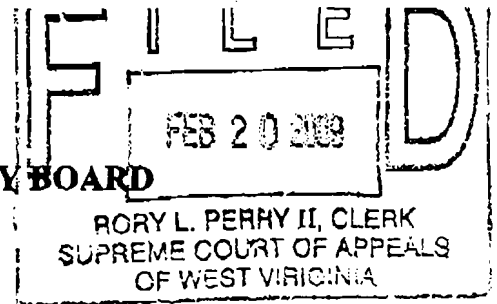


**BEFORE THE LAWYER DISCIPLINARY BOARD
STATE OF WEST VIRGINIA**



**In Re: DOUGLAS A. SMOOT, a member of
The West Virginia State Bar**

**Bar No.: 3495
I.D. No.: 07-01-078**

**RESPONDENT DOUGLAS A. SMOOT'S MOTION TO DISMISS STATEMENT
OF FORMAL CHARGES, OR IN THE ALTERNATIVE, RESPONDENT'S
ANSWER TO STATEMENT OF FORMAL CHARGES**

Respondent Douglas A. Smoot ("Respondent" or "Smoot"), by counsel and pursuant to Rule 2.12 of the West Virginia Rules of Lawyer Disciplinary Procedure, states as follows in response to the Statement of Formal Charges:

MOTION TO DISMISS

1. The Statement of Formal Charges must be dismissed on its face because the Respondent's conduct was in conformity with the well established rules of law governing federal black lung proceedings. *See* Hon. Rudolf L. Jansen Opinion Letter dated March 28, 2007, attached as Exhibit 1. As a matter of law, because the Respondent's conduct complied with his duties and obligations in federal black lung proceedings, Respondent did not violate the West Virginia Rules of Professional Conduct.

2. Moreover, the effect of the prosecution of this charge will prohibit any lawyer in West Virginia from representing either a claimant or a defendant in a federal black lung proceeding. Not only is the charge inconsistent with the prior optional practice of disassembling certain evidence in this area of law, but it is also contrary to the now mandatory practice requiring both claimants and defense counsel to disassemble evidence

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in order for it to be considered. See *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-242 (2007)(*en banc*); *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-136 (2006)(*en banc*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-109 (2006)(*en banc*). A finding that the Respondent violated any professional rule in that regard effectively eliminates a federal area of practice for West Virginia lawyers which is regulated and directed by the rules and regulations of the Department of Labor.

3. The Statement of Formal Charges must be dismissed because such charges have not been brought in a timely manner.

a. The West Virginia Supreme Court of Appeals has recognized that the purpose of all statutes of limitation are “to require the prosecution of a right of action within a reasonable time, to prevent undue delay in bringing suit on claims, and to suppress the assertion of fraudulent and stale claims to the surprise of the parties, when the evidence may have been [lost], or the facts may have become obscure because of defective memory, or the witnesses may have died or disappeared and thus become unavailable.” *Morgan v. Grace Hospital, Inc.*, 144 S.E.2d 156, 164 (W.Va. 1965). The West Virginia Rules of Lawyer Disciplinary Procedure also recognize the need to prevent the prosecution of stale disciplinary complaints. See W.V. R.Discip.Pro. 2.14 (noting that any complaint filed more than two years after the complainant knew or should have known of the alleged rule violation shall be dismissed by the Investigative Panel).

b. In this case it is undisputed that all events complained of in the Statement of Formal Charges took place in 2001, and that all adverse witnesses knew of the alleged misconduct no later than September of 2004, yet no complaint was opened until

February 16, 2007, and the Statement of Formal Charges were not initially served until January 5, 2009. Regardless of which date is applied—February 16, 2007 or January 5, 2009—any claim brought by any of the adverse witnesses in connection with the events occurring in 2001 would be absolutely time barred by the applicable rules. If this Hearing Panel were to permit the Office of Disciplinary Counsel (“ODC”) to prosecute this matter some 8-years after the events at issue in the Statement of Formal Charges, it would undermine the plain purpose behind the time barring of claims for several reasons.

