STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 16th day of October, 1997, the following order was made and entered:

Lawyer Disciplinary Board, Complainant

vs.) No. 23663

E. Joseph Buffa, a member of The West Virginia State Bar, Respondent

On a former day, to-wit, August 14, 1997, came the Hearing Panel Subcommittee of the Lawyer Disciplinary Board, by R. Kemp Morton, its chairperson, pursuant to Rule 3.10, Rules of Lawyer Disciplinary Procedure, and presented to the Court its written recommended disposition in the above-captioned matter recommending that the license to practice law in the State of West Virginia of the respondent, E. Joseph Buffa, be annulled, and that he be required to reimburse the Lawyer Disciplinary Board for all costs and expenses incurred in the investigation of this matter.

There being heard neither objection nor concurrence from either the Office of Disciplinary Counsel or from the respondent, the Court is of opinion to and doth hereby adopt the recommendations of the Hearing Panel Subcommittee of the Lawyer Disciplinary Board. It is therefore ordered that the license to practice law in the State of West Virginia of the respondent, E. Joseph Buffa, be, and it hereby is, annulled, effective this date. It is further ordered that the respondent reimburse the Lawyer Disciplinary Board for the costs and expenses incurred in the investigation of this matter.

A True Copy

Attest: _____
Clerk, Supreme Court of Appeals

BEFORE THE LAWYER DISCIPLINARY BOARD
STATE OF WEST VIRGINIA

IN RE: E. JOSEPH BUFFA

I.D. NO.: 96-02-183
SUP. CT. NO.: 23663

SUBCOMMITTEE REPORT

On April 25, 1997, a hearing was held in this disciplinary matter at the Office of Disciplinary Counsel at 9:40 a.m. Present were Subcommittee members R. Kemp Morton, Chairperson, Cheryl L. Henderson, Esquire and Mrs. Priscilla Haden. Also present was Sherri D. Goodman on behalf of the Office of Disciplinary Counsel. Respondent E. Joseph Buffa was not present; neither was he represented by counsel.

The Subcommittee first inquired as to what notice Respondent received about the hearing date. Ms. Goodman showed the Subcommittee her copy of the Notice of Hearing which had been sent to Respondent at P. O. Box 682532, Franklin, TN 37068-2532 on March 3, 1997, according to the Certificate of Service.

The Subcommittee also reviewed a letter from Disciplinary Counsel Assistant Maura A. Lewis, dated February 13, 1997 sending Respondent a copy of the Prehearing Conference Order dated February 11, 1997. These were marked Exhibit 18. The Prehearing Conference Order held that Counts II and III of the Amended Statement of Charges were deemed admitted because Respondent failed to answer the Amended Statement of Charges. The Order clarified that Respondent would be entitled to present evidence in mitigation on Counts II and III, and the Office of Disciplinary Counsel was still required to meet its burden of proof with respect to Count I, which Respondent answered on September 30, 1996.

The Subcommittee found that Respondent had sufficient notice of this hearing and decided to go forward with the hearing. The Office of Disciplinary Counsel called the following witnesses by telephone: Jarrodd Moore, Carol H. Moore, Janis Collins and Carol Marcum. Exhibits 1 through 18 were admitted into evidence.

At the conclusion of the hearing, the Subcommittee deliberated and determined that the Office of Disciplinary Counsel had met its burden of proof with respect to the Amended

Statement of Charges. The Subcommittee further recommended that Respondent be disbarred. The findings of the Subcommittee have been more fully set forth in writing below.

COUNT I

FINDINGS OF FACT

1. E. Joseph Buffa is a lawyer who practiced in Charleston, Kanawha County, West Virginia during the time of these events, and, as such, is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. Respondent was admitted to The West Virginia State Bar on May 20, 1975. He placed himself on inactive status on August 30, 1996 in lieu of being temporarily suspended by the Supreme Court.

2. Respondent represented Jarrodd Moore and his mother, Carol, in a civil action against the Fayette County Board of Education, arising from injuries Jarrodd Moore sustained from a security guard at a high school football game. A lawsuit had been filed in the name of *Moore v. Fayette County Board of Education* in the Circuit Court of Fayette County, Civil Action No. 93-C-0223.

