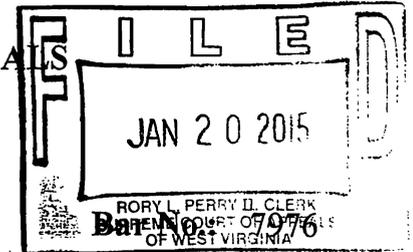


BEFORE THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA



**In Re:** DAVID S. HART, a member of  
The West Virginia State Bar

**Supreme Court No.:** 13-0748  
**I.D. Nos.:** 11-01-496, 12-01-111, 12-01-421  
12-01-485, 12-01-498, 12-01-500  
**Supreme Court No.:** 14-0349  
**I.D. No.:** 14-01-037

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**REPORT OF THE HEARING PANEL SUBCOMMITTEE**

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**I. PROCEDURAL HISTORY**

Office of Disciplinary Counsel filed formal charges against Respondent David S. Hart with the Clerk of the Supreme Court of Appeals on or about July 30, 2013, and served the charges upon Respondent via certified mail by the Clerk on August 1, 2013. Office of Disciplinary Counsel filed her mandatory discovery on or about August 21, 2013.

Because Respondent failed to file an answer to the Statement of Charges, and also failed to provide his mandatory discovery, Office of Disciplinary Counsel filed “Disciplinary Counsel’s Motion to Deem Admitted the Factual Allegations in the Statement of Charges” and “Motion to Exclude Testimony of Witnesses and Documentary Evidence or Testimony of Mitigating Factors” on October 17, 2013. At the prehearing on November 4, 2013, Respondent stated that he wanted to enter into stipulations with Office of Disciplinary Counsel, and also stated that he wanted to file an answer to the charges. The Hearing Panel Subcommittee gave Respondent until the end

of the business day on November 5, 2013 to file an answer and held in abeyance any ruling on Office of Disciplinary Counsel's motions. The evidentiary hearing date of November 13, 2013 was confirmed by all parties.

Respondent filed an answer to the Statement of Charges on November 5, 2013. In the afternoon of November 12, 2013, Respondent filed "Respondent's Motion to Continue Hearing," stating that he believed his malpractice insurance carrier would pay for representation in the disciplinary matter. On November 12, 2013, the Hearing Panel Subcommittee advised the parties that the continuance would be granted. A telephonic status conference was held on November 13, 2013. At the status conference, Respondent agreed to waive the time requested for holding an evidentiary hearing. The Hearing Panel Subcommittee set new prehearing and hearing dates, and denied "Disciplinary Counsel's Motion to Deem Admitted the Factual Allegations in the Statement of Charges" and "Motion to Exclude Testimony of Witnesses and Documentary Evidence or Testimony of Mitigating Factors." The Hearing Panel Subcommittee directed Respondent to provide his discovery to the Office of Disciplinary Counsel on or before December 13, 2013.

Because Respondent again failed to provide any discovery, Office of Disciplinary Counsel filed "Disciplinary Counsel's Renewed Motion to Exclude Testimony of Witnesses and Documentary Evidence or Testimony of Mitigating Factors" on December 18, 2013. At the January 2, 2014 telephonic prehearing, the Hearing Panel Subcommittee granted Office of Disciplinary Counsel's motion. The evidentiary hearing

date of January 23, 2014 was confirmed by all parties at the prehearing.

At approximately 5:00 p.m. on January 22, 2014, Respondent filed a second motion to continue the matter. The Hearing Panel Subcommittee convened the scheduled hearing at 10:00 a.m. on January 23, 2014, and addressed Respondent's motion at the commencement of the hearing. The Hearing Panel Subcommittee found that Respondent had not shown good cause to continue the matter. Therefore, the Hearing Panel Subcommittee denied Respondent's motion, and the hearing proceeded as scheduled.

The Hearing Panel Subcommittee was comprised of Richard M. Yurko, Jr., Esquire, Chairperson; John W. Cooper, Esquire, and Dr. K. Edward Grose, layperson. Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. Respondent appeared *pro se*. The Hearing Panel Subcommittee heard testimony from Duane Hammock, Orban Schlatman, Jr., Greta Walker, Edward Banks, Casey M. Johnson, Tony R. Henderson, Jr., and Respondent. In addition, ODC Exhibits 1-67 were admitted into evidence.

After the hearing, and before the Hearing Panel Subcommittee filed its report, Office of Disciplinary Counsel filed additional formal charges against Respondent with the Clerk of the Supreme Court of Appeals on or about April 11, 2014, and served the charges upon Respondent via certified mail by the Clerk on April 15, 2014. Respondent agreed to consolidate these new charges with the previous charges for consideration by the Hearing Panel Subcommittee. Disciplinary Counsel filed her mandatory discovery on

or about April 28, 2014. Respondent filed his Answer to the Statement of Charges on or about May 19, 2014. Respondent failed to provide his mandatory discovery, which was due on or before May 28, 2014. Office of Disciplinary Counsel then filed a Motion to Exclude Testimony of Witnesses And/or Documentary Evidence or Testimony of Mitigating Factors on July 7, 2014. The Hearing Panel Subcommittee granted this motion at the telephonic prehearing held on July 18, 2014.

The hearing on these charges was initially scheduled for August 1, 2014, in Charleston, West Virginia. On July 31, 2014, Respondent filed a motion to continue the matter based on illness. The Hearing Panel Subcommittee granted the motion, and the hearing was subsequently rescheduled for September 18, 2014.

Thereafter, this matter proceeded to hearing in Charleston, West Virginia, on September 18, 2014. The Hearing Panel Subcommittee was comprised of Richard M. Yurko, Esquire, Chairperson; John W. Cooper, Esquire, and Dr. K. Edward Grose, Layperson. Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. Respondent appeared *pro se*. The Hearing Panel Subcommittee heard testimony from Martin Durham and Respondent. In addition, ODC Exhibits 1-5 were admitted into evidence.

At the conclusion of each hearing, the Hearing Panel Subcommittee directed the parties to file proposed findings of fact and conclusions of law. Office of Disciplinary Counsel filed its proposed findings of fact and conclusions of law after each hearing. Respondent did not file proposed findings of fact and conclusions of law after either

hearing. Based upon the evidence and the record, the Hearing Panel Subcommittee submits the following findings of fact and conclusions of law.

## **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Respondent David S. Hart is a lawyer practicing in Beckley, Raleigh County, West Virginia. Respondent was admitted to The West Virginia State Bar on September 29, 1999, by successful completion of the Bar examination. Respondent is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.

### **I.D. No. 11-01-496 Complaint of Greta J. Walker**

2. Complainant Greta Walker filed a complaint against Respondent on or about October 20, 2011. Complainant retained Respondent to represent her in a divorce case which involved a Qualified Domestic Relations Order (QDRO) regarding a 401(k) account with American Century Investments allegedly held by her ex-husband.
3. A Temporary Order was issued in the divorce case on or about August 27, 2007, prohibiting both parties from making “any withdrawal from any retirement account, 401(k), pension or other such retirement account held by that party and in that party’s name as a result of any period of employment during the parties’ marriage. The [ex-husband] shall specifically be barred from making any additional withdrawal from the 401(k) account held by [the ex-husband] that had

an approximate balance of \$48,200.49 at the time of the parties' separation.

[Complainant] shall cause a copy of the Temporary Order to be mailed to the administrator of the [ex-husband's] 401(k) account to ensure that no further distributions are made from the said account." However, Complainant alleged that Respondent failed to forward the order freezing the account.

