VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 1st day of June, 2023.

Bradley Glenn Pollack, Appellant,

against Record No. 220698
Circuit Court No. CL21001114-00

Virginia State Bar *ex rel*. Seventh District Committee, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Shenandoah County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that the judgment of the circuit court should be affirmed.

Bradley Glenn Pollack appeals from the judgment of a three-judge circuit court ("circuit court") that found that Pollack violated Rules 1.15 and 1.16 of the Virginia Rules of Professional Conduct ("RPC") and, as a sanction for those violations, suspended his law license for six months. For the reasons that follow, we affirm the judgment of the circuit court.

I. BACKGROUND

Although the present appeal arises from an attorney disciplinary proceeding against Pollack that began in 2020, his appeal challenges the circuit court's treatment and consideration of his prior disciplinary record. As a result, we begin by reviewing his nearly quarter century long history of Virginia State Bar ("VSB") discipline.

A. Prior disciplinary history

In 1999, the VSB alleged that Pollack had violated Disciplinary Rule ("DR") 2-105 by "submit[ing] a bill for services over and above the previously approved amount[,]" DR 6-101(A), and DR 9-102(B)(4) relating to his failure to properly disburse client funds he held. In 2000, the Seventh District Subcommittee of the VSB concluded that Pollack had violated each of these rules. Exercising its discretion, the Subcommittee offered a "Dismissal with Terms[,]" which provided that the proceeding dealing with these rules violations would not be set for hearing and would be dismissed from the docket if Pollack agreed to comply with certain terms,

including the development of office policies designed to prevent future violations, attending additional continuing legal education classes, and establishing a relationship with a mentor who was experienced in the pertinent area of the law. Pollack complied with the terms, and, in June 2001, the VSB closed the matter.

In 2002, the VSB again initiated disciplinary proceedings against Pollack. Three separate VSB files were opened against Pollack. During the course of the proceedings, Pollack exercised his right, pursuant to Code § 54.1-3935, to have the matters heard by a three-judge circuit court. A three-judge circuit court was impaneled by the Chief Justice, and the allegations stemming from the three VSB files were tried before the three-judge circuit court in March 2005. Based on the evidence presented, the three-judge circuit court found that Pollack had committed multiple violations of the rules governing the conduct of a Virginia attorney. The three-judge circuit court specifically found that Pollack had violated the following RPCs: RPC 1.3(a), RPC 3.1, RPC 3.4(a), RPC 3.4(d), RPC 3.4(g), RPC 4.3(a), RPC 4.3(b), RPC 4.4, DR 1-102(A)(3), DR 1-102(A)(4), DR 7-102(A)(1), and DR 7-102(A)(2).[1] In making its finding that Pollack had violated these rules, the three-judge circuit court characterized the evidence as "overwhelming[.]"[2]

Turning to the question of sanction, the three-judge circuit court heard argument regarding the appropriate disposition before suspending Pollack's license to practice law for a period of two years (the "2005 suspension"). In partial explanation of the sanction, the three-judge circuit court "noted that even after [it had] render[ed] its findings before [Pollack], Pollack] thereafter still did not understand or appreciate the gravity of the unprofessional nature

[1] On January 25, 1999, this Court entered an order replacing the existing Code of Professional Responsibility with the new Rules of Professional Conduct, with the Rules of Professional Conduct becoming effective on January 1, 2000. The proceedings before the three-judge circuit court in 2005 dealt with acts of misconduct that Pollack committed both before and after the change. The three-judge circuit court's findings that he violated DRs were for conduct that occurred while the Code of Professional Responsibility governed; the findings of violations of the RPC were for conduct that occurred when the Rules of Professional Conduct were in force.

[2] Although the three-judge circuit court found the evidence overwhelming that Pollack had violated the rules specified, the three-judge circuit court did find for Pollack regarding one alleged rule violation. Specifically, the three-judge circuit court found that the VSB "failed to meet its burden of proof" regarding its allegation that Pollack also had violated RPC 8.2.

of his conduct."

Consistent with the Rules of Court, which granted him an appeal of right, Pollack sought to appeal the judgment of the three-judge circuit court to this Court. His appeal was dismissed, however, for lack of a timely transcript of the proceedings below. He sought rehearing of the dismissal, and this Court denied that motion as well.

In 2009, the VSB again initiated disciplinary proceedings against Pollack. The VSB alleged that Pollack had violated RPC 3.4. The Seventh District Subcommittee of the VSB, concluding that Pollack had indeed violated RPC 3.4, "unanimously approved an Agreed Disposition in the . . . matter." Consistent with the terms of his agreement with the VSB, Pollack agreed to a public reprimand with terms. On October 9, 2009, the VSB confirmed that Pollack had complied with the terms of the agreed disposition and deemed the matter "concluded."