3. Because Mrs. Moore was reluctant to become involved in a trial against the Fayette County Board of Education, which was her employer, she and her son had directed Mr. Buffa to settle the case, if possible. They did not wish to take the case to trial. Respondent initially made a settlement demand of $60,000.00 in the fall of 1994. This demand was not countered by an offer from the defendant. *See* Exhibit 1, letter to Carol and Jarrodd Moore from E. Joseph Buffa, Jr. dated May 26, 1995.

4. During the summer and fall of 1995, settlement negotiations resumed. On November 1, 1995, defense counsel, W. E. Sam Fox, II, conveyed a final settlement offer of $20,000.00. *See* Exhibit 2. Respondent made his clients aware of this offer and received authority to accept that offer. On November 3, 1995, Respondent wrote to Mr. Fox the following:

"To confirm my telephone conversation with your secretary yesterday, your client's offer of $20,000.00 is accepted. Please, if you have the ability to do so, get the check as soon as you can, today or tomorrow if possible. It is important or I wouldn't ask.

I appreciate your cooperation. If I can do any documents to speed things up, let me know. Again thank you for your help."

Exhibit 3.

5. Respondent wrote Jarrodd Moore a letter dated November 10, 1995 stating that the opposing lawyer had agreed to settle the case for $20,000. He explained that the Moores would need to sign a release, and he would take care of getting the case dismissed. He said that there would be some delay in getting the paperwork completed but predicted that "this will all be done before the end of the year." Exhibit 4.

6. On November 13, 1995, Mr. Fox caused the following to be hand delivered to Respondent: (1) a check in the amount of $20,000.00 made payable to "Jarrod Moore, Carol Moore and Joseph Buffa, their attorney"; (2) a release for the signatures of "Jarrod" Moore and Carol Moore; and, (3) a dismissal order. *See* Exhibit 5.

7. On November 13, 1995, Respondent signed the back of the check with his own signature and signed the signatures of Jarrodd Moore and Carol Moore, without their knowledge or authorization, in a manner which closely resembled their actual signatures. *See* signatures contained on check in Exhibit 6 and genuine signatures of a medical release in Exhibit 9. Jarrodd Moore and Carol Moore both testified that they have had the opportunity to review of copy of the negotiated check, and they did not sign it.

8. Respondent deposited the check, on that date, in his IOLTA trust account at First Empire Federal Savings and Loan Association. At the time Respondent deposited this check, his account had a negative balance of $289.42. *See* Exhibit 10, Statement from 11/1/95 through 11/30/95.

9. Respondent signed the names of Jarrodd Moore and Carol Moore on the release, without their knowledge or authorization. Exhibit 7. Respondent misspelled Jarrodd's name as

"Jarodd". He also signed the dismissal order and returned those two documents to Mr. Fox on November 20, 1995. Exhibit 8. The case was dismissed on November 21, 1995.

10. On the day Respondent deposited the settlement check, he wrote a check for $5,400 to a Jeff Knuckles who negotiated the check in Florida. Respondent's residence is in Florida. On November 15, 1995, Respondent wrote three checks to cash for $1,500, $700, and $700. He also wrote a check for $900 to his secretary. On subsequent days, Respondent wrote five checks for cash in the total amount of $8,200, wrote three checks to his secretary for a total of $900, wrote a check for $444.83 to a gift shop and $400 to the Circuit Clerk of Randolph County. By December 30, 1995, only $217.24 of the $20,000 remained in Respondent's trust account. *See* Exhibit 10.

11. When the Moores did not hear from Respondent, Carol Moore attempted to speak with Respondent about the case beginning in January of 1996. She did not speak with Respondent until the day she learned from opposing counsel and the Circuit Clerk's Office that the case had been dismissed following settlement, on or about June 12, 1996. Ms. Moore had contacted the Office of Disciplinary Counsel on June 12, 1996, and it was suggested to Ms. Moore that she contact the Circuit Clerk's Office to determine the status of the complaint.

12. On or about June 12, 1996, Respondent called Ms. Moore. He did not explain to her what had happened, but promised to pay her and Jarrodd their portion of the settlement. Shortly thereafter, Respondent mailed Ms. Moore a cashier's check for $12,736.00. Ms. Moore had requested that payment be made in a cashier's check.

13. Carol Moore testified that she needed the money from the settlement to pay Jarrodd's medical bills. During the time period Respondent made use of the Moores' money, medical providers were attempting to collect from her.