4. The Final Order in the matter also stated that Complainant was "entitled to an equitable distribution of the [ex-husband's] 401(k) account, with [Complainant] being entitled to receive an amount equal to one-half of the money or assets held in the 401(k) account at the time of the parties' separation on June 2, 2007. Counsel for the [Complainant] shall be responsible for the preparation of a Qualified Domestic Relations Order necessary for the division of the [ex-husband's] 401(k)." Complainant alleged that Respondent failed to prepare the QDRO, therefore she has been unable to receive her equitable share from the 401(k).
5. Complainant contacted Respondent on numerous occasions to discuss this situation but Respondent did not return her telephone calls. She stated that she has attempted to obtain information about the matter herself, but has repeatedly been told to contact her attorney.
6. By letter dated October 28, 2011, the Office of Disciplinary Counsel sent Respondent a copy of the complaint and directed him to file a response to the ethics complaint within twenty (20) days.
7. After receiving no response, on or about December 7, 2011, the Office of

Disciplinary Counsel sent a second letter by certified and first class mail directing Respondent to file a response by December 20, 2011, and advising him that his failure to do so may result in a subpoena *duces tecum* being issued for his appearance at the Office of Disciplinary Counsel for a sworn statement, or the allegations in the complaint would be deemed admitted and the matter would be referred to the Investigative Panel of the Lawyer Disciplinary Board. This letter was delivered on or about December 8, 2011.

8. On December 22, 2011, Respondent requested an additional ten (10) days to provide his response. Office of Disciplinary Counsel granted the request.
9. On or about January 3, 2012, Respondent provided a verified response to the complaint. Respondent stated that Complainant, not Respondent, was to provide a copy of the Temporary Order to the investment account holder, American Century, in order to advise the investment account holder that the account was frozen. Respondent maintained that Complainant had all of the information regarding the account at that time.
10. After the Final Order was issued, Respondent stated that he attempted to prepare the QDRO, but there were problems. However, Respondent was unable to recall any specific problems and had no notes or correspondence with American Century, but he stated that he would contact American Century in order to obtain information regarding dividing the account and would forward that information upon its receipt.

11. Respondent stated that he had not heard from Complainant for quite some time, but stated that she could have made an appointment with his office to discuss the matter if he was unavailable when she called.
12. On or about March 15, 2012, the Office of Disciplinary Counsel requested a status update from Respondent regarding his progress in completing the QDRO, as well as copies of any correspondence directed to American Century regarding the same.
13. After receiving no response from Respondent, on or about May 22, 2012, the Office of Disciplinary Counsel again requested that Respondent provide a status update and copies of correspondence with American Century via certified mail. Respondent was advised that the request was a lawful demand for information within the meaning of Rule 8.1(b) of the Rules of Professional Conduct. Respondent received this letter on or about May 24, 2012.
14. Office of Disciplinary Counsel issued a subpoena *duces tecum* for Respondent's appearance at the Office of Disciplinary Counsel on August 30, 2012, to give a sworn statement concerning this matter.
15. During his August 30, 2012 sworn statement, Respondent stated that he had informed Complainant that she needed to provide the Temporary Order to the account administrator, because she had the information regarding the account at the time.
16. Respondent said that one of his assistants had been working on this matter and that he believed the assistant had spoken to American Century. But the assistant had

left his employment in March of 2012, and he was unsure if the Temporary Order had actually been sent. Respondent said he believed the assistant had sent a draft of the QDRO to American Century to determine whether the account would be sufficient to divide, but he had not been informed that the money had been removed since the time the Order was entered. Respondent also said that Complainant's file had been located while cleaning out the assistant's office. When he reviewed the file after it was "found," he realized that the QDRO had not been entered. Respondent said that the plan administrators were not cooperating and that this would make the order more difficult to enter. Respondent stated that the QDRO just needed to be submitted to the Court and to the ex-husband's attorney advising of the submission of the QDRO, and that he planned to do that as well as contact Complainant.

17. When questioned about his lack of response to letters from this Office, Respondent admits that "there's no good reason why I didn't [respond]."
18. On or about November 7, 2012, Complainant notified the Office of Disciplinary Counsel that Respondent had submitted the QDRO, but she had also received a letter from American Century stating that there were no investments with the company. Complainant contacted American Century, and was told the account was with JPMorgan Retirement Plan Services. Complainant attempted to contact Respondent, in order to pass along this information, but said she has not been successful in having Respondent return her calls.

19. On or about December 17, 2012, a copy of Complainant's letter was forwarded to Respondent requesting his response within ten (10) days.
20. On or about January 17, 2013, the Office of Disciplinary Counsel again requested Respondent to reply to Complainant's letter via certified mail. Respondent was advised that the request was a lawful demand for information within the meaning of Rule 8.1(b) of the Rules of Professional Conduct. Respondent received this letter on or about January 18, 2013.
21. Respondent did not respond to the letter.
22. Because Respondent failed to act with reasonable diligence by failing to pursue the entry of the QDRO on Complainant's behalf, he has violated Rule 1.3 of the Rules of Professional Conduct, which provides as follows:

**Rule 1.3. Diligence.**

A lawyer shall act with reasonable diligence and promptness in representing a client.

23. Because he failed to keep Complainant reasonably informed about the status of the matter and failed to promptly comply with her reasonable requests for information about her case, Respondent has violated Rule 1.4(a) and Rule 1.4(b) of the Rules of Professional Conduct, which provide as follows:

**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.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

24. Because he failed to comply with the Office of Disciplinary Counsel's lawful requests for information, Respondent has violated Rule 8.1(b) of the Rules of Professional Conduct, which provides as follows:

**Rule 8.1. Bar admission and disciplinary matters.**

[A] lawyer in connection with . . . a disciplinary matter, shall not:

\* \* \*

(b) . . . knowingly fail to respond to a lawful demand for information from . . . disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

**I.D. No. 12-01-111**

**Complaint of Urban H. Schlatman, Jr.**

25. Complainant Urban Schlatman, Jr., hired Respondent in approximately May of 2010 to file an appeal of a criminal conviction. Complainant paid Respondent a retainer fee of Seven Thousand Five Hundred Dollars (\$7,500.00). Complainant alleged that the first appeal Respondent filed was filed too late. Complainant was resentenced on or about October 19, 2011, and on or about November 21, 2011, Respondent filed a Notice of Intent to Appeal. However, as of February 24, 2012, when Complainant filed his complaint, no appeal had been filed with the Supreme Court of Appeals of West Virginia. Complainant stated that he has attempted to call Respondent numerous times, and that his wife, Mrs. Sadie E. Schlatman, also has attempted to call Respondent, but they have had little success in reaching Respondent to discuss the matter. Complainant said that Respondent has told them that the appeal has been filed, however when he or his wife call the Supreme

Court, they are informed that no Appeal has been filed.

26. By letter dated February 27, 2012, the Office of Disciplinary Counsel sent Respondent a copy of the complaint and directed him to file a response within twenty (20) days.
27. After receiving no response, on or about April 13, 2012, the Office of Disciplinary Counsel sent a second letter by certified and first class mail directing Respondent to file a response by April 25, 2012, and advising him that his failure to do so may result in a subpoena *duces tecum* being issued for his appearance at the Office of Disciplinary Counsel for a sworn statement, or the allegations in the complaint would be deemed admitted and the matter would be referred to the Investigative Panel of the Lawyer Disciplinary Board. Respondent received this letter on or about April 17, 2012.
28. On or about May 3, 2012, Respondent provided a verified response. Respondent acknowledged that he missed the first deadline for filing an appeal, and therefore filed a motion with the Supreme Court to extend the time of the petition. Once the Supreme Court remanded the matter back to the Circuit Court, Respondent prepared an Order resentencing Complainant. Respondent then filed a second Notice of Appeal with the Circuit Court. Respondent said he later realized that the Notice should have been filed with the Supreme Court. Respondent stated that he then filed the Notice with the Supreme Court, along with a second Motion to Extend Time. At the time he filed his response, Respondent indicated that he had

not yet received any response from the Supreme Court regarding this matter.

Finally, Respondent stated that he provided Complainant with copies of the filings.