In 2011, the VSB once again initiated disciplinary proceedings against Pollack, alleging that he violated RPC 1.8(a) and RPC 1.8(j). In 2012, the Seventh District Subcommittee of the VSB concluded that Pollack had violated both RPC 1.8(a) and RPC 1.8(j) but decided to "offer [Pollack] an opportunity to comply with certain terms and conditions, compliance with which will be a predicate for the disposition of a PRIVATE Reprimand with Terms of this complaint." Pollack complied with the proposed terms and conditions, and, on March 28, 2013, the VSB informed Pollack that the matter had been "concluded."

B. Present disciplinary proceeding

In 2020, the VSB began investigating complaints filed against Pollack by three of his former clients (individually referred to as "W.J.," "B.K.," and "R.T."). Upon conclusion of the investigations, the Seventh District Subcommittee of the VSB (the "Subcommittee") met on August 20, 2021 and considered the matters.

On September 22, 2021, the Subcommittee served its Subcommittee Determination (the "Certification") on Pollack via certified mail. The Certification included the factual allegations against Pollack in the W.J., B.K., and R.T. matters, a specification of the nature of misconduct implicated thereby, and the Subcommittee Chair's signature certifying the matters to the VSB Disciplinary Board.

All three matters involved allegations that Pollack had mishandled client funds. Regarding W.J., the Subcommittee alleged that Pollack accepted a total of $6,000 to represent W.J. in a criminal matter but did not keep adequate records of W.J.'s payments or deposit those

payments into his trust account to be kept until Pollack had earned the fees. Similarly, the Subcommittee alleged that Pollack did not deposit R.T.'s payment for criminal representation into his trust account to be held until Pollack had earned the fees. In the B.K. matter, the Subcommittee alleged that B.K. paid Pollack a $10,000 advance fee plus additional fees to represent her in a divorce proceeding, but Pollack did not deposit any of the funds into his trust account to be held until he had earned the fees.

When the Subcommittee sent Pollack the Certification, the Subcommittee Chair also notified Pollack that he had 21 days to file an answer or an answer with a "demand that further proceedings be conducted before a three-judge panel in accordance with Virginia Code Section 54.1-3935[.]" Pollack timely filed an answer, including a demand for further proceedings to be conducted before a three-judge panel.

Accordingly, pursuant to Code § 54.1-3935, the VSB filed a complaint in the Circuit Court of Shenandoah County requesting that the court assume jurisdiction over the matter and issue a rule against Pollack to show cause why he should not be disciplined. The Rule to Show Cause was filed on November 1, 2021 and certified to then Chief Justice Lemons. Consistent with the provisions of Code § 54.1-3935, Chief Justice Lemons designated three judges from other circuit courts to preside over the disciplinary proceeding. The Honorable Edward K. Stein of the 25th Judicial Circuit, the Honorable James A. Willett of the 31st Judicial Circuit, and the Honorable Penney S. Azcarate of the 19th Judicial Circuit were designated as the three-judge circuit court, and Judge Azcarate was selected as the chief judge of the panel. The matter was set for trial for February 3 and 4, 2022.

Prior to the hearing, Pollack filed a series of motions with the circuit court. On November 3, 2021, he filed a motion to recall the circuit court's rule to show cause, which the circuit court denied on November 30, 2021. In December 2021, Pollack filed a motion to dismiss, a motion for sanctions, and a motion for referral to dispute resolution or mediation, each being denied on December 28, 2021 by Chief Judge Designate Azcarate "with leave to [Pollack] to request the Three-Judge Circuit Court to take these [m]otions up at" trial. In January 2022, Pollack filed a motion to recognize invalidity or staleness of respondent's 2005 two-year suspension, arguing that his 2005 suspension was "null and void, or, considering the totality of the circumstances, it should not be considered." The circuit court did not rule on this motion before trial. Pollack also emailed a motion to dissolve three-judge circuit court to the VSB on

January 20, 2022, but apparently did not file the motion with the circuit court.[3] Upon Pollack's motion, the trial date was continued until June 30, 2022.

On June 30, 2022, the circuit court heard arguments on the rule to show cause issued against Pollack. The hearing began with the parties stipulating to a number of facts. Regarding the W.J. matter, the parties stipulated that, "[d]uring the investigation, [Pollack] cooperated fully and admitted that he did not keep the records required by Rule 1.15 of the Virginia Rules of Professional Conduct and otherwise did not to [sic] keep his trust account in accordance with the requirements of Rule 1.15 of the Virginia Rules of Professional Conduct." Regarding the B.K. matter, the parties stipulated that, "[d]uring the investigation, [Pollack] cooperated fully and admitted that he did not keep his trust account in accordance with requirements of Rule 1.15 of the Virginia Rules of Professional Conduct." Regarding the R.T. matter, the parties stipulated that, "[d]uring the investigation, [Pollack] cooperated fully and admitted that he did not keep his trust account in accordance with requirements of Rule 1.15 of the Virginia Rules of Professional Conduct."