14. Respondent stated in his Answer, paragraph 8, that his failure to disburse the funds to his clients was due to his attention to personal matters. He further stated that "he had funds available to promptly disburse to this client had he not been inattentive to his obligations to Jarrodd Moore to promptly disburse the settlement." He denied any criminal intent or misconduct.

15. A review of Respondent's escrow account demonstrates that from November 13, 1995 to May 31, 1996, Respondent's ending balance for each monthly statement was below $12,736.00 with one exception. In January 29, 1996, Respondent deposited $25,000 in his escrow account. This deposit appears to be from a loan made by Thomas V. Flaherty and evidenced by a promissory note dated January 26, 1996. *See* Exhibit 14. By February 22, 1996, Respondent's balance was $420.71.

16. Statements from Respondent's two business accounts at Bank One also indicate that these accounts never had sufficient funds to pay the Moores, even if combined with the balance of the escrow account. *See* Exhibits 11 and 12.

17. The bank records also show that the $25,000 loan from Thomas Flaherty was used for living and business expenses, suggesting that Respondent not only did not have sufficient funds to pay the Moores, he did not have sufficient money to meet his routine living expenses.[1]

CONCLUSIONS OF LAW

By misappropriating client funds and forging his client's name on the check and the release, Respondent violated Rules 8.4(b) and 8.4(c) of the Rules of Professional Conduct, which provide:

> **Rule 8.4. Misconduct.**
> It is professional misconduct for a lawyer to:
> (b)commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

By failing to notify the Moores promptly that the settlement check had actually been received, and by failing to pay the Moores their portion of the settlement promptly, Respondent violated Rule 1.15(b) of the Rules of Professional Conduct, which provides:

> **Rule 1.15. Safekeeping property.**
> (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client

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[1] Checks were written after the $25,000 deposit to Respondent's secretary, Jeff Knuckles in Florida, Computer Warehouse, Ford Motor Credit Co., Blue Cross/Blue Shield, U.S. Air, department stores and nine checks to Respondent or cash totalling $10,200.

or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

By depositing fee checks, which had already been earned, or by leaving fees in the trust account, and then writing checks for personal and business expenses unrelated to a particular case from his trust account, Respondent violated Rule 1.15(a) of the Rules of Professional Conduct, which provides:

> **Rule 1.15. Safekeeping property.**
> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account designated as a "client's trust account" in an institution whose accounts are federally insured and maintained in the state where the lawyer's office is situated, or in a separate account elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

COUNT II

FINDINGS OF FACT

18. Respondent represented Wayne and Janis Collins in a medical malpractice action entitled *Janis E. Collins, Administratrix of the Estate of Kayla Nashea Collins, and Janis E. Collins and Wayne M. Collins v. Ft. Gay Primary Health Care, Inc. and Brian Uniacke, M.D.*, Civil Action No. 94-C-024 in the Circuit Court of Wayne County, West Virginia.

19. The defendants filed a motion for summary judgment on the grounds that plaintiffs had failed to make their expert witness available for deposition. Exhibit 15. Respondent did not file a response to this motion and did not appear for the hearing held on July 12, 1996. *See* Order entered July 22, 1996, Exhibit 16. Respondent also did not inform his clients of the summary judgment motion, according to the testimony of Ms. Collins.

20. The Court entered an order dismissing the civil action with prejudice on July 22, 1996. Exhibit 16. Respondent did not notify his clients of the dismissal until late August, 1996, after he was informed that the Office of Disciplinary Counsel would be contacting his clients about the matter.

CONCLUSIONS OF LAW

By failing to respond to the summary judgment motion or attend the hearing, Respondent violated Rule 1.3 of the Rules of Professional Conduct which provides:

> **Rule 1.3. Diligence.**
> A lawyer shall act with reasonable diligence and promptness in representing a client.

By failing to inform his clients of the motion or this dismissal order, Respondent violated Rule 1.4(a) of the Rules of Professional Conduct, which provides:

> **Rule 1.4. Communication.**
> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

COUNT III

FINDINGS OF FACT

21. Respondent represented Carol and John Marcum in a medical malpractice action entitled *Carol Marcum and John D. Marcum v. Carolyn E. Clark, M.D.*, Civil Action No. 95-C-109 in the Circuit Court of Cabell County. Carol Marcum testified that they never signed a fee agreement, although they had orally agreed to a contingent fee.

