

**BEFORE THE SUPREME COURT OF APPEALS OF THE  
STATE OF WEST VIRGINIA**

**LAWYER DISCIPLINARY BOARD,**

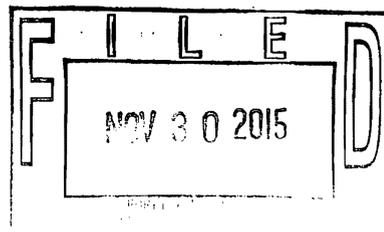
**Complainant,**

**v.**

**No. 14-0670**

**THORN H. THORN,**

**Respondent.**



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**BRIEF OF THE OFFICE OF DISCIPLINARY COUNSEL**

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## I. STATEMENT OF THE CASE

### A. NATURE OF PROCEEDINGS AND RECOMMENDATION OF THE HEARING PANEL SUBCOMMITTEE

This is a lawyer disciplinary proceeding against Respondent Thorn H. Thorn (hereinafter “Respondent”), arising as the result of a Statement of Charges issued against him and filed with the Supreme Court of Appeals of West Virginia on or about July 14, 2014. Respondent was served with the Statement of Charges via certified mail by the Clerk of the Supreme Court of Appeals on or about July 17, 2014. Respondent filed his Answer to the Statement of Charges on or about September 25, 2014, after the deadline for filing was extended by the Office of Disciplinary Counsel (hereinafter “ODC”) pursuant to Rule 2.12 of the Rules of Lawyer Disciplinary Procedure for good cause shown. The hearing in this matter was first scheduled to take place on or about January 14, 2015. However, at the December 19, 2014, pre-hearing conference, the hearing was continued to February 17, 2015 upon a joint motion of the parties. Thereafter, on February 17, 2015, severe inclement weather conditions prevented travel to the hearing by members of the ODC, as well as several of its witnesses, and the matter was again continued without objection to April 8, 2015.

On April 8, 2015, this matter proceeded to hearing at the West Virginia University College of Law in Morgantown, West Virginia. The Hearing Panel Subcommittee (hereinafter “HPS”) was comprised of John W. Cooper, Esquire, Chairperson, Henry W. Morrow, Esquire, and Jon Blair Hunter, Layperson. Renée N. Frymyer, Lawyer Disciplinary Counsel, appeared on behalf of the ODC. Respondent appeared *pro se*. The HPS heard testimony from Jessica D. Morris, Daniel N. Britton, Carly A. Wears, Mark D. Benkiel, Russell “Jack” Torsney, Jr., and Respondent.

On or about September 18, 2015, the HPS issued its decision in this matter and filed with the Supreme Court of Appeals of West Virginia its “Recommended Decision of the Hearing Panel

Subcommittee.” On or about October 13, 2015, the HPS issued an “Amended Recommended Decision of the Hearing Panel Subcommittee” (hereinafter “Recommendation”), which included minor corrections. The HPS found that the evidence established that Respondent had committed one (1) violation of Rule 1.1<sup>1</sup>; eight (8) violations of Rule 1.3<sup>2</sup>; seven (7) violations of Rule 1.4 (a) and (b)<sup>3</sup>; eight (8) violations of Rule 3.2<sup>4</sup>; two (2) violations of Rule 1.15(b)<sup>5</sup>; five (5) violations of Rule 1.16(d)<sup>6</sup>; five (5) violations of Rule 8.1(b)<sup>7</sup>, and three (3) violations of Rule 8.4(c)<sup>8</sup> of the Rules of

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<sup>1</sup> 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.

<sup>2</sup> Rule 1.3. Diligence. A lawyer shall act with reasonable diligence and promptness in representing a client.

<sup>3</sup> 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.

<sup>4</sup> Rule 3.2. Expediting litigation. A lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client.

<sup>5</sup> Rule 1.15. Safekeeping property. (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person shall promptly render a full accounting regarding such property.