c. First, because it is not disputed that the events at issue took place in 2001, and that all adverse witnesses knew of the conduct complained of no later than September of 2004, under no circumstances can it be said that the formal charges have been brought within a reasonable time or without undue delay. Second, the Respondent has been charged with violations of Rules 3.4, 4.3, and 8.4 of the West Virginia Rules of Professional Conduct. Significantly, **all of these alleged violations relate directly** to the Respondent’s dealings with Mr. Elmer Daugherty, and in particular the voluntary disclosures the Respondent made to Mr. Daugherty, who was proceeding *pro se*, in the underlying federal black lung proceedings in 2001. However, because Mr. Daugherty is now deceased, the Respondent is precluded from questioning Mr. Daugherty concerning (i) his understanding of the disclosures, (ii) his understanding of the underlying federal black lung proceedings, or (iii) any of his dealings with the Respondent. Because such evidence may have a profound impact on the Respondent’s defense of the charged violations, the Respondent is highly prejudiced by being forced to defend this matter now, some 8-years after the alleged rule

violations, and without the ability to question Mr. Daugherty regarding any of the events in the Statement of Formal Charges.

d. For these reasons, if this Hearing Panel were to permit the Office of Disciplinary Counsel to prosecute these charges now, some 8-years after the alleged misconduct, it would severely undermine the plain purpose behind statutes of limitation, and unduly and unfairly prejudice the Respondent. This Hearing Panel should not permit the Office of Disciplinary Counsel to rely on any technicalities in order to circumvent the plain purpose behind statutes of limitation, and in fact Rule 2.14 of the West Virginia Rules of Disciplinary Procedure should bar the instant charges.

e. Finally, despite the fact that all of the events at issue in the Statement of Formal Charges occurred in 2001, and all potential adverse witnesses knew of the events that took place in 2001 no later than September of 2004, the Respondent is still unaware of the identity of any complainant in these disciplinary proceedings. The Respondent has a procedural due process right to receive notice of the complaint and be confronted by the complainant in a timely manner. Because approximately 8-years has passed since the events complained of in the Statement of Formal Charges, and over 4-years has passed since all adverse witnesses knew of the conduct complained of, these proceedings violate Respondent's procedural due process rights, and therefore must be dismissed.

WHEREFORE, for all of these reasons, the Respondent respectfully requests that this Hearing Panel dismiss the instant charges with prejudice.

ANSWER TO STATEMENT OF FORMAL CHARGES

In the alternative, the Respondent states as follows for his response to the Statement of Formal Charges:

1. The Respondent admits the allegations set forth in Paragraph 1 of the Statement of Formal Charges.
2. The statements set forth in Paragraph 2 of the Statement of Formal Charges do not appear to be allegations of fact directed toward the Respondent. To the extent a response is required, the Respondent denies such allegations.
3. Based upon information and belief, Respondent admits the allegations set forth in Paragraph 3 of the Statement of Formal Charges.
4. The statements set forth in Paragraph 4 of the Statement of Formal Charges do not appear to be allegations of fact directed toward the Respondent. To the extent a response is required, the Respondent denies such allegations.
5. Based upon information and belief, Respondent admits the allegations set forth in Paragraphs 5 and 6 of the Statement of Formal Charges.
6. In response to the allegations set forth in Paragraph 7 of the Statement of Formal Charges, Respondent states that on or about November 12, 2001, Respondent provided Mr. Daugherty a copy of a letter addressed to Judge Daniel L. Leland, which included (I) the exam report of Dr. George L. Zaldivar dated February 7, 2001; (ii) the report of Dr. Harold B. Spitz containing his interpretation of the CT scan dated June 27, 2001; and (iii) the curricula vitae of Drs. Zaldivar and Spitz. Respondent admits that this November 12, 2001