29. Respondent stated that he has spoken with Complainant and Complainant's wife on several occasions.
30. Respondent also offered to keep the Office of Disciplinary Counsel updated on the status of the matter.
31. On or about June 25, 2012, Complainant sent a letter stating that Respondent has sent him copies of the filings. However, his wife was told by the Supreme Court that they had sent Respondent a form to complete and send back within thirty (30) days, but Respondent failed to do so. Complainant alleged that Respondent lied about the Appeal, and pointed out that it has been two years, and not one appeal has been properly filed.
32. On or about June 25, 2012, a copy of Complainant's letter was sent to Respondent, requesting a response within ten (10) days. Respondent was also advised that the request was a lawful demand for information within the meaning of Rule 8.1(b) of the Rules of Professional Conduct. Respondent failed to respond.
33. On or about August 13, 2012, via certified mail, the Office of Disciplinary Counsel again requested that Respondent reply to Complainant's letter by August 24, 2012. Respondent received this letter on or about August 16, 2012. Respondent was again advised that the request was a lawful demand for information within the meaning of Rule 8.1(b) of the Rules of Professional Conduct and that failure to

respond could result in disciplinary action.

34. On or about September 11, 2012, Respondent notified the Office of Disciplinary Counsel that he was awaiting entry of a second Order resentencing Complainant. Once the order is entered, Respondent stated that he will re-file the previously prepared Notice of Appeal on Complainant's behalf. Respondent stated that he has informed Complainant of these developments.
35. On or about December 17, 2012, this Office requested a status update from Respondent, requesting a reply within ten (10) days.
36. On or about January 17, 2013, the Office of Disciplinary Counsel again requested a status update from Respondent via certified mail. Respondent received this letter on or about January 18, 2013.
37. On or about February 14, 2013, Complainant notified the Office of Disciplinary Counsel that Respondent has blocked Complainant's calls. Complainant stated that Mrs. Schlatman contacted the Supreme Court and was informed that no appeal has been filed.
38. On or about February 20, 2013, the Office of Disciplinary Counsel contacted the Supreme Court of Appeals of West Virginia to inquire about the status of Complainant's appeal. The Office was informed that nothing has been filed on behalf of Complainant.
39. A copy of Complainant's letter was sent to Respondent on or about February 20, 2013 via certified mail. Respondent received this letter on or about February 21,

2013.

40. On or about March 6, 2013, Respondent informed the Office of Disciplinary Counsel that Complainant's appeal was perfected on or about February 25, 2013. Respondent stated that he "has provided Complainant a copy of the Brief of the Petitioner and various volumes of the Appendix of Exhibits in this matter." Respondent stated that he will forward Complainant the other information he has requested.
41. Because he neglected Complainant's case and failed to properly file at least two appeals of Complainant's criminal conviction, Respondent has violated Rules 1.1 and 1.3 of the Rules of Professional Conduct which provide as follows:

**Rule 1.1. Competence.**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

**Rule 1.3. Diligence.**

A lawyer shall act with reasonable diligence and promptness in representing a client.

42. Because Respondent failed to keep Complainant informed as to the status of the matter and failed to respond to his and his wife's requests for information, Respondent has violated Rules 1.4(a) and 1.4(b) of the Rules of Professional Conduct.
43. Because Respondent engaged in dilatory practices that brought the administration of justice into disrepute and failed to make reasonable efforts consistent with

Complainant's objective, he has violated Rule 3.2 of the Rules of Professional Conduct which provides as follows:

**Rule 3.2. Expediting litigation.**

A lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client.

**I.D. No. 12-01-421**

**Complaint of Tony R. Henderson, Jr.**

44. Complainant Tony Henderson Jr., filed a complaint with the Office of Disciplinary Counsel on or about July 24, 2012. Complainant retained Respondent to represent him in a child support case in or about March 2011. Complainant alleged that Respondent neglected the matter and failed to respond to requests for information about the case. On or about June 27, 2012, Complainant terminated Respondent's representation and requested a refund of the retainer fee he had paid. Complainant stated that he received only One Thousand Dollars (\$1,000.00) from Respondent from the Three Thousand Five Hundred (\$3,500.00) retainer. Complainant also requested an accounting of the fee, but has not received anything from Respondent. Finally, Complainant was concerned that time limitations in his case may have expired.
45. By letter dated July 30, 2012, the Office of Disciplinary Counsel sent Respondent a copy of the complaint and directed him to file a response to the ethics complaint within twenty (20) days.
46. On or about August 30, 2012, Complainant faxed additional correspondence to the

Office of Disciplinary Counsel. Complainant stated that he also paid Four Thousand Dollars (\$4,000.00) to Respondent on or about February 22, 2011, and another payment of Three Thousand Seven Hundred Fifty Dollars (\$3,750.00) on or about March 22, 2012. Complainant again requested an accounting of these payments. Complainant also stated that Respondent ignored numerous phone messages and e-mail messages, and canceled numerous scheduled meetings. Finally, Complainant alleged that Respondent did not provide a diligent defense in the matter and allowed statutes to expire.

47. After receiving no response, on or about September 28, 2012, the Office of Disciplinary Counsel sent a second letter, along with a copy of Complainant's additional correspondence, by certified and first class mail directing Respondent to file a response by October 8, 2012, and advising him that his failure to do so may result in a subpoena *duces tecum* being issued for his appearance at the Office of Disciplinary Counsel for a sworn statement, or the allegations in the complaint would be deemed admitted and the matter would be referred to the Investigative Panel of the Lawyer Disciplinary Board. Respondent received this letter, although the date stamp on the return receipt is illegible.
48. On or about December 17, 2012, this Office again sent a letter to Respondent via certified mail notifying him of the complaint. Respondent received this letter on or about December 19, 2012.
49. Respondent did not file any response in this matter.

50. Because he failed to act with reasonable diligence by failing to pursue Complainant's child support matter in a timely manner, Respondent has violated Rule 1.3 of the Rules of Professional Conduct.
51. Because he failed to keep Complainant reasonably informed about the status of the matter and failed to promptly comply with Complainant's reasonable requests for information, Respondent has violated Rule 1.4(a) and Rule 1.4(b) of the Rules of Professional Conduct.
52. Because he failed to produce an accounting and/or itemized statement detailing Complainant's account as requested, he has violated Rule 1.15(c) of the Rules of Professional Conduct, which provides as follows:

**Rule 1.15. Safekeeping property.**

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion that is in dispute shall be kept separate by the lawyer until dispute is resolved.

53. Because he failed to return any unearned portion of the fee paid to him by Complainant, Respondent has violated Rule 1.16(d) of the Rules of Professional Conduct, which provides as follows:

**Rule 1.16. Declining or terminating representation.**

(d) Upon 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, surrendering

papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

54. Because Respondent failed to comply with the Office of Disciplinary Counsel's lawful requests for information, he has violated Rule 8.1(b) of the Rules of Professional Conduct.

**I.D. No. 12-01-485**  
**Complaint of Casey M. Johnson**

55. Respondent had previously represented Complainant Casey Johnson in a divorce case. Complainant then hired Respondent to later represent her on a custody modification. Complainant met with Respondent on or about January 4, 2011. Complainant stated that Respondent asked her to pay half of the Two Thousand Five Hundred Dollar (\$2,500.00) retainer fee as well as the filing fees within forty-five (45) days and he would initiate proceedings. Complainant said she paid the first half of the retainer and the filing fees and then made a final payment on or about June 6, 2011.
56. Complainant alleged that she did not hear from Respondent again until approximately August 2011, when he called and advised her that the modification had not yet been filed. Respondent stated that it "fell through the cracks" but he assured her that it would be filed within a week.
57. Complainant stated that she has not heard from Respondent since that telephone

conversation despite calling his office numerous times and leaving voice mails as well as messages with his staff.