The VSB then called five witnesses, including Pollack, proffered the testimony of another, and moved 26 exhibits into evidence without objection. At the close of the VSB's case, Pollack moved to strike all alleged rule violations to which he had not stipulated. The circuit court granted Pollack's motion to strike regarding the allegations that he had violated RPC 1.3(a) and RPC 1.5(a)(4) in his representation of W.J. and the allegations that he had violated RPC 1.3(a) and RPC 1.4(a) & (b) in his representation of R.T. The circuit court denied Pollack's motion to strike regarding the remaining allegations.

Pollack then presented his case in chief, testifying in his own behalf but calling no other witnesses and introducing no additional exhibits into evidence. Once Pollack rested, the parties made closing statements, and the circuit court rendered its findings regarding the allegations of misconduct.

Regarding Pollack's representation of W.J., the circuit court found by "clear and convincing evidence[,]" that Pollack had violated RPC "1.15(b)(3) and (5)"; RPC "1.15(c)(1)-

[3] In an August 22, 2022 motion, Pollack attached a drafted, but unfiled, motion to strike as an exhibit. Within this exhibit, Pollack stated that "[a]lthough [I] sent the [m]otion to [d]issolve three judge court to [the VSB], it is not filed with the Court below according to the Judicial Information System."

(4)"; RPC "1.15(d)(1)-(4)"; RPC "1.15(a)(1)"; RPC "1.15(b)(3)-(5)"; RPC "1.15(c)(1)-(4)"; RPC "1.15(d)(1)-(4)"; and RPC "1.16(d)." Furthermore, the circuit court found that W.J. had "terminated [Pollack's representation] in August of 2020, and [Pollack] waited almost two years to return any fees that [Pollack] did not earn." The circuit court also found that Pollack's "actions in this regard create[d] a harm or potential harm to his client, the [B]ar, and the public."

Regarding Pollack's representation of B.K., the circuit court found by "clear and convincing evidence[,]" that Pollack had violated RPC "1.15(a)(1)"; RPC "1.15(b)(3) and (5)"; RPC 1.15(c)(1)-(4)"; and RPC "1.15(d)(1)-(4)." The circuit court further found that Pollack's testimony regarding the fees in his representation of B.K. was not credible.

Regarding Pollack's representation of R.T., the circuit court found by "clear and convincing evidence[,]" that Pollack had violated RPC "1.15(a)(1)"; RPC "1.15(b)(3) and (5)"; RPC "1.15(c)(1)-(4)"; and RPC "1.15 (d)(1)-(4)."

Having found that Pollack had committed multiple acts of misconduct, the circuit court "proceeded to the sanctions phase of the proceeding." The VSB then introduced multiple exhibits into evidence, including Pollack's prior disciplinary record. Pollack did not object to the introduction of the exhibits. Pollack sought to move several exhibits into evidence, and the VSB objected. The circuit court overruled the VSB's objections and admitted the challenged exhibits, which included character references from Pollack's friends, associates, and clients. Pollack testified in his own behalf, and the VSB called one witness in rebuttal.

After deliberation, the circuit court reconvened on July 1, 2022 and announced its decision on the record. The circuit court suspended Pollack's license to practice law for six months.[4] In addition to the license suspension, the circuit court imposed conditions upon Pollack if he sought to practice after the period of suspension had run. Specifically, Pollack was ordered to "retain a certified public account[ant] licensed in the Commonwealth of Virginia who shall issue a report every six months for a one-year period . . . to the Office of Bar Counsel certifying that his trust account is in compliance with Rule 1.15 of the Virginia Rules of Professional

[4] In post-trial proceedings, Pollack moved this Court to stay his suspension during pendency of his appeal to this Court. By order entered on August 15, 2022, we granted Pollack's "motion" and stayed "the August 9, 2022 order of suspension . . . until further order of this Court." Accordingly, Pollack has yet to serve any portion of the suspension imposed by the circuit court.

Conduct" once he resumed the practice of law after the suspension. The circuit court memorialized its rulings in a Summary Order dated July 1, 2022 and in a Final Judgment Memorandum Order entered on August 9, 2022. Pollack noted his objections to the judgment on the Final Judgment Memorandum Order.

On August 8, 2022, Pollack filed a motion for remote hearing, asking the circuit court to hold a remote hearing to rule on his December 2021 motion to dismiss[5] and his motion to recognize invalidity of respondent's 2005 two-year suspension. The circuit court entered an order the next day denying the motions.