correspondence did not include Dr. Zaldivar's narrative report dated May 16, 2001. However, Respondent expressly denies that the November 12, 2001 correspondence omitted documentation evidencing a finding of complicated pneumoconiosis inasmuch as the November 12, 2001 correspondence specifically included Dr. Zaldivar's x-ray interpretation finding complicated pneumoconiosis. Based upon information and belief, Respondent admits the allegations set forth in Footnote 1 as contained in Paragraph 7 of the Statement of Formal Charges. The statements set forth in Footnote 2 as contained in Paragraph 7 of the Statement of Formal Charges do not appear to be allegations of fact directed toward the Respondent. To the extent a response is required, the Respondent denies such allegations.

7. The statements set forth in Paragraphs 8, 9, 10, 11, 12, and 13 of the Statement of Formal Charges do not appear to be allegations of fact directed toward the Respondent. To the extent a response is required, the Respondent denies such allegations only as they relate to charges against him. The statements set forth in Footnote 3 as contained in Paragraph 9 of the Statement of Formal Charges do not appear to be allegations of fact directed toward the Respondent. To the extent a response is required, Respondent denies such allegations only as they relate to charges against him. In response to Footnote 4 as contained in Paragraph 11 of the Statement of Formal Charges, Respondent states that he is an Equity Member at Jackson Kelly PLLC. The remaining allegations set forth in Footnote 4 of the Statement of Formal Charges do not appear to be allegations of fact directed toward the Respondent. To the extent a response is required, the Respondent denies such allegations only as they relate to charges against him.

8. In response to Paragraph 14 of the Statement of Formal Charges, Respondent admits that he appeared at the October 19, 2004 hearing before ALJ Lesniak on behalf of his client Westmoreland Coal Company. Respondent further states that, consistent with the well settled law governing federal black lung proceedings, Respondent discussed on the record the fact that the November 12, 2001 correspondence to Judge Leland, which was also provided to Mr. Daugherty, did not contain Dr. Zaldivar's narrative report dated May 16, 2001. Respondent expressly denies that Dr. Zaldivar's May 16, 2001 narrative report was improperly withheld. The remaining statements set forth in Paragraph 14 of the Statement of Formal Charges do not appear to be allegations of fact directed toward the Respondent. To the extent a response is required, the Respondent denies such allegations.

9. The statements set forth in Paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28 of the Statement of Formal Charges do not appear to be allegations of fact directed toward the Respondent. To the extent a response is required, the Respondent denies such allegations as they relate to charges against him.

10. Respondent denies each and every allegation contained in Paragraphs 29, 30, and 31 of the Statement of Formal Charges.

11. Respondent expressly denies each and every allegation of fact not expressly admitted herein.

OTHER DEFENSES

12. Respondent relies on each and every defense to which he is entitled to under the West Virginia Rules of Lawyer Disciplinary Procedure, the West Virginia Rules of Civil Procedure, and the West Virginia Rules of Professional Conduct for Lawyers.

13. The Respondent notes that despite the extensive discussion in the Statement of Formal Charges concerning the Respondent's lawful refusal to produce non-testifying expert reports, none of the charged violations of the Rules of Professional Conduct involve the Respondent's lawful refusal to produce the non-testifying expert reports. Accordingly, all such discussions and allegations relating to the refusal to produce the non-testifying expert reports are wholly irrelevant to these proceedings. Regardless of that, and as stated more fully in Judge Jansen's Opinion Letter dated March 28, 2007, attached as Exhibit 1, pursuant to well settled federal law, the Respondent was required to disobey all orders compelling discovery and then receive some sanction in order to acquire standing to pursue an interlocutory appeal of those orders. See *U.S. v. Moussaoui*, 336 F.3d 279, 281 (4th Cir. 2003); *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 121-22 (4th Cir. 1994). Needless to say, because the non-compliance with ALJ Lesniak's orders was specifically required under the applicable law in order to perfect Westmoreland Coal Company's right to challenge the validity of the discovery orders, such conduct cannot, as a matter of law, constitute a violation of the Rules of Professional Conduct.