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> Rule 8.4. Misconduct. It is professional misconduct for a lawyer to: (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Professional Conduct.<sup>9</sup> The HPS also made the following recommendations as to the appropriate sanction:

- a. That Respondent's law license be suspended for a period of ninety (90) days;
- b. That prior to reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, Respondent shall issue refunds to Debra Miller in the amount of One Thousand One Hundred Dollars (\$1,100.00), Martin Donovan in the amount of Six Hundred Dollars (\$600.00); that within eighteen (18) months of the date of his reinstatement, Respondent shall make restitution to Mark Benkiel in the amount of Twenty Four Thousand Dollars (\$24,000.00), and provide proof thereof to the ODC;
- c. That prior to reinstatement, Respondent must issue an itemized statement of account to Jessica Morris, Daniel Britton, Lisa Long, and Carly Wears, in addition to providing them with refunds where appropriate, and provide proof thereof to the ODC;
- d. That upon reinstatement, Respondent's practice shall be supervised for a period of one (1) year by an attorney agreed upon between the ODC and Respondent. The goal of supervised practice will be to improve the quality and effectiveness of Respondent's law practice to the extent that Respondent's sanctioned behavior is unlikely to recur;
- e. That Respondent submit to counseling with a licensed psychologist or psychiatrist beginning immediately and that such counseling continue at least eighteen (18) months after that date of the Court's mandate in this case. During such period, Respondent shall cause his counselor to file a report with the ODC at least semi-annually describing the nature of the counseling, the nature of the therapy, the progress of Respondent during that period, and verifying that his mental status is such that he is capable of performing his profession as a lawyer;
- f. That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

In its Recommendation, the HPS noted that at the conclusion of the hearing, ODC offered Exhibits 1 through 83 to be admitted into evidence, and that Respondent objected to the admission of any exhibits filed concerning witnesses who did not appear and testify against him. The HPS concluded that to the extent Respondent was questioned about any such exhibit during his testimony

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<sup>9</sup> The instant Statement of Charges was issued prior to January 1, 2015. Therefore, the version of the Rules of Professional Conduct in effect prior to the January 1, 2015 amendments is used herein.

and responded without making a formal objection at the time of questioning, the objection to its admissibility was waived. The Recommendation also stated that the HPS avoided basing any of its findings on the credibility of any witness who may have generated such exhibit but failed to appear, unless Disciplinary Counsel questioned Respondent about such exhibit and Respondent failed to interpose an objection at the time of the questioning. Thereafter, by letter dated October 21, 2015, the ODC filed its objection to the Recommendation pursuant to Rules 3.11 and 3.13 of the Rules of Lawyer Disciplinary Procedure.

**B. FINDINGS OF FACT OF THE HEARING PANEL SUBCOMMITTEE**

Respondent maintains a solo law practice in Morgantown, which is located in Monongalia County, West Virginia. Respondent was admitted to The West Virginia State Bar on April 23, 1997, after successful passage of the Bar Exam [Trans. p. 102]. As such, he is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.

1. Debra Miller Complaint, I. D. No. 13-06-191

Ms. Miller stated in her complaint, which was sworn and notarized on or about May 3, 2013, that she hired Respondent in October of 2011 for a probate matter and paid him Three Thousand Six Hundred Ninety Five Dollars (\$3,695.00) [ODC Ex. 1, bates 3]. The nature of Ms. Miller's complaint was that Respondent failed to advance her case in the proper court and cancelled hearings that had been set [ODC Ex. 1, bates 1-2]. Ms. Miller also claimed in her complaint that Respondent was nonresponsive to her telephone messages [ODC Ex. 1, bates 12-13, 20]. Because after one year the case had not progressed, on or about October 11, 2012, Ms. Miller sent Respondent an email in which she terminated Respondent's representation, requested an itemized bill, and asked Respondent to

provide her with a refund of the unearned retainer [ODC Ex. 1, bates 10]. Ms. Miller stated in her complaint that Respondent had refused to return her file or provide her with a refund [ODC Ex. 1, bates 1-2].