On August 22 and 25, 2022, Pollack filed additional post-trial motions seeking to have the circuit court revisit its ruling on his motion to strike and to dismiss the proceeding in its entirety among other matters. On August 30, 2022, the circuit court entered an order denying Pollack's post-trial motions.

Pollack timely exercised his right to appeal the judgment to this Court. He advances 18 assignments of error, ranging from collateral attacks on his 2005 suspension to procedural attacks on the conduct of the proceedings in this case to challenging the punishment imposed. The VSB responds by asserting that the errors alleged by Pollack are procedurally defaulted, waived, utterly without merit, or some combination of the three.

II. ANALYSIS

A. Standard of review

Because the VSB prevailed in the proceeding below, we view the evidence in the light most favorable to it, granting it all reasonable inferences that can be drawn from such a view of the evidence. *Green v. Virginia State Bar*, 278 Va. 162, 171 (2009). Viewing the evidence in that light, "we conduct an independent examination of the entire record pertaining to the charge before us." *Pilli v. Virginia State Bar*, 269 Va. 391, 396 (2005). Although we do not accord the circuit court's factual determinations the same deference we grant to a jury's verdict, we "view [its] findings as prima facie correct" and "will sustain those conclusions unless it appears that they are not justified by a reasonable view of the evidence or are contrary to law." *Id*. To the extent that resolution of Pollack's appeal involves the interpretation of statutes or the Rules of

[5] As noted above, the chief judge of the panel had provisionally denied the motion with leave for Pollack to raise it at trial before the full circuit court. Despite this, Pollack did not raise the issues at trial.

this Court, it poses questions of law that we review de novo. *LaCava v. Commonwealth*, 283 Va. 465, 470-71 (2012). In contrast, questions regarding the sanction are committed to the discretion of the circuit court, and thus, our review applies a more deferential abuse of discretion standard. *Morrissey v. Virginia State Bar ex rel. Third Dist. Comm.*, 260 Va. 472, 479 (2000).

B. Collateral attack on 2005 suspension

In seven of his 18 assignments of error, Pollack contends that the circuit court "erred by considering" his 2005 suspension during the sanctions phase of the proceedings below. He claims that the members of the three-judge circuit court that imposed the 2005 suspension were ineligible to serve and that the three-judge circuit court erred in conducting the hearing in Arlington County. Furthermore, he contends that there were procedural irregularities before and during those proceedings that render his 2005 suspension void.

Apparently recognizing that the appropriate time to raise such challenges to that proceeding was prior to it being rendered final by our dismissal of his appeal more than a decade ago, Pollack argues that at least some of the defects he alleges regarding the proceedings leading to his 2005 suspension deprived the three-judge circuit court that imposed the suspension of subject matter jurisdiction. We disagree.

Subject matter jurisdiction "refers to a court's power to adjudicate a class of cases or controversies[.]" *Cilwa v. Commonwealth*, 298 Va. 259, 266 (2019) (quoting *In re Commonwealth*, 278 Va. 1, 11 (2009)). It "is the authority granted through constitution or statute to adjudicate a class of cases or controversies[.]" *Morrison v. Bestler*, 239 Va. 166, 169 (1990). Subject matter jurisdiction "can only be acquired by virtue of the Constitution or of some statute." *Pure Presbyterian Church of Washington v. Grace of God Presbyterian Church*, 296 Va. 42, 49 (2018). Absent subject matter jurisdiction, a "court cannot proceed at all in any cause," *id*. at 50 (quoting *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)), and thus, other than orders declaring that a court lacks subject matter jurisdiction, any other order issued by a court that lacks subject matter jurisdiction "is null and void[,]" *id*. (quoting *Morrison*, 239 Va. at 170), and is therefore "no order at all." *Cilwa*, 298 Va. at 266. Because a court order entered in the absence of subject matter jurisdiction is void from the time of its entry, it "may be impeached directly or collaterally[,]" *Singh v. Mooney*, 261 Va. 48, 52 (2001), and ordinary rules prohibiting collateral attacks on prior judgments do not apply so long as they are raised "in a valid direct or collateral proceeding where the voidness of the order is properly at issue." *Bonanno v. Quinn*,

299 Va. 722, 736-37 (2021).

In this way, subject matter jurisdiction is distinct from the concept of active jurisdiction. "'[A]ctive jurisdiction' – pragmatically called the 'jurisdiction to err' – involves not the power of the court but the proper exercise of its authority[.]" *Cilwa*, 298 Va. at 266 (footnote omitted) (quoting *Farant Inv. Corp. v. Francis*, 138 Va. 417, 427 (1924)). To have active jurisdiction, a court must possess not only subject matter jurisdiction, but also

> territorial jurisdiction, that is, authority over persons, things, or occurrences located in a defined geographic area; notice jurisdiction, or effective notice to a party or if the proceeding is *in rem* seizure of a *res*; and the other conditions of fact must exist which are demanded . . . as the prerequisites of the authority of the court to proceed to judgment or decree.

