a part of Dr. Zaldivar's report because he never intended to submit the whole report into evidence. Nothing in the federal Black Lung regulations or any other applicable rule requires or condones the undisclosed removal of key portions of relevant medical documents provided to unsuspecting parties. It would be understandable for the Panel to be confused as to why Attorney Smoot provided the *pro se* claimant and judge an altered version of the medical report in light of his

claim that he never intended to use the entire report as evidence. Instead, the Panel uncritically accepts this “flimsy” excuse and manufactures a “common practice” it believes can excuse Smoot’s misconduct.

To the extent the federal Black Lung claims process is actually complex, a proposition with which the United Mine Workers of America does not disagree, this is all the more reason to sanction misleading delivery of altered documents to an inexperienced *pro se* claimant attempting to navigate the complex process alone. Not only did the Panel fail to undertake an appropriately critical analysis of Attorney Smoot’s stated justification for his conduct, it failed to consider the ethical implications of the fact his conduct was directed at an unrepresented party.¹¹

II. Adoption of the Panel’s Recommendation Will Prejudice Administration of Justice in West Virginia and Erode Public Confidence in the Judicial System.

In *Gum v. Dudley*, this Court gave an unsurpassably eloquent explanation of how its role as the ultimate arbiter of attorney ethics advances its responsibility to guarantee effective administration of justice and maintain public confidence in the judiciary:

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. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. *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.

¹¹ The Panel completely ignored - rendered no findings or specific conclusions - as to the Rule 4.3 charge at issue in this case. Attorney Smoot’s decision to mislead the *pro se* claimant into believing he had provided Dr. Zaldivar’s exam report, where key portions of that report were missing, was alleged by the ODC to be a prohibited implication by Attorney Smoot that he was disinterested - that he was merely passing along to the claimant the doctor’s entire “exam report.” The Panel improperly failed to consider this allegation.

While no one would want to disagree with these generalities about the obvious, it is important to reaffirm, on a general basis, the principle that *lawyers, who serve as officers of the court, have the first line task of assuring the integrity of the process*. Each lawyer undoubtedly has an important duty of confidentiality to his client and must surely advocate his client's position vigorously, but only if it is truth which the client seeks to advance. *The 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*. It is without note, therefore, that we recognize that the lawyer's duties to maintain the confidences of a client and advocate vigorously are trumped ultimately by a duty to guard against the corruption that justice will be dispensed on an act of deceit.

202 W.Va. 477, 487, 505 S.E.2d 391, 401 (W.Va. 1997) (emphasis supplied.)

The Panel's recommendation in this case condones attorney conduct that is inherently misleading. It is self-evident that "half of the truth may obviously amount to a lie, if it is understood to be the whole." Prosser & Keeton, *The Law of Torts* (5th ed. 1984) Misrepresentation and Nondisclosure, § 106, p. 738. Attorney Smoot altered Dr. Zaldivar's exam report by removing the narrative portion in which the doctor diagnosed the *pro se* coal miner claimant as having simple and complicated pneumoconiosis. When Attorney Smoot provided the altered report to the claimant and an administrative law judge under cover describing it as the "exam report" without giving any indication that he had removed the most significant part of that exam report, Smoot provided half the truth understood to be the whole - a lie.

If the Court agrees with the Panel that such conduct is compatible with ethical practice under the Rules of Professional Conduct, it will have significantly lowered the standard that informs all practitioners of the minimally acceptable level of candor to other parties and triers of fact. Practitioners will surely take note of the newly lowered standard and, in order to carry out their obligation to provide zealous representation to their clients, they will adjust their litigation

behavior accordingly. Parties engaged in pre-litigation document exchange will disassemble and withhold portions of documents unfavorable to their clients' cases. Resting on the Panel's recommendation, if approved, they will be under no obligation to inform the opposing party when they remove key material from documents. Misrepresentation, if condoned by this Court, will become the new norm. Deceptive gamesmanship will preoccupy the front-line actors in the judicial system dedicated to the search for truth.

If the Court adopts the Panel's recommendation to lower the standard for acceptable conduct, its decision will have undesirable repercussions in all areas of practice in this state. However, *pro se* Black Lung claimants will likely be hurt the most. As outsiders to the game, they will be oblivious and helpless - blinded by a simple faith that Rules are in place to protect them from misleading conduct. This is significant because substantial numbers of Black Lung claimants appear *pro se*. As one West Virginia attorney observed, "it has become increasingly common to find instances of U.S. Department of Labor hearing dockets populated primarily with *pro se* claimants . . ." *Committee on Legal Ethics of the W.Va. State Bar v. Triplett*, 378 S.E.2d 82, 90 (W.Va. 1988). The reasons can be numerous:

Miners frequently apply for benefits without representation because they cannot afford it, cannot find it, or do not realize they need it. If they can afford it, miners seeking counsel frequently cannot find it because attorneys shy away from representing black lung claimants due to the extreme length of black lung claims, the extremely low success rate for miners, and federal rules preventing attorneys from collecting fees until after a miner receives a final benefits award.

Brian L. Hager, *Is There Light At the End of the Tunnel? Balancing Finality and Accuracy for Federal Black Lung Benefits Awards*, 60 Wash. & Lee L. Rev. 1561, 1602 (2003). According to a Black Lung administrative law judge, "[e]mployers' financial capability far exceeds Claimant's

resulting in a lack of qualified attorneys who are willing to aggressively pursue meritorious claims,” which, in turn, results in more claimants appearing *pro se*. William S. Mattingly, *If Due Process is a Big Tent, Why Do Some Feel Excluded From the Big Top?*, 105 W. Va. L. Rev. 791, 824 (2003).

More sophisticated *pro se* claimants (and all seasoned litigators) will necessarily adopt a cynical presumption that every medical exam report received from the company’s attorney is incomplete, mislabeled or altered. Motions to compel “withheld, concealed or altered portions of documents already provided” will be routinely filed after pre-hearing document exchange and aggressively pursued. The number of hearings scheduled to resolve discovery disputes will skyrocket. As the parties’ faith in the basic fairness of the system erodes, the ability of that system to effectively administer justice will become strained.

The Panel reached the wrong result because it failed to understand the issue in this case. The issue in this case is not whether Attorney Smoot’s actions should be condoned because “everybody’s doing it” - there is no evidence his conduct comports with a common practice and, even if it did, that practice is unethical and this case is the opportunity to halt it. The issue is not whether Attorney Smoot should get a “free pass” because this is the first instance in which he is charged with professional misconduct - nobody should. Whether Attorney Smoot’s actions comply with the regulations governing the federal Black Lung claims process or whether his conduct presents “no problem” in the non-expert opinion of his paid witnesses is not the matter at hand. The only issue in this case is whether any person whose life’s work has caused debilitating mortal disease can appear before a system of justice in West Virginia that prohibits officers of the court from misleading him. Beyond the Black Lung arena, this case will set the

standard: whether justice is a right available to even the most vulnerable citizens, or a game tilted in favor of unscrupulous players.

CONCLUSION

Amicus Curiae, the United Mine Workers of America, respectfully urges this Court to reject the Panel's recommendation and render its own independent judgment, based on the facts in the record, that Attorney Douglas A. Smoot violated the West Virginia Rules of Professional Conduct; or, at the very least, that it remand the case for additional fact-finding in accordance with the correct legal standard.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "G. Crandall / AT". The signature is written in a cursive style and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing *Brief of Amici Curiae United Mine Workers of America* via U.S. first-class mail, postage prepaid, on this 7th day of June, 2010, upon the following:

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