In his response to the complaint, verified on or about July 12, 2013, Respondent denied he had violated the Rules of Professional Conduct and asserted that Ms. Miller's retainer was "mainly exhausted." Respondent asserted that he would send Ms. Miller the balance of her retainer, but Ms. Miller had refused to tell him where to send it [ODC Ex. 5, bates 35-37]. Thereafter, Ms. Miller contacted the ODC and advised that Respondent had not provided her with her file, despite her requests. By letter dated August 12, 2013, Disciplinary Counsel asked Respondent to provide Ms. Miller with her file on or before August 23, 2013 [ODC Ex. 6, bates 38]. By letter dated August 29, 2013, Respondent confirmed that he had forwarded a copy of the file to Ms. Miller at the address he had on file, but that it had been returned to sender. Respondent stated that he resubmitted the file to Ms. Miller at the Post Office Box address she listed on the ethics complaint [ODC Ex. 7, bates 41-43]. The record reflected that Ms. Miller subsequently informed Disciplinary Counsel that she had not yet received her file from Respondent [ODC Ex. 10, bates 46]. Disciplinary Counsel alerted Respondent of the same and, by letter dated October 1, 2013, Respondent informed Disciplinary Counsel that he had again mailed a copy of Ms. Miller's file to her at her Post Office Box address [ODC Ex. 11, bates 47].

Ms. Miller did not appear at the hearing. Respondent testified at the hearing that he performed work on Ms. Miller's behalf, including filing what he contended was the appropriate pleading, a petition to remove Ms. Miller's brother as a fiduciary in the Marion County Circuit Court. Respondent acknowledged that Ms. Miller became dissatisfied when he had to continue the hearing

in the matter several times due to various reasons and terminated his representation [Trans. pp. 132-135, 143-144]. Respondent testified that he could not recall if he had been timely in response to some of Ms. Miller's inquiries in emails circa August, 2012, to October, 2012, but that the likelihood was that he probably had not been [Trans. p. 136]. However, Respondent testified that contrary to Ms. Miller's complaint, he did file a petition to remove Ms. Miller's brother as fiduciary in the estate of a parent on or about October 16, 2012 [Trans. pp. 138, 143]. Respondent indicated that he elected to file in the Circuit Court of Marion County because that was the county where Ms. Miller's brother had been appointed and where the property was located [Trans. pp. 138-139]. Respondent also stated that he had been successful in going to circuit court instead of probate court previously in both Marion and Preston Counties in other similar matters [Trans. pp. 134].

By Respondent's own admission at the hearing, he was not diligent and responsive with respect to some of his communications with Ms. Miller. Respondent testified that beginning in late 2012 he experienced problems with depression due to problems with his marriage, and the symptoms continued to persist throughout most of 2013 [Trans. p. 113]. Respondent referred to the depression during this time period as "debilitating, and he testified that he "had kind of just given up for a period of time to the sense that [he] had suicidal ideations and everything else for a period," [Trans. p. 114]. Respondent testified that he had been "pretty much solidly back on [his] feet," as of April, 2014, but that in late 2012 and early 2013, he "was just a mess," [Trans. p. 114]. Respondent testified that it was not until the first or second quarter of 2014 that he felt like he wanted to continue what he was doing: "I want to continue being an attorney, I want to continue living. I want to continue being a father, I want to continue to, you know, be a person," [Trans. p. 115]. Respondent testified that the majority of the complaints contained in the Statement of Charges filed against him concern the time period of

late 2012, and 2013, and that, without question, he definitely had issues for that period [Trans pp. 118, 186]. “I wasn’t communicating with [clients],” Respondent stated [Trans. p. 120]. Respondent also testified that he was having issues with his answering service around the same time period [Trans. p. 141].