Pure Presbyterian, 296 Va. at 49 (internal quotation marks omitted) (quoting *Morrison*, 239 Va. at 169). Unlike subject matter jurisdiction, these other aspects of active jurisdiction are subject to waiver. *Cilwa*, 298 Va. at 270. Accordingly, such challenges to a tribunal's authority must be raised in the case itself and cannot be used to attack a final judgment collaterally. Thus, the viability of Pollack's arguments on the consideration of his 2005 suspension turns on whether he has correctly characterized them as a challenge to the subject matter jurisdiction. He has not.

As noted above, a tribunal enjoys subject matter jurisdiction when it has "authority granted through constitution or statute to adjudicate a class of cases or controversies[.]" *Morrison*, 239 Va. at 169. Subject to appeals to this Court, the power to adjudicate attorney discipline cases, by both statute and rule, lies with the VSB Disciplinary Board or, upon request of a party, a three-judge circuit court. *See Green*, 278 Va. at 175-76; Code § 54.1-3935. The record reflects that, in the proceeding that led to his 2005 suspension, Pollack requested a three-judge circuit court pursuant to Code § 54.1-3935, and thus, it was the tribunal empowered by statute to hear his claims. As a result, it had subject matter jurisdiction.

Pollack's claims that the panel was improperly constituted or proceeded inappropriately do not change this basic fact. In fact, we previously rejected a similar claim in *Green*. In a proceeding before the Disciplinary Board, Green argued that his prior disciplinary record could not be considered because the district subcommittee that had imposed the prior discipline had been improperly constituted. *Green*, 278 Va. at 174. From this premise, Green argued that the district subcommittee was stripped of subject matter jurisdiction, rendering his prior disciplinary

record void *ab initio*. *Id*. We rejected the argument, holding that "[i]ssues regarding the composition of Board subcommittees do not divest the Bar of [subject matter] jurisdiction. Objections to such composition are therefore waived if not timely made." *Id*. at 175-76.

Applying this reasoning here, Pollack's challenges to the composition and conduct of the three-judge circuit court that imposed his 2005 suspension were required to be raised during that proceeding. Once that proceeding was rendered final by our dismissal of Pollack's appeal of that matter, any such challenges ceased to be viable. Accordingly, the circuit court in this case did not err in considering Pollack's 2005 suspension during the sanctions phase of the proceeding below.

C. Jury trial

Pollack contends that, pursuant to both the United States and Virginia Constitutions, he was entitled to a jury trial to determine whether he had committed misconduct, and thus, "the . . . [c]ircuit [c]ourt erred by denying [him] a jury trial." The record, however, demonstrates that Pollack failed to timely request the circuit court to empanel a jury or otherwise argue that he was entitled to a jury in this proceeding.[6] His failure to do so precludes appellate consideration of his argument.

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[6] In his opening brief, Pollack tacitly concedes that he did not raise the argument with the circuit court in this case. In identifying where the argument allegedly was preserved, he identifies a January 2022 motion as the place where he preserved this argument in the circuit court. That motion, entitled "Motion to Recognize Invalidity or Staleness of Respondent's 2005 Two-year Suspension," did not request that the circuit court empanel a jury to hear this case. Rather, it contended that the circuit court should not consider his 2005 suspension because he "was denied the right to a trial by jury in the matter that resulted in the [t]wo-[y]ear [s]uspension." An argument that he was denied a jury trial in another proceeding does not represent a jury trial demand in this case or otherwise equate to an objection to no jury being empaneled in this case.

We note that a jury demand is set out in another January 2022 motion, entitled "Motion to Dissolve Three-Judge Circuit Court," that Pollack sent to counsel for the VSB. Pollack, however, conceded in another pleading that "[a]lthough [I] sent the [m]otion to [d]issolve [t]hree [j]udge [c]ourt to [the VSB], it is not filed with the [c]ourt below according to the Judicial Information System." Because that motion was not filed, it provides no basis for appellate review.

To the extent that Pollack made a jury demand in a post-trial motion, it was untimely. A litigant cannot wait until after a proceeding has concluded in an unfavorable manner to assert that he is entitled to a jury trial.

Rule 5:25, often referred to as the contemporaneous objection rule, provides that "[n]o ruling of the trial court, disciplinary board, commission, or other tribunal before which the case was initially heard will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling[.]" Consistent with the rule, a litigant, to preserve an issue for appellate review, must timely raise a specific argument with the trial court, obtain a ruling on that argument, and make clear to the trial court that the litigant objects to the ruling. By not timely raising the issue with the circuit court, Pollack not only failed to object to a ruling, he failed to obtain a ruling to which he could object. *See Hawkins v. Town of S. Hill*, 301 Va. ___, ___, 878 S.E.2d 408, 417 (2022) (noting that a failure of a litigant to obtain a ruling on an argument in the proceedings below leaves us with "no ruling to address on appeal"). Accordingly, we do not consider this assignment of error.