58. Complainant stated that she faxed a letter to Respondent in or about April 2012 “informing him his services would no longer be needed.” Complainant stated that she requested a refund of her payments and filing fees and provided Respondent her address and telephone number so he could make arrangements to reimburse her. A copy of this letter and copies of checks paid to Respondent were enclosed with the complaint, which complaint was filed on or about August 28, 2012.
59. By letter dated August 29, 2012, the Office of Disciplinary Counsel sent Respondent a copy of the complaint and directed him to file a response within twenty (20) days.
60. After receiving no response, on or about December 17, 2012, the Office of Disciplinary Counsel sent a second letter by certified and first class mail directing Respondent to file a response by January 2, 2013, and advising him that his failure to do so may result in a subpoena *duces tecum* being issued for his appearance at the Office of Disciplinary Counsel for a sworn statement, or the allegations in the complaint would be deemed admitted and the matter would be referred to the Investigative Panel of the Lawyer Disciplinary Board. Respondent received this letter on or about December 19, 2012.
61. Respondent did not file any response in this matter.
62. Because he failed to act with reasonable diligence by failing to pursue

Complainant's modification matter in a timely manner, Respondent has violated Rule 1.3 of the Rules of Professional Conduct.

63. Because he failed to keep Complainant reasonably informed about the status of the matter and failed to promptly comply with Complainant's reasonable requests for information, Respondent has violated Rule 1.4(a) and Rule 1.4(b) of the Rules of Professional Conduct.
64. Because he failed to return the unearned fee paid to him by Complainant, Respondent has violated Rule 1.16(d) of the Rules of Professional Conduct.
65. Because Respondent failed to comply with the Office of Disciplinary Counsel's lawful requests for information, he has violated Rule 8.1(b) of the Rules of Professional Conduct.

**I.D. No. 12-01-498**  
**Complaint of Duane L. Hammock**

66. Respondent was appointed by the court to represent Complainant Duane L. Hammock in a criminal matter that proceeded to a jury trial. Respondent was to file an appeal of Complainant Hammock's criminal conviction. Complainant requested copies of the evidence that was used against him, specifically a surveillance CD, audio CD, and a transcript, but he alleged that he never received any response from Respondent. Enclosed with his complaint were copies of letters he had written to Respondent and to the Honorable H. L. Kirkpatrick, III, requesting these items and requesting that a new attorney to be appointed in his

case. Complainant filed his complaint on or about August 31, 2012.

67. On or about September 6, 2012, the Office of Disciplinary Counsel sent Respondent a copy of the complaint.
68. On or about September 12, 2012, the Office of Disciplinary Counsel received Respondent's verified response. Respondent stated that another attorney within his law firm was initially appointed to represent Complainant, however, that attorney left the law firm and Respondent took over the case. Respondent stated that against his advice, Complainant chose to go to trial. Complainant was found guilty and sentenced to a ten-year determinate sentence. As this was Complainant's second felony, the Court was required to add an additional five (5) years to the sentence. Respondent stated that he convinced the Court to find that a firearm was not used during the crime because the weapon Complainant used was a BB gun. As a result, Complainant is eligible for parole in three and three quarter (3 3/4) years instead of five (5) years. Respondent stated that he strongly recommended that Complainant take the State's plea offer, which would have resulted in a shorter sentence based on the strength of the evidence against him.
69. Respondent stated that Complainant's request for new counsel was denied.
70. Following Complainant's conviction, Respondent stated that he filed motions requesting a new trial, but those motions were denied. Respondent stated that he requested copies of the transcripts, which he has received. Respondent stated that he has also filed a Notice of Appeal, and has provided a copy to Complainant.

Respondent stated that he has previously provided Complainant a complete copy of his file, including the items Complainant had listed in the complaint.

Respondent stated that he will keep Complainant updated on the status of the case.

71. On or about September 26, 2012, the Office of Disciplinary Counsel received Complainant's response to Respondent's letter. Complainant stated that he had been unaware that his original attorney had left Respondent's law firm until Respondent visited the jail approximately six months later. Complainant acknowledged that Respondent encouraged him to take the plea offered by the State. However, Complainant insisted that he did not wish to take the plea. Complainant requested that Respondent send him the items he has been requesting. Complainant further alleged that Respondent "did not object to things at the trial that [Respondent] should have objected to."
72. On or about December 19, 2012, the Office of Disciplinary Counsel requested that Respondent provide an update on the status of the appeal. Respondent did not respond.
73. On or about January 7, 2013, the Office of Disciplinary Counsel again requested from Respondent an update on the status of Complainant's appeal. Respondent received this letter on or about January 8, 2013.
74. On or about January 29, 2013, the Office of Disciplinary Counsel received a letter from Complainant informing the Office of Disciplinary Counsel of his new address and stating that he never received the items he had requested from

Respondent. Complainant stated that Respondent's response had stated that these items were provided to Complainant, but Complainant denied that he had received anything.

75. By letter dated February 4, 2013, the Office of Disciplinary Counsel sent Respondent a copy of Complainant's letter via certified mail and requested a response. Respondent received this letter on or about February 5, 2013.
76. On or about February 5, 2013, the Office of Disciplinary Counsel received a certified docket sheet regarding Complainant's case. The docket sheet indicated that the Notice of Appeal was filed on or about September 16, 2011, but no appeal had yet been filed. The docket sheet also indicated that the transcripts of the arraignment and motions hearing, jury trial transcripts volumes 1, 2, 3, and the sentencing hearing transcript were filed on November 8, 2011. The transcript also indicated that Complainant was re-sentenced on September 10, 2012. The sentencing was the last entry on the docket sheet.
77. On or about February 26, 2013, Respondent sent a letter to the Office of Disciplinary Counsel advising that the appellate brief and appendix record for Complainant's case had been filed with the court.
78. On or about March 6, 2013, the Office of Disciplinary Counsel received a letter from Complainant again informing the Office of Disciplinary Counsel that he has still not received the items he requested from Respondent.
79. Because he neglected Complainant's case and failed to timely pursue the filing of

the appeal of Complainant's criminal conviction, Respondent has violated Rules 1.1 and 1.3 of the Rules of Professional Conduct.

80. Because Respondent failed to keep Complainant informed as to the status of the matter, Respondent has violated Rules 1.4(a) and 1.4(b) of the Rules of Professional Conduct.
81. Because Respondent engaged in dilatory practices that brought the administration of justice into disrepute and failed to make reasonable efforts consistent with Complainant's objective, he has violated Rule 3.2 of the Rules of Professional Conduct, as set forth above.

**I.D. No. 12-01-500**  
**Complaint of Charles E. Banks**

82. On or about September 5, 2012, Complainant Charles Banks filed a complaint with the Office of Disciplinary Counsel. Complainant hired Respondent on or about December 23, 2008, to contest the administration of the estate of his father because Complainant's sister had sold everything from their father's estate, including cars, houses, and land, without notifying the other siblings of their father's passing. Complainant paid a flat fee of Five Thousand Dollars (\$5,000.00) plus the cost of filing fees.
83. Complainant provided a copy to the Office of Disciplinary Counsel of the contract he entered into with Respondent, dated December 23, 2009, as well as copies of the cashier's check paid to Respondent in the amount of Five Thousand Dollars

(\$5,000.00).

84. Complainant also provided a copy to the Office of Disciplinary Counsel of a letter dated January 25, 2010, which Complainant received from Respondent stating that Respondent had completed the petition and requesting payment for the filing fee in the amount of One Hundred Forty-Five Dollars (\$145.00), and payment for the service of process fee in the amount of Seventy-Five Dollars (\$75.00). Respondent's letter stated that he planned to have the petition ready to file in the Circuit Court of Fayette County, West Virginia, by the first week of February, 2010.
85. Complainant alleged that since that time, Respondent has failed to communicate with him regarding the case.
86. By letter dated September 7, 2012, the Office of Disciplinary Counsel sent Respondent a copy of the complaint and directed him to file a response within twenty (20) days.
87. After receiving no response, on or about December 17, 2012, the Office of Disciplinary Counsel sent a second letter by certified and first class mail directing Respondent to file a response by January 2, 2013, and advising him that his failure to do so may result in a subpoena *duces tecum* being issued for his appearance at the Office of Disciplinary Counsel for a sworn statement, or the allegations in the complaint would be deemed admitted and the matter would be referred to the Investigative Panel of the Lawyer Disciplinary Board. Respondent received this

letter on or about December 19, 2012.