Respondent challenged Ms. Miller’s reported claim that she was entitled to a full refund because nothing had been filed, when, in fact, a petition had been filed on her behalf [Trans. p. 145]. Respondent admitted that he owed Ms. Miller a partial refund of One Thousand One Hundred Dollars (\$1,100.00) of the Three Thousand Six Hundred Dollar (\$3,600.00) fee that Ms. Miller had paid him [Trans. p. 147]. Disciplinary Counsel inquired of Respondent about the nature of the fee arrangement he had with Ms. Miller. Respondent testified that the matter was a flat-fee case and, although he did not have a written fee agreement indicating that it was a non-refundable fee, he had explained it to the client [Trans. pp. 149-150]. Respondent conceded that he did not provide an itemization of his fee or an accounting of his time, but stated that his usual hourly rate was Two Hundred Dollars (\$200.00) [Trans. pp. 147-148].

2. Bonnie R. Hughes Complaint, I. D. No. 13-02-230

Ms. Hughes stated in her complaint, which was sworn and notarized on or about May 21, 2013, that she retained Respondent on or about February 28, 2013, for representation in a time-sensitive guardianship matter and paid him a retainer of One Thousand One Hundred Eighty Five Dollars (\$1,185.00) [ODC Ex. 16, bates 63-69]. Ms. Hughes’ complaint stated that she subsequently called Respondent approximately three times per week to obtain the status of the matter and left messages with Respondent’s answering service when she was unable to reach Respondent [ODC Ex. 16, bates 69]. By May of 2013, Ms. Hughes claimed that Respondent had failed to take any action in

the matter [ODC Ex. 16, bates 69]. Thereafter, by email dated May 13, 2013, Ms. Hughes terminated Respondent's representation and requested that Respondent issue her a refund of the retainer [ODC Ex. 16, bates 64]. Ms. Hughes' new counsel also sought to obtain a refund from Respondent on her behalf [ODC Ex. 20, bates 82-83].

In his response to the complaint, verified on or about July 19, 2013, Respondent denied he had violated the Rules of Professional Conduct but asserted that he would provide Ms. Hughes with a full refund [ODC Ex. 21, bates 84-86]. Ms. Hughes confirmed that she received a refund from Respondent in late July, 2013 [ODC Ex. 23, bates 88]. At the hearing, Respondent testified that it was possible that he failed to respond to Ms. Hughes' phone calls, as it was "in the right time frame." [Trans. p. 156.] Respondent also testified that nothing happened in Ms. Hughes' case and, as a result, he provided her with a full refund [Trans. p. 156]. Respondent acknowledged that Ms. Hughes had been provided with a refund on or about July 12, 2013, which was after she had lodged an ethics complaint against him [Trans. pp. 157-158]. Ms. Hughes did not appear or testify at the hearing.

3. Jessica D. Morris Complaint, I.D. No. 13-02-305

Ms. Morris stated in her complaint, which was sworn and notarized on or about July 12, 2013, that she retained Respondent for representation in her divorce in October of 2011, that Respondent subsequently filed the appropriate paperwork but otherwise failed to advance the case [ODC Ex. 26, bates 113-115]. Ms. Morris' complaint further alleged that many of her subsequent calls and emails to Respondent were not returned, that Respondent failed to provide Ms. Morris with a copy of the response that had been filed by the opposing party in the matter, and that Respondent failed to provide certain documents to opposing counsel and the Court [ODC Ex. 28, bates 124-126]. Thereafter, Ms. Morris sought legal representation from another lawyer and, by letter dated February 20, 2013,

terminated Respondent's representation and requested that Respondent issue her a refund of the retainer and provide her with an itemization of accounting of all legal services that had been rendered [ODC Ex. 28, bates 124]. In his response to the complaint, verified on or about October 2, 2013, Respondent attributed the delays in the underlying matter to cancellations made by the Family Court and stated that he was in the midst of negotiations when he was informed by Ms. Morris that his services were terminated [ODC Ex. 30, bates 138-140].