D. Composition of the circuit court

Pollack argues that the circuit court's judgment must be reversed because the three-judge panel was "composed of no local judges," which he claims violates the Virginia Constitution. Once again, the record demonstrates that Pollack failed to timely raise this alleged defect with the circuit court.[7] His failure to do so precludes appellate consideration of his argument. *See* Rule 5:25; *Hawkins*, 301 Va. at ___, 878 S.E.2d at 417.

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[7] In his opening brief, Pollack again tacitly concedes that he did not raise this issue with the circuit court. In identifying where this argument allegedly was preserved, he identifies his January 2022 "Motion to Recognize Invalidity or Staleness of Respondent's 2005 Two-year Suspension" and emails he exchanged with then Chief Justice Lemons after the Chief Justice, consistent with his duties pursuant to Code § 54.1-3935, appointed the panel. As before, the motion made no argument or objection regarding the composition of the three-judge court in the instant case, but rather, sought to prevent the circuit court from considering the results of a prior case because of the manner in which that three-judge court was composed. An argument that another panel in another proceeding was improperly constituted does not constitute an objection to the composition of the panel in this case or otherwise equate to an objection to the panel proceeding in this case. Regarding his emails with the former Chief Justice, it should go without saying that communications with a judge or justice of a different court, including this one, are insufficient to raise an objection with the three-judge court on this case. Consistent with Rule 5:25, a litigant is required to raise the specific argument with the tribunal hearing his case, not some other judicial officer.

We also note that, much like his jury trial contention, Pollack raised this argument in another January 2022 motion, entitled "Motion to Dissolve Three-Judge Circuit Court," that Pollack sent to counsel for the VSB. As noted above, Pollack has conceded that, although he sent a copy of the motion to the VSB, he never filed this motion. Because that motion was not filed, it provides no basis for appellate review.

E. Proceedings before the Subcommittee

In four assignments of error, Pollack contends that there were procedural irregularities in the proceedings before the Subcommittee that require reversal of the judgment below. Reviewing the record in the light most favorable to the VSB, it is apparent that Pollack's contentions in this regard are not well grounded in fact, lack legal merit, or both.

1. No action by the Seventh District Committee

Pollack alleges impropriety in that the charging documents in this case were issued as a result of actions taken by the Subcommittee as opposed to the full Seventh District Committee of the VSB. He contends that such actions by a district subcommittee as opposed to a full district committee are invalid, and thus, the proceedings against him also were invalid. His position cannot be reconciled with the express text of the rules governing lawyer disciplinary proceedings.

Part 6, § IV, ¶ 13 of the Rules sets out how lawyer disciplinary matters are to proceed. It provides for the creation of district committees and subcommittees to conduct disciplinary proceedings. *Id.* ¶¶ 13-4, -7, -15, -16. Of particular significance, and fatal to Pollack's argument, "District Committee" expressly is defined as "one of the District Committees appointed as hereinafter provided or, where the context requires, a Panel, a Section, or a *Subcommittee* thereof." *Id.* ¶ 13-1 (emphasis added). In turn, the rules authorize a subcommittee to conduct the proceedings that the Subcommittee conducted in this case. *Id.* ¶ 13-15. Because the Rules authorize the Subcommittee to take all of the actions it took in this case, Pollack's argument that the proceedings were improperly initiated fails.

2. Subcommittee Certification

In three assignments of error, Pollack contends that reversal is required because the VSB "fail[ed] . . . to comply with Part 6, Sec. IV, Par 13-15.B.3 of the Rules of the Supreme Court of Virginia" in that the Subcommittee allegedly failed to properly certify the allegations of misconduct against Pollack. A review of the record demonstrates that Pollack's allegations in this regard are baseless.

To the extent that Pollack challenged the composition of the panel in a post-trial motion, it was untimely. Absent unusual circumstances not present here, a litigant cannot wait until after a proceeding has concluded in an unfavorable manner to assert that a panel is improperly constituted.