22. The defendant served interrogatories upon Respondent on June 17, 1995. Respondent did not file answers, and defense counsel wrote a letter requesting answers on September 29, 1995. Respondent did not answer the letter. *See* recitation of facts in Order of March 14, 1996, Exhibit 17.

23. On November 9, 1995, defense counsel filed a motion to compel discovery. In lieu of a hearing, counsel for the parties agreed that plaintiffs would provide answers by February 1, 1996 and an Order reflecting this agreement was entered on January 23, 1996. Exhibit 17.

24. As testified by Ms. Marcum, Mr. and Mrs. Marcum delivered handwritten answers to the interrogatories to Respondent at his office when it was located on the west side of Charleston. However, he never filed the answers.

25. A pretrial conference was held on February 14, 1996. Respondent did not appear. At that conference, defense counsel moved for a dismissal of the complaint for Plaintiffs' failure to comply with discovery, including their failure to name an expert witness. Exhibit 17.

26. The Court dismissed the case without prejudice for failure to prosecute on March 14, 1996. The Order reflected that all counsel of record were to be sent certified copies. Exhibit 17.

27. Respondent did not inform his clients of the motion to dismiss or the dismissal. The Marcums learned of the dismissal on August 29, 1996 when they were contacted by the Office of Disciplinary Counsel.

28. After the case was dismissed, Ms. Marcum had one telephone conversation with Respondent. He told her that her expert witness was weak, but did not tellher the true status of the case. He also said that he was having ethical problems because a client was dissatisfied with her settlement check.

CONCLUSIONS OF LAW

By failing to file answers to interrogatories, failing to respond to defense counsel's correspondence and failing to attend the pretrial conference, Respondent violated Rule 1.3 of the Rules of Professional Conduct, as set forth above.

By failing to notify the Marcums of the dismissal of their action or the Order compelling answers to interrogatories, Respondent violated Rule 1.4(a) of the Rules of Professional Conduct as set forth above.

RECOMMENDED DISCIPLINE

Misappropriate of funds is the one of the most serious ethical offenses an attorney can commit. Had Mr. Buffa been charged and convicted of this crime, his law license would have been annulled without an evidentiary hearing and he would not have been entitled to a mitigation hearing. *Office of Disciplinary Counsel v. Tantlinger*, No. 23972, ___ W. Va. ___ (July 8, 1997). The fact that Respondent was not indicted does not prevent him for being sanctioned for criminal conduct. *Committee on Legal Ethics v. Craig*, 187 W. Va. 14, ___, 415 S.E.2d 255, 259 (1992).

There exist several mitigating factors. Respondent has not previously been formally disciplined by the Supreme Court. Respondent repaid the money he misappropriated, albeit without interest. But an important aggravating factor also exists. Respondent did not acknowledge that he misappropriated the money. He submitted a verified answer which stated that he had funds available to promptly disburse to his clients but for his inattention to his obligations. The clear and convincing evidence is that Respondent was living beyond his means and used the Moores' money to meet his monthly business and personal obligations.

Additionally, this Subcommittee has concerns about the pattern exhibited in Respondent's bank records of his writing a large number of checks to "cash" and to himself. For example, Respondent negotiated checks for cash or to himself on November 7, 1995 for $400; on November 13, 1995 for $50; on November 15, 1995 for $1,500; on November 16, 1997 for $700 and another $700; on November 22 for $5,000; on December 5, 1995 for $1,500; on December 9, 1995 for $300; on December 16 for $700; and on December 18, 1995 for $700. The Subcommittee did not have the opportunity to inquire of Respondent as to the purpose of these expenditures, because Respondent chose to absent himself from the hearing.

Respondent's lack of candor in the disciplinary process, his refusal to acknowledge the extent of his wrongdoing and his failure to dispel the Subcommittee's concerns money being spent on an addiction, leads the Panel to conclude that disbarment is the appropriate sanction on Count I alone for the protection of the public.

The Subcommittee also considered that the ethical violations which occurred in Counts II and III were convincing factors, when added to Count I, for disbarment.

Accordingly, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board recommends to the Supreme Court of Appeals of West Virginia the following:

1. That the law license of Respondent E. Joseph Buffa be annulled; and

2. That Respondent E. Joseph Buffa pay the costs incurred in this disciplinary proceeding.

R. Kemp Morton, Chairperson

Date: 7/31/97

Cheryl L. Henderson, Esquire

Date: 8/1/97

Mrs. Priscilla Haden

Date: 8/3/97