At the hearing, Ms. Morris testified that multiple phone calls were not returned by Respondent and her emails to him went unanswered. Ms. Morris stated that Respondent "was not doing anything to help proceed [the case]." [Trans. pp. 8-9] Ms. Morris testified that she began keeping a log of her attempts to communicate with Respondent due to her frustrations. She stated that the log reflected that from December 27, 2012, to February 6, 2013, she made multiple unsuccessful attempts to communicate with Respondent [ODC Ex. 28, bates 125; Trans. pp. 12-13]. Ms. Morris also testified that she was entitled to a refund from Respondent because she did not believe Respondent had earned the full retainer [Trans. pp. 15-16]. She could not, however, recall how much she paid Respondent [Trans. p. 23].

Respondent testified that he failed to communicate well with Ms. Morris [Trans. pp. 162; 186]. Respondent also testified that he probably did not respond to the letter of February 20, 2013, wherein Ms. Morris requested an itemized accounting of his services and a refund [Trans. pp. 186-187]. Respondent had previously contended that he charged Ms. Morris a "flat fee," that was a "non-refundable, one-time payment." [Trans. p. 17] Respondent testified that he believed that he earned the full fee Ms. Morris paid him, which he estimated was Two Thousand Five Hundred Dollars (\$2,500.00) [Trans. p. 187]. Respondent did not, however, provide an accounting of his time or an

itemization of his fee. Respondent further testified that the reason the case was pending from late 2011 to early 2013 was due to cancellations of hearings on the part of the Family Court of Marion County [Trans. pp. 162-163, 188].

4. Todd H. Goodnight Complaint, I. D. No. 13-05-384

Mr. Goodnight stated in his complaint, which was sworn and notarized on or about August 19, 2013, that Respondent was appointed to represent Mr. Goodnight in criminal matters and in an abuse and neglect proceeding in the Circuit Court of Marion County [ODC Ex. 33, bates 148-150]. Mr. Goodnight's complaint alleged that Respondent failed to appear for hearings that were scheduled in the abuse and neglect proceeding on February 4, 2013, March 8, 2013, and June 11, 2013, respectively [ODC Ex. 33, bates 150]. It was further alleged that on June 13, 2013, the Circuit Court Judge entered an Order which relieved Respondent of his representation of Mr. Goodnight and appointed Mr. Goodnight a new attorney in the abuse and neglect cases. The Order noted that the State had advised that Respondent had failed to appear for Multi-Disciplinary Team ("MDT") meetings in the preceding six months and had not been responsive to telephone calls made to him to determine the status of Mr. Goodnight [ODC Ex. 33, bates 152-153]. Mr. Goodnight's complaint also alleged that Respondent was unresponsive to his own inquiries [ODC Ex. 33, bates 149].

In his response to the complaint, verified on or about October 2, 2013, Respondent denied that the allegations raised in Mr. Goodnight's complaint affected the final disposition of either Mr. Goodnight's criminal cases or the abuse and neglect cases [ODC Ex. 36, bates 166-169]. At the hearing, Respondent did not dispute that he failed to attend some MDT meetings on behalf of Mr. Goodnight, who was incarcerated at the time, and may not have responded to calls [Trans. pp. 190, 195]. However, Respondent contended that he missed some MDT meetings because he was not

notified, on others he appeared by telephone, and on others he could not attend because he had court appearances which took precedence over MDT meetings. Respondent testified that Mr. Goodnight had committed domestic battery on his current girlfriend and a former girlfriend, was incarcerated as a result, and could not participate in a parenting plan or improvement periods because he continually got in trouble [Trans. pp. 191-195]. Mr. Goodnight could not be located by ODC and did not appear or testify at the hearing.