Pursuant to the Rules, a "certification" is "the document issued by a Subcommittee or a District Committee when it has elected to certify allegations of Misconduct to the Board for its consideration, which document shall include sufficient facts to reasonably notify Bar Counsel and Respondent of the basis for such Certification and the Disciplinary Rules alleged to have been violated." *Id.* ¶ 13-1. Pursuant to Part 6, § IV, ¶ 13-15(B)(3) of the Rules of Court, a district subcommittee, upon forming "a reasonable belief that the Respondent has engaged or is engaging in Misconduct that, if proved, would justify a Suspension or Revocation[,]" is charged with issuing a certification or filing a complaint regarding the allegations of misconduct in a circuit court. The record reflects that the Subcommittee did so in this case, producing a 17-page, single-spaced certification detailing the allegations of misconduct against Pollack, specifying the facts giving rise to the allegations of misconduct, and listing the RPCs that Pollack allegedly violated. The detailed Certification produced by the Subcommittee was more than sufficient to provide Pollack with notice of the allegations against him, which is the purpose of a certification pursuant to Part 6, § IV, ¶ 13-15(B)(3). *See Baumann v. Virginia State Bar*, 299 Va. 80, 90 (2020); *Pappas v. Virginia State Bar*, 271 Va. 580, 587 (2006).

Despite this, Pollack argues the Certification is somehow invalid. First, he notes that the Subcommittee met on August 20, 2021, but that the Certification was not signed by the chairman of the Subcommittee until a later date. He contends this demonstrates that the Subcommittee did not appropriately consider the Certification, suggesting that the Certification was drafted by VSB counsel without input from the Subcommittee. He cites no authority for his position and offers no evidence to even suggest that the Certification does not accurately reflect the actions taken by the Subcommittee. The pertinent rules do not require that a certification be signed on the day a subcommittee meets, and we will not impose such a requirement. Furthermore, in the absence of any evidence to the contrary, we apply the presumption of regularity, and thus, conclude that the Certification signed by the Subcommittee chairman accurately reflects the actions of the Subcommittee.

Pollack next challenges the Certification on the grounds that the written complaints from his clients are not contained in the Certification and the Certification addresses specific rules that are not set forth in the complaints made by his clients. Once again, none of the pertinent rules require the Subcommittee to include the written complaints of a lawyer's clients in the Certification. Similarly, no pertinent rule requires that, once an investigation is initiated, its

scope is limited to the allegations of a client. Neither the VSB nor the Subcommittee is required to turn a blind eye to additional attorney misconduct discovered while reviewing complaints filed by clients. *See Motley v. Virginia State Bar*, 260 Va. 251, 259-60 (2000).

Ultimately, Pollack's challenge to the Certification fails because the actions he contends are procedural defects violate no applicable rule or procedure.

F. Ruling on Pollack's motion to dismiss

Pollack next asserts that the circuit court committed reversible error regarding the motion to dismiss he filed in December 2021. He asserts that the "[c]ircuit [c]ourt erred by allowing the Chief Judge alone to rule on the [m]otion to [d]ismiss[,]" and that this requires reversal of the judgment below. Even assuming that Pollack's factual assertion is correct, it does not provide a basis for reversing the judgment of the circuit court.

As noted above, Pollack filed a motion to dismiss in December 2021 and, in an order entered by the chief judge of the panel, the motion was denied. The denial of the motion, however, was, by its own terms, not the end of the matter. The denial order expressly granted Pollack "leave . . . to request the Three-Judge Circuit Court to take the[] [m]otion[] up at" trial. For whatever reason, when presented the opportunity to raise the motion to all three members of the circuit court in person, Pollack chose not to do so. As a result, he likely waived any arguments raised in the motion. *See Graham v. Cook*, 278 Va. 233, 248 (2009) ("A party will be held to have waived a timely objection if the record affirmatively shows that he has abandoned the objection or has shown by his conduct the intent to abandon that objection.").

Even if we assume Pollack's silence at trial did not waive the argument, that the record supports the contention that the denial of the motion pretrial and again post-trial represented the actions of the chief judge alone, and that the denial of the motion by the chief judge alone was error, Pollack still is not entitled to reversal. Even if all of the foregoing were true, any error in the chief judge denying the motion was harmless. *See* Code § 8.01-678 (requiring harmless error review in all cases). The arguments raised in Pollack's motion to dismiss deal with what he alleges were procedural irregularities in the proceedings before the Subcommittee and are the same arguments we have rejected as meritless on this appeal. *See* discussion *supra* Section II(E). Because the arguments raised in the motion to dismiss are meritless, the alleged actions of the chief judge, to the extent that they constitute error, are at most harmless.

G. Failure to timely return unearned fees to W.J.

In two assignments of error, Pollack asserts that the circuit court erred in finding that he violated RPC 1.16(d) related to his failure to timely return the unearned portion of the advance fees W.J. had paid him. He asserts that the attempts he and his counsel made to resolve the fee dispute with W.J. insulated him from a finding of misconduct and that "there was no clear and convincing evidence of actual or even potential harm to his client, the [VSB], or the public in Pollack's delay in refunding" the unearned portion of the fees paid by W.J. We disagree.

RPC 1.16(d) provides that

> [u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, refunding any advance payment of fee that has not been earned and handling records as indicated in paragraph (e).