88. Respondent did not file any response in this matter.
89. Because he failed to act with reasonable diligence by failing to pursue Complainant's matter in a timely manner, Respondent has violated Rule 1.3 of the Rules of Professional Conduct.
90. Because he failed to respond to Complainant's reasonable requests for information and failed to communicate to the extent reasonably necessary for Complainant to make informed decisions about the representation, Respondent has violated Rule 1.4(a) and Rule 1.4(b) of the Rules of Professional Conduct.
91. Because he failed to return the unearned fee paid to him by Complainant, Respondent has violated Rule 1.16(d) of the Rules of Professional Conduct.
92. Because Respondent failed to comply with the Office of Disciplinary Counsel's lawful requests for information, he has violated Rule 8.1(b) of the Rules of Professional Conduct.

**I.D. No. 14-01-037**  
**Complaint of Martin E. Durham**

93. Complainant Martin Durham filed a complaint against Respondent on or about January 23, 2014. Complainant stated that he spoke with Respondent on or about September 27, 2013, regarding a lawsuit he wanted to file against Bobby Shifflett and Briar Patch Golf Links, PLLC, resulting from an assault on Complainant by Mr. Shifflett, an employee of Briar Patch Golf Links, which occurred on or about

November 11, 2009. Complainant stated that Respondent agreed to call him, but as of January 5, 2014, he had not done so. In addition, Complainant alleges that he later learned that Respondent appears to be friends with Mr. Shifflett on Facebook and Complainant believes that Respondent now has a conflict of interest. However, Complainant did not know if Respondent ever filed anything on his behalf in this matter.

94. Complainant also alleged that Respondent had represented him in another matter, a civil case against Nationwide Insurance following a motor vehicle accident (Raleigh County Circuit Court Case number 09-C-1169-H). Complainant stated that this case settled for \$18,000.00. Respondent received \$6,000.00 and Complainant received \$5,955.00. The remaining money (\$4,154.04 according to Complainant) was to be paid to Advantra Freedom. Complainant contacted Advantra Freedom to confirm that they had received the money from Respondent, but was informed that Advantra was no longer in business. Complainant then contacted the Social Security Administration and was told that he owed nothing. Thereafter, Complainant contacted Respondent about releasing the remaining money being held to him because Advantra Freedom was no longer in business and there were no other liens. When Respondent failed to respond, Complainant filed a civil suit (Raleigh County Magistrate Court Case number 13-C-292) against Respondent on or about April 8, 2013, "to acquire the monies that [Respondent] retained for Advantra Freedom.... On September 27, 2013, and [sic] order of

dismissal was reached and [Respondent] presented a check to [Complainant] for the amount of \$4,154.04.”

95. By letter dated January 27, 2014, the Office of Disciplinary Counsel sent Respondent a copy of the complaint and directed him to file a response to the ethics complaint within twenty (20) days.
96. After receiving no response, on or about March 7, 2014, the Office of Disciplinary Counsel sent a second letter by certified and first class mail directing Respondent to file a response by March 21, 2014, and advising him that his failure to do so may result in a subpoena *duces tecum* being issued for his appearance at the Office of Disciplinary Counsel for a sworn statement, or the allegations in the complaint would be deemed admitted and the matter would be referred to the Investigative Panel of the Lawyer Disciplinary Board. Respondent received this letter on or about March 10, 2014.
97. Although Respondent did not respond to the complaint, his explanation at the hearing of the circumstances relating to the complaint satisfy the Hearing Panel Subcommittee that Respondent did not violate Rule 1.3, 1.4, and 1.15 of the Rules of Professional Conduct.
98. Because Respondent failed to comply with the Office of Disciplinary Counsel’s lawful requests for information, Respondent has violated Rule 8.1(b) of the Rules of Professional Conduct, which provides as follows:

**Rule 8.1. Bar admission and disciplinary matters.**

[A] lawyer in connection with . . . a disciplinary matter, shall

not:

\* \* \*

(b) . . . knowingly fail to respond to a lawful demand for information from . . . disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

### **Aggravating Factors**

99. Respondent has exhibited a pattern and practice of misconduct by continuing to fail to respond to his clients' inquiries, failing to act diligently in representing his clients, and in failing to respond to the Office of Disciplinary Counsel.

100. Respondent has previously received disciplinary action for prior violations of the Rules of Professional Conduct. On or about March 6, 2007, a Statement of Charges was filed against Respondent alleging violations of Rules 1.3, 1.4(a), 1.4(b), and 8.1(b) of the Rules of Professional Conduct. Moreover, the underlying charges in the March 6, 2007 Statement of Charges involved Respondent's failure to timely perfect an appeal of the denial of the Complainant's Petition for Writ of *Habeas Corpus* after his March 30, 2003 appointment, failure to respond to the Complainant's inquiries about the status of the appeal, and Respondent's failure to respond to the Office of Disciplinary Counsel after the complaint was filed against him in 2005. By Order of the Supreme Court of Appeals entered on September 13, 2007, Respondent was issued a reprimand, required to complete six (6) additional hours of continuing legal education during the 2006-2008 reporting year, and directed to pay the costs of the disciplinary proceeding. Respondent

was also directed to file a Motion to Withdraw.<sup>1</sup> See, Lawyer Disciplinary Board v. David S. Hart, Supreme Court No. 33328.

### III. DISCUSSION

This Court has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but also to protect the public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard the public's interests in the administration of justice. Lawyer Disciplinary Board v. Taylor, 192 W.Va. 139, 451 S.E.2d 440 (1994). Factors to be considered in imposing appropriate sanctions are found in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure. These factors consist of: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. *See also*, Syl. Pt. 4, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998).

#### A. **Respondent violated duties to his clients, to the public, to the legal system and to the legal profession.**

Clearly, Respondent engaged in conduct in violation of the Rules of Professional Conduct and therefore violated duties to his clients, the public, the legal system and the legal profession. The evidence demonstrates that Respondent repeatedly failed to respond to his clients' reasonable requests for information, neglected their cases and

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<sup>1</sup> The Order included specific instructions to Respondent in the event his Motion to Withdraw was denied by the Circuit Court of Raleigh County.

continually failed to comply with the Office of Disciplinary Counsel's lawful demands for information about the complaints that were filed against him. All of these transgressions are serious and amount to an inescapable pattern of misconduct.

Lawyers owe their clients duties of loyalty, communication, and diligence. The comment to Rule 1.4 states that the client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued. The comment goes on to say, "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest, and the client's overall requirements as to the character of representation." The evidence reflects that Respondent continually failed his clients' expectations in the underlying matters.

**I.D. No. 11-01-496**  
**Complaint of Greta J. Walker**

Respondent admitted that he failed in his duty to communicate with Ms. Walker and that he neglected her matter. Ms. Walker stated that it was her belief that after the entry of the Temporary Order, Respondent was to "freeze" her now ex-husband's 401(k) account in order to preserve the remaining funds after her ex-husband made a sizable withdrawal and that after the entry of the Final Order in May of 2009, Respondent was to prepare a QDRO regarding her portion of her ex-husband's 401(k) funds. Ms. Walker testified that she tried on numerous occasions after the Final Hearing to contact Respondent to find out the status of the QDRO but she was unsuccessful in her attempts, except for one time when Respondent returned one of her voicemails. When Respondent

failed to communicate with her after that, she filed the complaint. Respondent testified that the QDRO was not filed until 2012, which was more than one year after the filing of the complaint against him, and three years after the entry of the Final Order in Ms. Walker's divorce.