5. Mark D. Benkiel Complaint, I. D. No. 13-02-414

Mr. Benkiel stated in his complaint, which was sworn and notarized on or about September 4, 2013, that he retained Respondent for representation relating to an automobile accident that occurred in the state of Pennsylvania on or about April 23, 2010, in which Mr. Benkiel suffered injury. Mr. Benkiel said that he and Respondent entered into signed a contingent-fee agreement with respect to the matter [ODC Ex. 43, bates 181-183]. Mr. Benkiel alleged that despite his phone calls and texts, Respondent failed to take any action in the case for three years [ODC Ex. 43, bates 181-183]. Mr. Benkiel further alleged that Respondent failed to file the complaint on Mr. Benkiel's behalf before the statute of limitations expired on April 23, 2012. In fact, Mr. Benkiel stated that Respondent, who is not licensed in Pennsylvania, had advised him that Pennsylvania had a three-year statute of limitations period, and had provided Mr. Benkiel with a one page complaint for him to file *pro se* in Allegheny County, Pennsylvania, on April 24, 2013. The Clerk did not accept Mr. Benkiel's complaint at that time due to it being barred by the statute of limitations [ODC Ex. 43, bates 181-183; Trans. pp. 87-88].

By letter dated September 11, 2013, the ODC sent Respondent a copy of the complaint and directed him to file a verified response within twenty days [ODC Ex. 44, bates 190-191]. After not

receiving any response from Respondent, by letter dated November 15, 2013, sent via certified mail, return receipt requested, Disciplinary Counsel requested that Respondent provide the requested response by Tuesday, November [26], 2013,<sup>10</sup> or Respondent would be subpoenaed to appear at the ODC to give 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 [ODC Ex. 45, bates 192-194]. Respondent failed to provide a verified response to the complaint by the above-referenced deadline and, as a result, Respondent was issued a subpoena to appear at the ODC to give a sworn statement [ODC Ex. 46, bates 196]. However, on or about February 10, 2014, Disciplinary Counsel agreed to cancel the statement if Respondent provided a verified written response to Mr. Benkiel's complaint by February 28, 2014 [ODC Ex. 47, bates 200-201].

In his response to the complaint, verified on or about March 13, 2014, Respondent stated that the underlying matter involved pending litigation and he requested that he be permitted to respond to this complaint once the litigation had been resolved [ODC Ex. 48, bates 202-203]. At the hearing, Mr. Benkiel appeared by telephone and, after being duly sworn, testified that because he had grown up with Respondent he called him for legal advice after he was involved in an automobile accident in Pennsylvania where another driver had been at fault and Mr. Benkiel sustained injury [Trans. pp. 82-83]. Mr. Benkiel also testified on cross-examination that he was the advertising representative for Respondent in his law practice in the metropolitan area of Morgantown, which included West Virginia and Pennsylvania [Trans. pp. 95-96]. Mr. Benkiel confirmed that he and Respondent had entered into a written contingency-fee representation agreement [Trans. pp. 83-84].

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<sup>10</sup> The letter contained a typographical error for the date as follows, "Tuesday, November 26 21, 2013, . . ."

Mr. Benkiel stated that he was not aware that Respondent was not licensed to practice law in Pennsylvania and that the case would have to be filed in that jurisdiction [Trans. p. 84]. Mr. Benkiel testified that he sought medical treatment, provided medical records and other information to Respondent, and he believed that Respondent “sent out various letters,” on Mr. Benkiel’s behalf [Trans. p. 85]. Mr. Benkiel said he was under the impression that the case would be filed in court at some point, and that he “. . . kept bugging [Respondent] and saying, hey, we’ve got to get this done,” [Trans. p. 86]. Mr. Benkiel testified that he ultimately learned that the statute of limitations had expired in the case and that there was nothing more he could do to pursue the matter [Trans. p. 88]. Mr. Benkiel said that he was never able to pursue damages against the driver that caused that April 2010 accident and that he still experienced some neck pain from the accident [Trans. pp. 89, 90].