In this case, there is no question that W.J. advanced fees to Pollack, terminated Pollack's representation, and requested that Pollack return the unearned portion of the advanced fees. Although Pollack notes that there was a dispute as to how much of the advanced fees were unearned, it also is undisputed that at least some portion of the advanced fees were unearned and that, despite Rule 1.16(d) and W.J.'s requests, Pollack did not return any portion of the advanced fees to W.J. when requested, but rather, retained the unearned portion of the fees for nearly two years, only returning it on the eve of his trial for misconduct.

Given these facts, the circuit court did not err in concluding that Pollack violated Rule 1.16(d). Pollack conceded at trial that approximately half of the advanced fees paid by W.J. were unearned at the time his representation was terminated. Thus, at a minimum, Rule 1.16(d) required Pollack to return the portion of the advanced fees that even he acknowledges was unearned when the representation was terminated. He did not do so despite W.J.'s request, holding those funds for nearly two years. It is hard to imagine a starker violation of RPC 1.16(d).

Pollack's second argument—that there was no evidence that his violation of RPC 1.16(d) either caused harm or had the potential to cause harm—fares no better. The undisputed evidence is that, in violation of RPC 1.16(d), Pollack deprived W.J. of his money for a period of nearly two years. At a minimum, Pollack denied W.J. the time value of his money, depriving him of its

use and the benefits of any use to which he may have put it. *Cf. Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826, 829 (7th Cir. 2018) (recognizing that the loss of the time value of money constitutes a legally cognizable harm). Thus, the evidence is sufficient to establish not only a potential of harm from Pollack's violation of RPC 1.16(d), but that his violation caused actual harm. Accordingly, the circuit court did not err in concluding that Pollack violated RPC 1.16(d).

H. Sanction imposed

In his last two assignments of error, Pollack challenges the sanction imposed by the circuit court. Specifically, he asserts that the "[c]ircuit [c]ourt erred by imposing a [s]ix [m]onth [s]uspension[.]" He argues that the circuit court only reached its conclusion by "according improper weight to prior discipline" and that the suspension is "contrary to the evidence and the reasonable exercise of appropriate discretion."

Pollack has waived his contention that the circuit court gave improper weight to his prior disciplinary history by failing to include any supporting argument in his opening brief. Other than including it as an assignment of error, Pollack's opening brief contains no argument or authority to support the proposition that, in fashioning a sanction, the circuit court gave improper weight to his lengthy disciplinary record. Accordingly, we will not consider this argument on appeal. *See* Rule 5:27(d); *Norfolk S. Ry. Co. v. Sumner*, 297 Va. 35, 43 (2019).

His argument that a six-month suspension is contrary to the evidence and represents an abuse of discretion fares no better. As we previously have stated, "[t]he penalty imposed by a three-judge court in a disciplinary proceeding is viewed on appeal as prima facie correct, and it will not be disturbed unless, upon our independent examination of the whole record, we conclude that the court abused its discretion." *Morrissey*, 260 Va. at 479.

A review of the entire record reveals that, whatever the outer limit of reasonable punishment for Pollack's multiple violations of the RPC that subjected him to discipline in this case, the circuit court's imposition of just a six-month suspension falls well within that limit. The violations in this case stem from multiple failures by Pollack to properly manage his trust account and handle client funds. Such failures constitute significant misconduct that, standing alone, can justify significant discipline, including a suspension.

Here, the violations do not stand alone, but are considered in conjunction with Pollack's disciplinary record. Beginning in 1999, the VSB has initiated disciplinary proceedings against Pollack on at least five occasions. On each occasion, Pollack has either admitted violations of

the rules, been found by the pertinent authority to have violated the rules, or a combination of the two. Those five disciplinary proceedings established that Pollack has committed numerous violations of the rules over time with some of the violations being significant enough to warrant a two-year suspension of Pollack's license to practice law. In addition, like the violations in the instant case, the 1999 proceeding found that Pollack had violated rules regarding accounting for and handling client fees, meaning he was not simply a repeat violator of the rules, but was a repeat violator of rules designed to safeguard client fees and funds.

Taken as a whole, the record is more than sufficient to support the imposition of significant discipline, including a suspension. Accordingly, the circuit court did not err in suspending Pollack's law license and its judgment in this regard is affirmed.

III. CONCLUSION

For the foregoing reasons, the judgment of the circuit court is affirmed.[8]

This order shall be certified to the Circuit Court of Shenandoah County.

A Copy,

Teste:

Clerk

[8] Previously, we stayed execution of the imposition of the circuit court's suspension of Pollack's license to practice law. Today, we lift the stay, but do not immediately impose the period of suspension. Rather, we remand the matter to the circuit court with instruction to enter an order, after notice to Pollack, fixing the effective date of Pollack's suspension and the date Pollack shall comply with the provisions of Part 6, § IV, ¶ 13-29 of the Rules of Court.