**I.D. No. 12-01-111**  
**Complaint of Orban H. Schlatman, Jr.**

Mr. Schlatman and his wife paid Respondent \$7,500.00 to appeal his criminal conviction for second degree sexual assault after a jury trial. Mr. Schlatman was initially sentenced on June 28, 2010, to a term of incarceration for an indeterminate period of not less than ten years and not more than twenty-five years. The evidence clearly establishes that Respondent neglected Complainant's matter and that Respondent failed to perfect Mr. Schlatman's appeal during a time period stretching nearly three years and through at least two failed attempts to properly file a Notice of Appeal. Respondent first attempted to file Mr. Schlatman's appeal on May 26, 2011. This appeal was not timely filed and by Order entered June 21, 2011, the Supreme Court of Appeals of West Virginia remanded the matter to the Circuit Court of Fayette County to "promptly resentence [Mr. Schlatman for purposes of appointment of counsel and the filing of an appeal . . . [and] dismissed [the matter] from the docket of this Court." In his Motion for Extension of Time to File Petition for Appeal, Respondent admitted that "[t]he failure to file the appeal on a timely basis was due to the neglect of the petitioner's counsel, and was through no fault of the petitioner."

After Mr. Schlatman was resented on or about October 19, 2011, Respondent

again attempted to file Mr. Schlatman's appeal. However, for the second time, Respondent again filed the Notice of Intent untimely. Moreover, Respondent admitted in his Motion for Extension of Time to File Notice of Appeal, that he filed the Notice of Appeal on the incorrect form and in the wrong court. By Order entered May 15, 2012, the Supreme Court of Appeals "refuse[ed] said motion for extension to file notice of appeal as the appeal period of four months from the October 19, 2011 resentencing order has expired." The matter was remanded for a second time for resentencing and Respondent was "directed to properly complete and file a notice of appeal within thirty days of entry of the order of resentencing."

Thereafter, Mr. Schlatman was resentenced on September 12, 2012. Respondent's third attempt at filing Mr. Schlatman's Notice of Appeal was timely filed on or about October 5, 2012. Thereafter, the Supreme Court entered a Scheduling Order on October 23, 2013, and directed Respondent to perfect the appeal on or about January 14, 2013. However, Respondent failed to comply with the Supreme Court's directive to perfect the appeal by January 14, 2013, and on January 28, 2013, the Supreme Court of Appeals entered a Notice of Sanction against Respondent directing him to perfect the appeal within ten days of receipt of the order, and show good cause as to why the appeal was not perfected timely. On February 26, 2013, the State of West Virginia filed a Motion to Dismiss due to Respondent's failure to perfect the appeal in accordance with the Supreme Court's directive. Respondent finally filed his brief on behalf of Mr. Schlatman on or about February 28, 2013, and the State of West Virginia moved to withdraw its Motion to Dismiss. On March 12, 2013, the Supreme Court of Appeals granted the State's Motion

to Withdraw the Motion to Dismiss and entered an Amended Scheduling Order. Respondent's conduct in this matter clearly fell below that which is expected of a competent member of the West Virginia State Bar. Moreover, the evidence demonstrates that Respondent neglected Mr. Schlatman's matter.

**I.D. No. 12-01-421**  
**Complaint of Tony R. Henderson, Jr.**

Respondent's conduct in this matter violated his duties owed to his client because Respondent failed to provide an itemized statement of services upon Mr. Henderson's request after Mr. Henderson terminated Respondent's representation. Mr. Henderson also testified to his difficulties in communicating with Respondent and the fact that Respondent failed to return telephone messages and emails. Respondent admitted at the hearing that he did not prepare any type of accounting or itemized statement reflecting his services for Mr. Henderson.

**I.D. 12-01-485**  
**Complaint of Casey M. Johnson**

Respondent completely neglected Ms. Johnson's matter and failed in his duty to communicate with her. On or about January 4, 2011, Ms. Johnson retained Respondent to represent her in a custody modification and she paid him a total of \$2,650.00, which included both a retainer fee and filing fees. She did not hear again from Respondent until August of 2011, when Respondent admitted to her that her matter had "fallen through the cracks." Ms. Johnson testified that she never heard from Respondent again after that August 2011 telephone call despite her own attempts to contact him to find out information about her case. In April of 2012, Ms. Johnson faxed Respondent a letter

terminating the representation and asked Respondent for a refund. Again, Respondent failed to acknowledge her letter or respond in any way. Ms. Johnson testified that she eventually had to hire another attorney and she paid the attorney \$3,000.00 to complete the matter for which she had hired Respondent in 2011. She also testified that the matter was not concluded until a hearing in December of 2013. At the hearing, Respondent admitted that Ms. Johnson is owed a refund. Respondent clearly violated his duties of diligence and communication.

**I.D. No. 12-01-498**  
**Complaint of Duane L. Hammock**

Respondent neglected Mr. Hammock's case. Respondent was appointed to represent Complainant in a criminal matter that went to a jury trial in May of 2011. Mr. Hammock was found guilty of first degree robbery. On or about September 13, 2011, Mr. Hammock was sentenced to a ten year determinate sentence and, due to the fact that Mr. Hammock was a second time felon, an additional five years was added to the sentence. A Notice of Appeal was filed on or about September 16, 2011, but the appeal was not perfected.

On or about August 31, 2012, Mr. Hammock filed a complaint alleging that Respondent "will not file my appeal" and included copies of letters he had sent to Respondent to which Respondent had not replied. The Office of Disciplinary Counsel notified Respondent of the complaint by letter dated September 6, 2012.

On or about September 10, 2012, Mr. Hammock was resentenced by the Circuit Court of Raleigh County. Thereafter, Respondent filed a Notice of Appeal on or about

September 12, 2012. By letter dated September 11, 2012, Respondent filed a response to Mr. Hammock's complaint and advised "I have filed a Notice of Appeal of the conviction, which has been provided to Mr. Hammock."

Thereafter, the Supreme Court entered a Scheduling Order on September 24, 2012, and directed Respondent to perfect the appeal on or about January 11, 2013. However, Respondent failed again to comply with the Supreme Court's directive to perfect the appeal by January 11, 2013, and on January 24, 2013, the State of West Virginia filed a Motion to Dismiss due to Respondent's failure to file his brief on behalf of Mr. Hammock. On January 28, 2013, the Supreme Court of Appeals entered a Notice of Sanction against Respondent, directing him to perfect the appeal within ten days of receipt of the order, and show good cause as to why the appeal was not perfected timely.

Respondent finally filed his brief on behalf of Mr. Hammock on or about February 26, 2013.<sup>2</sup> Clearly, Respondent's conduct in this matter fell below that which is expected of a competent member of the West Virginia State Bar and that Respondent neglected Mr. Hammock's matter, failed to keep him informed as to the status after the filing of the first Notice of Appeal in September of 2011, and failed to make reasonable efforts to expedite Mr. Hammock's case consistent with his duty owed to his client. The Hearing Panel Subcommittee notes, however, that while Respondent violated some duties to Mr. Hammock, Complainant may have obtained a better result had he taken Respondent's advice, and Respondent did persuade the prosecutor that an enhanced sentence should not apply in Complainant's circumstances. The Hearing Panel

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<sup>2</sup> The Supreme Court of Appeals affirmed Mr. Hammock's conviction by Memorandum Decision filed on October 18, 2013.  
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Subcommittee believes that Complainant has some credibility issues, and at least in some circumstances, may be a disgruntled felon looking to blame his lawyer. The Hearing Panel Subcommittee, however, finds Respondent's conduct in failing to perfect the appeal and failing to respond to the Office of Disciplinary Counsel is inexcusable. Respondent clearly violated the Rules of Professional Conduct.

**I.D. No. 12-01-500**  
**Complaint of Charles E. Banks**

Mr. Banks paid a flat fee of \$5,000.00 to Respondent for representation in a will contest. On or about January 2010, Mr. Banks received a letter from Respondent advising him that Respondent had completed the petition and requesting \$200.00 in filing fees. In or about July of 2012, Mr. Banks wrote a letter to Respondent asking for a refund of the \$5,200.00 he had paid to Respondent because he had been unable to speak to Respondent about his case and Respondent never filed the petition. The evidence clearly establishes that Respondent violated the duties of diligence and communication he owed to Mr. Banks and owes Mr. Banks a refund of the retainer fee and filing fee Mr. Banks had paid to him.