Mr. Benkiel said he attempted to pursue damages from Respondent through counsel but abandoned his claim after learning that Respondent was filing for bankruptcy [Trans. pp. 90-91; ODC Ex. 43, bates 184-189]. In the course of negotiations regarding the professional negligence claim, Respondent offered an arrangement whereby he would “hire” Mr. Benkiel as a consultant for a fee of One Thousand Dollars (\$1,000.00) per month for a period of twenty-four months, and Mr. Benkiel’s sole job during that period would be “to keep his accusations confidential,” [ODC Ex. 43, bates 186]. Mr. Benkiel testified that he declined said offer from Respondent [Trans. pp. 92-93]. Respondent admitted in his testimony that he had made an offer to Mr. Benkiel, via Mr. Benkiel’s counsel, to pay him Twenty Four Thousand Dollars (\$24,000.00) in One Thousand Dollar (\$1,000.00) a month monthly payments [ODC Ex. 40, bates 186; Trans. p. 200]. The HPS found this evidence troubling in that such a proposal might have been construed in the bankruptcy proceeding as creating favorable treatment of one creditor over another by concealing one creditor with a legitimate claim

against Respondent in a malpractice case, and then satisfying that creditor without listing him as a creditor in the bankruptcy proceeding and then designating the payments to satisfy the debt as “compensation” for work that did not exist and was never to be performed.

Respondent testified at hearing that Mr. Benkiel was aware that he was not licensed to practice law in Pennsylvania and that they would need to get counsel in Pennsylvania if the case proceeded to litigation [Trans. p. 197]. Respondent denied that he provided Mr. Benkiel with advice concerning the laws in Pennsylvania [Trans. p. 198]. Respondent acknowledged, however, that he did not act with reasonable diligence and promptness during his representation of Mr. Benkiel because he missed the statute of limitations in the case [Trans. pp. 198-199].

Respondent testified that his recollection was that he was not able to quickly find a Pennsylvania lawyer to assist with the case, so the case “probably fell along the wayside,” [Trans. p. 200]. Respondent acknowledged that Mr. Benkiel had never filed a lawsuit against him alleging malpractice, and Respondent stated that he filed for personal bankruptcy in late 2014 [Trans. pp. 200-201]. Respondent testified earlier in the hearing that he did not maintain malpractice insurance [Trans. p. 106]. Respondent stated that he would be willing to make restitution to Mr. Benkiel and that he believed Twenty Four Thousand Dollars (\$24,000.00) to be a fair amount considering the facts of the case [Trans. p. 205].

6. Daniel N. Britton Complaint, I.D. No. 13-02-417

Mr. Britton stated in his complaint, which was sworn and notarized on or about August 30, 2013, that he retained Respondent on or about June 14, 2013, for representation in a Family Court matter and paid him a retainer of One Thousand Seven Hundred Dollars (\$1,700.00). The complaint further stated that the matter involved a request to modify a parenting plan in order to permit Mr.

Britton's children to attend a different school [ODC Ex. 49, bates 204-208]. Mr. Britton alleged that despite his representation that the matter was time-sensitive, it took Respondent approximately five weeks to file the necessary documents [ODC Ex. 49, bates 204-208; Trans. pp. 28-29]. Mr. Britton further alleged that Respondent was not responsive to Mr. Britton's calls of inquiry [Trans. pp. 29-30; 43].

Mr. Britton stated that Respondent finally obtained a court date of August 23, 2013, purportedly after Mr. Britton had contacted the Family Court of Preston County to ascertain the status of the matter and the Court's assistant notified Respondent of Mr. Britton's call to the Court [Trans. pp. 29-30; 43]. The hearing was later continued to the following week due to the vacation of opposing counsel [Trans. p. 38]. Mr. Britton testified at the hearing that he believed that the Court ultimately denied his request to modify the parenting plan because the hearing took place after the new school year began [Trans. p. 30]. Mr. Britton further testified that he believed that had Respondent filed the paperwork sooner, they could have obtained an earlier hearing date [Trans. p. 38]. Mr. Britton testified that he did not believe that Respondent had earned the full One Thousand Seven Hundred Dollars (\$1,700.00) he had been paid [Trans. p. 32].