14. As set forth more fully in Judge Jansen's Opinion Letter dated March 28, 2007, attached as Exhibit 1, Respondent properly fulfilled all of his obligations under the law governing federal black lung proceedings in producing Dr. Zaldivar's reports, and therefore, did not violate the West Virginia Rules of Professional Conduct. Respondent submitted all of Dr. Zaldivar's reports, including the narrative report dated May 16, 2001, to Mr. Daugherty prior to the applicable evidentiary and discovery deadlines. Moreover, when Mr. Daugherty asked for the reports in a discovery request, the Respondent provided all of the

testifying experts' reports, including Dr. Zaldivar's narrative report dated May 16, 2001, all within the discovery time periods.

15. It is indisputable that the Respondent did not violate any discovery rule or regulation in disclosing Dr. Zaldivar's reports. Moreover, the federal rules of civil procedure do not apply to discovery in federal black lung proceedings. Instead, the production of independent medical reports is governed by specific federal black lung regulations. Binding case law from the United States Department of Labor's Benefits Review Board interpreting those regulations establishes that Respondent had no obligation to produce any of Dr. Zaldivar's reports until Mr. Daugherty asked for them in a formal discovery request. *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997). Once again, when Mr. Daugherty served Respondent's former client Westmoreland Coal Company with a formal discovery request, Respondent timely produced all of Dr. Zaldivar's reports, including the May 16, 2001 narrative report.

16. Regardless of the fact that the Respondent complied with all his duties and obligations under the law in producing Dr. Zaldivar's reports, the undisputed evidence establishes that the Respondent had no intent to deceive or prejudice Mr. Daugherty or the ALJ when Respondent made the initial disclosures to Mr. Daugherty on November 12, 2001. This is evidenced most clearly by the fact that the November 12, 2001 initial disclosures included Dr. Zaldivar's x-ray interpretation finding the most serious form of pneumoconiosis. If Respondent had intended to deceive or mislead anyone regarding Dr. Zaldivar's opinion, he would not have submitted Dr. Zaldivar's x-ray interpretation to the Court and to Mr. Daugherty in the initial disclosures.

17. Just as the Respondent explained to the ALJ in the underlying proceedings, the reason Respondent did not initially submit Dr. Zaldivar's May 16, 2001 narrative report was because Respondent intended to go back to Dr. Zaldivar after more of Mr. Daugherty's medical records were available and obtain a more complete opinion from Dr. Zaldivar. The record establishes that Respondent did exactly as intended. Specifically, the Respondent gathered all of Mr. Daugherty's medical records and submitted them to Dr. Zaldivar, including the discovered medical information indicating Mr. Daugherty had a fungal infection of the lungs in the 1960s.

18. When Respondent provided Dr. Zaldivar with this additional information, Dr. Zaldivar changed his initial opinion, which was of course set forth in Dr. Zaldivar's original narrative report dated May 16, 2001. In particular, once Dr. Zaldivar was provided with the additional medical information, he opined that the abnormalities on Mr. Daugherty's x-rays were not the result of complicated pneumoconiosis, but instead the result of a prior fungal infection. Significantly, in accordance with all evidentiary and discovery deadlines, the Respondent then submitted Dr. Zaldivar's original narrative report dated May 16, 2001 and his supplemental report explaining his change in opinion.

19. Accordingly, not only does the record establish that Respondent had no intent to deceive anyone, including Mr. Daugherty, when Respondent made the initial disclosures on November 12, 2001, but it is also indisputable that the Respondent timely complied with all his discovery obligations, which included the proper disclosure of Dr. Zaldivar's narrative report dated May 16, 2001.