**I.D. No. 14-01-037**  
**Complaint of Martin E. Durham**

During the hearing on this complaint, the Hearing Panel Subcommittee found Complainant's testimony almost completely incredible, and Respondent's explanation of the circumstances satisfactory. Therefore, the Hearing Panel Subcommittee does not believe that Respondent violated any of the Rules of Professional Conduct relating to his representation of Mr. Durham. The Hearing Panel Subcommittee, however, finds

Respondent's failure to comply with the Office of Disciplinary Counsel's requests to be a violation of the Rules of Professional Conduct.

In all of these matters, the evidence clearly establishes that Respondent's conduct violated the duties owed to the legal system and to the profession. Although each complaint constituting the Statement of Charges was provided to Respondent by the Office of Disciplinary Counsel pursuant to Rules 2.4 and 2.5 of the Rules of Lawyer Disciplinary Procedure, and responses to each complaint were requested, Respondent provided an initial response to only the Walker, Schlatman, and Hammock complaints. Moreover, even when he initially responded to the Walker complaint, Respondent then failed to provide the requested additional information. Respondent failed to respond or file any written response whatsoever to the Johnson, Henderson, Banks, and Durham complaints. In all of these matters, Office of Disciplinary Counsel made multiple attempts to contact Respondent without success. Additionally, once formal charges were filed against Respondent, Respondent failed to timely file answers; failed to file discovery; failed to file responses to the Office of Disciplinary Counsel's motions; failed to submit witness and exhibit lists; and failed to file proposed findings of fact and conclusions of law after each hearing. Respondent's failures are inexcusable.

A lawyer's duties include maintaining the integrity of the profession. Lawyers are officers of the Court, and as such, must operate within the bounds of the law and abide by the rules of procedure which govern the administration of justice in our state.

Respondent's repeated failures to respond to the requests of the Office of Disciplinary Counsel clearly violates his duties to the legal system and to the profession.

**B. Respondent acted intentionally and knowingly.**

There is no doubt that Respondent acted intentionally and knowingly.

Respondent acknowledged, for the most part, that he was aware of his clients attempts to contact him and that he had received the correspondence from the Office of Disciplinary Counsel asking him to respond to requests for information. In fact, Respondent could offer no reason at all to explain his misconduct.

**C. The amount of real injury is great.**

At hearing, witnesses expressed how they were harmed by Respondent's conduct. In addition to describing intangible emotional injuries, each of the witnesses testified that as a result of Respondent's misconduct, their trust and confidence in lawyers and the legal system has been seriously affected. Ms. Walker stated that "I feel that [the legal system and her dealing with Respondent] really lets people down. When they're counting on something and something is owed to you and you've went through a hard, stressful time in your life, your attorney is supposed to be there and kind of guide you through it." Ms. Johnson testified that "[i]t makes you leery of who you hire and give your money to." Respondent's actions clearly negatively impacted his former clients' faith in other lawyers and the legal system. Moreover, the delays Respondent created in the underlying matters also created potential injury for all of these Complainants. Respondent's noncompliance with the Rules of Professional Conduct is clearly detrimental to the legal system and profession. Respondent's conduct has brought the legal system and legal profession into disrepute.

**D. There are several aggravating factors present.**

Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Court to examine when considering the imposition of sanctions. Elaborating on this rule, this Court held “that aggravating factors in a lawyer disciplinary proceeding ‘are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.’” Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E. 2d 550, 557 (2003) quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.21 (1992).

The following aggravating factors exist in this case: (1) prior disciplinary offenses; (2) substantial experience in the practice of law; (3) pattern and practice of failing to adequately communicate with clients and neglect of their cases; (4) pattern and practice of failing to respond to requests from the Office of Disciplinary Counsel which constitutes bad faith obstruction of the disciplinary process; (5) multiple offenses; (6) lack of remorse; and (7) indifference to making restitution. Respondent has exhibited a pattern and practice of accepting retainer fees but failing to carry out services; failing to communicate with his clients; failing to expedite cases consistent with the interests of his clients; and failing to respond to the Office of Disciplinary Counsel.

Respondent has committed multiple violations of numerous Rules of Professional Conduct during his representation of these Complainants. Respondent has been a licensed attorney for nearly fifteen years. The Supreme Court has held that “lawyers who engage in the practice of law in West Virginia have a duty to know the Rules of Professional Conduct and to act in conformity therewith.” Lawyer Disciplinary Board v.

Ball, 219 W.Va. 296, 633 S.E.2d 241 (2006).

Rule 9.22(a) of the ABA Model Standards for Imposing Lawyer Sanctions also recognizes that prior disciplinary action is an aggravating factor. Respondent was issued a reprimand by this Court on September 13, 2007. On or about March 6, 2007, a Statement of Charges was filed against Respondent alleging violations of Rules 1.3, 1.4(a), 1.4(b) and 8.1(b) of the Rules of Professional Conduct. The underlying charges involved Respondent's failure to timely perfect an appeal of the denial of Complainant Jerry R. Rose's Petition for Writ of Habeas Corpus after his March 30, 2003 appointment, failure to respond to Mr. Rose's inquiries about the status of the appeal, and then Respondent's failure to respond to the Office of Disciplinary Counsel after the complaint was filed against him in 2005. By Order of the Supreme Court of Appeals entered on September 13, 2007, Respondent was reprimanded, required to complete six additional hours of continuing legal education during the 2006-2008 reporting year, and directed to pay the costs of the disciplinary proceeding. Respondent was also ordered to file a Motion to Withdraw.<sup>3</sup> Clearly, Respondent did not learn from the previous discipline.

**E. There are no mitigating factors present.**

In addition to adopting aggravating factors, this Court also adopted mitigating factors in a lawyer disciplinary proceedings and stated that mitigating factors "are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 214, 579 S.E.2d 550,

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<sup>3</sup> The Supreme Court's Order also included specific instructions to Respondent in the event his Motion to Withdraw was denied by the Circuit Court of Raleigh County.

555 (2003) quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.31 (1992).<sup>4</sup>

There are no mitigating factors present in this matter. While Respondent claimed at the hearing that he was suffering from undiagnosed depression during the time frame of these complaints due to his divorce, he did not present any medical testimony or evidence, or call any witnesses on his behalf. However, Respondent's divorce is now final and he acknowledged that he is "two years away now away from the situation that's causing [him] to be overwhelmed. . . ."

Moreover, Respondent's alleged undiagnosed depression is not sufficient to mitigate any sanction in this matter. In Lawyer Disciplinary Board v. Dues, 218 W.Va. 104, 624 S.E.2d 125 (2005), this Court stated that "[i]n a lawyer disciplinary proceeding, a mental disability is considered mitigating when: (1) there is medical evidence that the attorney is affected by a mental disability; (2) the mental disability caused the misconduct; (3) the attorney's recovery from the mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely." In this case, there is no medical evidence to establish that Respondent suffered any mental disability or that the alleged disability caused the misconduct because it appears that Respondent never sought treatment. Likewise, Respondent cannot show that any recovery was demonstrated by a

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<sup>4</sup> In Scott, this Court held that mitigating factors which may be considered in determining the appropriate sanction to be imposed against a lawyer for violating the Rules of Professional Conduct include: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses.

meaningful and sustained period of successful rehabilitation and no evidence was presented that the recovery arrested the misconduct and that recurrence of similar misconduct is unlikely.<sup>5</sup>

#### IV. SANCTION

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syllabus Pt. 3, *in part*, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), *cited in* Committee on Legal Ethics v. Morton, 186 W.Va. 43, 45, 410 S.E.2d 279, 281 (1991). In addition, discipline must serve as both instruction on the standards for ethical conduct and as a deterrent against similar misconduct to other attorneys. In Syllabus Point 3 of Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987), this Court stated:

In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.

Moreover, a principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999).

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<sup>5</sup> At the conclusion of the hearing, the Hearing Panel Subcommittee gave Respondent permission to file a motion to reopen the record, presumably to give Respondent a present additional evidence. However, Respondent did not submit any additional evidence.

In Committee on Legal Ethics v. Mullins, this Court stated that “[m]isconduct or malpractice consisting of negligence or inattention, in order to justify a suspension or annulment, must be such as to show the attorney to be unworthy of public confidence and an unfit or unsafe person to be entrusted with the duties of a member of the legal profession or to exercise its privileges.” Mullins, 159 W.Va. 647, 652, 226 S.E.2d 427, 430 (1976) (indefinite suspension for failure to act with reasonable diligence, failure to communicate effectively with clients, and failure to respond to the disciplinary authorities repeated requests for information, including failure to appear at the disciplinary hearing), *quoting* Syllabus No. 1, In Re Damron, 131 W.Va. 66, 45 S.E.2d 741 (1947). *See also*, Lawyer Disciplinary Board v. Keenan, 189 W.Va. 37, 427 S.E.2d 471 (1993) (indefinite suspension for failure to provide competent representation, failure to act with reasonable diligence, failure to communicate effectively with his clients, and failure to return unearned fees); Committee on Legal Ethics v. Karl, 192 W.Va. 23, 449 S.E.2d 277 (1994) (three month suspension for failure to act with reasonable diligence, failure to communicate effectively with clients, and failure to respond to the disciplinary authorities repeated requests for information); Lawyer Disciplinary Board v. Burgess, No. 23030 (WV 4/25/96) (unreported) (two year suspension with one year suspension deferred while respondent undergoes a one-year period of supervision following reinstatement for violations of Rules of Professional Conduct 1.1, 1.3, 1.4 (a) and (b), 1.16(a)(3), 1.16(d); 8.1(b); and 8.4 (c) and (d)); Lawyer Disciplinary Board v. Holmstrand, No. 22523 (WV 5/30/96) (unreported) (one year suspension and psychiatric evaluation ordered for multiple violations of Rules of Professional Conduct 1.3, 1.4(a), 3.3(a)(1)(4) and 8.4(c)

and (d)); Lawyer Disciplinary Board v. Farber, No. 32598 (WV 1/26/06) (unreported) (indefinite suspension and a psychological counseling ordered to determine fitness to practice law for violating Rules of Professional Conduct 1.1, 1.3, 1.4, and 8.1(b), including failure to appear at the disciplinary hearing); Lawyer Disciplinary Board v. Simmons, 219 W.Va. 223, 632 S.E.2d. 909 (2006) (the Supreme Court of Appeals of West Virginia Court, while expressing concern about the effectiveness of short suspensions, nonetheless, suspended an attorney for twenty (20) days for failure to act with reasonable diligence, failure to appear for court hearings on numerous occasions, and failure to communicate effectively with his clients).

In addition, Standard 4.42 of the *ABA Model Standards for Imposing Lawyer Sanctions* states that suspension is generally appropriate when a lawyer “(a) knowingly fails to perform services for a client and causes injury or potential injury to a client; or (b) a lawyer engages in a pattern of neglect causes injury or potential injury to a client.”

Rule 8.2 of the ABA Model Standards for Imposing Lawyer Sanctions states, “[s]uspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.”

Respondent’s actions in these cases clearly rise to such a level to establish that Respondent is unworthy of public confidence and unfit to be entrusted with the duties or privileges of a licensed member of the legal profession. Respondent was not merely negligent in communication and in legal representation. Rather, Respondent clearly exhibits a pattern and practice which show a lack of concern for some of the fundamental

aspects of the practice of law outlined in the Rules of Professional Conduct, such as his duty to maintain reasonable communication with his clients and his duty to expedite his clients cases consistent with his clients' interest. Consideration must also be given to Respondent's apparent disregard of his duty to respond to lawful demands for information from disciplinary authority.

For the public to have confidence in our disciplinary and legal systems, lawyers who engage in the type of conduct exhibited by Respondent must be removed from the practice of law for some period of time. A license to practice law is a revocable privilege and when such privilege is abused, the privilege should be revoked. Such sanction is also necessary to deter other lawyers from engaging in similar conduct and to restore the faith of the victims in this case and of the general public in the integrity of the legal profession.

## **V. RECOMMENDED SANCTIONS**

Rule 3.15 of the Rules of Lawyer Disciplinary Procedure provides that the following sanctions may be imposed in a disciplinary proceeding: (1) probation; (2) restitution; (3) limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment.

The evidence clearly establishes that Respondent has violated the Rules of Professional Conduct by failing to act diligently in his representation of his clients and in his failure to communicate with his clients. Furthermore, Respondent violated his duty to the legal system, the profession and the public when he failed to respond to the written

requests of the Office of Disciplinary Counsel for information about the complaints that were filed against him. Respondent's misconduct in his lack of representation of his clients and his failure to meaningfully participate in the disciplinary process establishes that Respondent has violated the Rules of Professional Conduct and dictates that Respondent's law license be suspended.

Sanctions are not imposed only to punish the attorney, but also are designed to reassure the public's confidence in the integrity of the legal profession and to deter other lawyers from similar conduct. Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993); Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000). For the public to have confidence in our disciplinary and legal systems, lawyers such as Respondent must be removed from the practice of law, especially when, as in Respondent's history, he has already been disciplined by this Court for the exact same misconduct and violations of the Rules of Professional Conduct. Respondent gained no insight into his failure to comply with the Rules of Professional Conduct when he was previously reprimanded. Thus, a severe sanction in this case is necessary to deter Respondent and other lawyers from continuing to engage in similar misconduct.

A principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison,

205 W.Va. 344, 518 S.E.2d 101 (1999). This type of conduct has a dramatic impact on the public's confidence in the integrity of the Bar, and suspension is the appropriate sanction.

Respondent has been previously reprimanded by this Court for similar misconduct, has substantial experience in the practice of law and has continued to exhibit a pattern and practice of misconduct by failing to communicate with his clients and failing to diligently pursue cases on their behalf, and failing to respond to requests for information from Office of Disciplinary Counsel. *See, Lawyer Disciplinary Board v. David S. Hart*, No. 33328 (WV 9/13/07) (unreported case).

For the reasons set forth above, the Hearing Panel Subcommittee recommends the following sanctions:

- A. That Respondent's law license be suspended for one year;
- B. That prior to petitioning for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, Respondent issue refunds to Casey M. Johnson in the amount of \$2,650.00 and Charles E. Banks in the amount of \$5,200.00, and provide proof thereof to the Office of Disciplinary Counsel;
- C. That Respondent issue an itemized statement of account to Tony R. Henderson, Jr., and provide proof thereof to the Office of Disciplinary Counsel; and
- D. That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.<sup>6</sup>

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<sup>6</sup> The Hearing Panel Subcommittee makes no recommendations with respect to reinstatement. *Lawyer Disciplinary Board v. John C. Scotohel, Jr.*, Case No. 11-0728, Slip Op. (W. Va. Nov. 25, 2014).  
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*Richard M. Yurko*

**Richard M. Yurko, Esquire**

Chairperson of the  
Hearing Panel Subcommittee

Date: \_\_\_\_\_

*1/16/15*

*John W. Cooper*

**John W. Cooper, Esquire**

Hearing Panel Subcommittee

Date: \_\_\_\_\_

*1/16/15*

*Approved by Dr. K. Edward Grose*

*Richard M. Yurko*

**Dr. K. Edward Grose, Laymember**

Hearing Panel Subcommittee

Date: \_\_\_\_\_

*1/9/15*

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**CERTIFICATE OF SERVICE**

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This is to certify that I, Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 20<sup>th</sup> day of January, 2015, served a true copy of the foregoing **"REPORT OF THE HEARING PANEL SUBCOMMITTEE"** upon Respondent David S. Hart by mailing the same via United States Mail with sufficient postage, to the following address:

David S. Hart, Esquire  
102 McCreery Street  
Beckley, West Virginia 25801

  
\_\_\_\_\_  
Andrea J. Hinerman