20. Paragraph 30 of the Formal Charge makes no sense and the Formal Charge fails to state any violation of Rule 4.3. Respondent was at all times known to be zealously representing his client Westmoreland Coal Company, adversely to the claimant Elmer Daugherty. Such representation was open and obvious.

21. Having asserted that Respondent's conduct was at all times proper and in accord with the rules and regulations applicable, the Respondent asserts that the charges herein are contrary to the existing law of the State of West Virginia. Absent fraud, deceit or false statements, the Respondent owed his duty of loyalty to his client and was obligated to zealously represent them under the rules. The West Virginia case law does not support a duty owed to the opposition and the charge herein seeks to impose a duty not allowable at law.

22. The charges herein seek, in effect, to impose discovery sanctions upon the Respondent, something neither the administrative court nor the district court did. The charges also seek to review and interpret complicated federal black lung law and regulations.

23. The Formal Charges stem from over forty (40) years of ongoing litigation involving a small number of claimant and defense practitioners in a very narrow and specialized area of practice. Claimant's counsel was paid under the applicable law for all activity for Mr. Daugherty and therefore had a direct financial interest in pursuing this complaint before the ALJ and the United States District Court. The professional rules and the disciplinary process may not be used for tactical advantages in such litigation.

24. The exculpatory disclosures of the ODC initially received on January 29, 2009 contain discovery complaints as to other lawyers in the 1980's and the 1990's and cannot form any basis for the charge herein and Respondent moves to strike their use in all forms.

25. The aforesaid produced ODC file lacks any independent material in the form of investigation to support the charge against this Respondent. Nothing in the 1980's and 1990's material relates to this Respondent. The charge should be dismissed for lack of evidence.

26. Further, the charge appears to have ignored the detailed and indexed response of the Respondent dated April 9, 2007. The investigative file lacks any rebuttal of any type to the record and case law supplied therein and thus reflects a lack of evidence and a lack of investigation to support the charge presented to the Investigative Panel. Additionally, the ODC was advised in writing in September 2006 that the time limits to charge were expiring and failed to act until December of 2008.

27. The failure of the Investigative Panel to issue "no probable cause" letters to lawyers Kathy Snyder and Dorothea Clark (two of four complaints served in February 2007) constitutes prejudice to them and deprives this Respondent of a full ability to defend himself. Both Snyder and Clark were to be witnesses in this matter for Respondent. In order to prepare and issue a charge against this Respondent, the Investigative Panel had to review all matters related to Snyder and Clark and the sixty (60) day requirement for the issuance of charges expired no later than February 8, 2009. Respondent requests the issuance of such letters so he may call them as unencumbered witnesses in his defense.

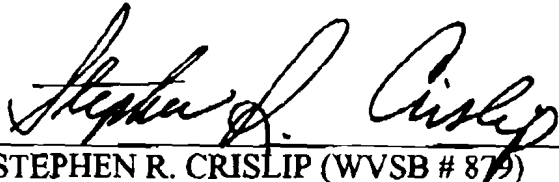
28. Respondent demands the right to take the testimony of the complaining witness or witnesses in Charleston within the prescribed time, prior to the hearing. If none is presented, Respondent moves to dismiss all charges.

29. Finally, the effect of the prosecution of this charge will prohibit any lawyer in West Virginia from representing either a claimant or a defendant in a federal black lung proceeding. Not only is the charge inconsistent with the prior optional practice of disassembling certain evidence in this area of law, but it is also contrary to the now mandatory practice requiring both claimants and defense counsel to disassemble evidence in order for it to be considered. See *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-242 (2007)(*en banc*); *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-136 (2006)(*en banc*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-109 (2006)(*en banc*). A finding that the Respondent violated any professional rule in that regard effectively eliminates a federal area of practice for West Virginia lawyers which is regulated and directed by the rules and regulations of the Department of Labor.

WHEREFORE, Respondent respectfully requests, in light of the undisputed evidence in this case, that the Statement of Formal Charges be closed and dismissed.

DOUGLAS A. SMOOT

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