By letter dated September 16, 2013, the ODC sent Respondent a copy of Mr. Britton's complaint and directed him to file a verified response within twenty days [ODC Ex. 50, bates 209-210]. After not receiving any response from Respondent, by letter dated November 15, 2013, sent via certified mail, return receipt requested, Disciplinary Counsel requested that Respondent provide the requested response by Tuesday, November [26], 2013,<sup>11</sup> or Respondent would be subpoenaed to appear at the ODC to give a sworn statement or the allegations in the complaint would be deemed

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<sup>11</sup> The letter contained a typographical error for the date as follows, "Tuesday, November 26 21, 2013, . . ."

admitted and the matter would be referred to the Investigative Panel of the Lawyer Disciplinary Board [ODC Ex. 51, bates 211-212]. Respondent failed to provide a verified response to the complaint by the above-referenced deadline and, as a result, Respondent was issued a subpoena to appear at the ODC to give a sworn statement [ODC Ex. 52, bates 214]. However, on or about February 10, 2014, Disciplinary Counsel agreed to cancel the statement if Respondent provided a verified written response to Mr. Britton's complaint by February 28, 2014 [ODC Ex. 47, bates 200-201]. In his response to the complaint, verified on or about March 13, 2014, Respondent denied that the late-August hearing date was a factor in the Court's decision in the underlying case, citing to the fact that the children had been attending the same school for the previous two years based upon an agreed parenting plan that was previously in place. Respondent also denied that he owed Mr. Britton any refund, citing to the work he performed on the matter [ODC Ex. 54, bates 220-222].

At the hearing, Respondent contended that Mr. Britton was charged a "flat fee," which was "non-refundable," [Trans. p. 36]. Respondent testified that he had communication and diligence issues with regard to his representation of Mr. Britton, but denied that those issues contributed to the result of Mr. Britton's case [Trans. p. 215]. Respondent further testified that he believed that he had earned his full fee from Mr. Britton [Trans. p. 216]. Respondent testified that the reason he had failed to timely file a response to Mr. Britton's complaint was that he "had pretty much given up for a period of time," and "wasn't interested in responding," [Trans. p. 219]. Respondent denied that the failure to respond to ethics complaints or other requests from the ODC was detrimental to the practice of law [Trans. p. 220].

7. Martin H. Donovan Complaint, I.D. No. 13-02-538

Mr. Donovan stated in his complaint, which was sworn and notarized on or about October 25, 2013, that he retained Respondent on or about November 17, 2011, for an expungement matter and paid him a retainer of Six Hundred Dollars (\$600.00) [ODC Ex. 55, bates 223-229]. Mr. Donovan's complaint stated that Respondent subsequently provided him with no updates in the matter [ODC Ex. 55, bates 227]. Mr. Donovan stated that on or about October 22, 2013, he contacted the Court to determine the status of the matter and learned that no expungement had ever been filed on his behalf [ODC Ex. 55, bates 227; ODC Ex. 58, bates 234].

By letter dated November 21, 2013, the ODC sent Respondent a copy of the complaint and directed him to file a verified response within twenty (20) days [ODC Ex. 56, bates 230-231]. After not receiving any response from Respondent, by letter dated February 12, 2014, Disciplinary Counsel advised Respondent that if a response was not received by February 28, 2014, such would be regarded as an admission of the allegations and subject Respondent to disciplinary action [ODC Ex. 57, bates 232-233]. In his response to the complaint, verified on or about March 13, 2014, Respondent acknowledged that he failed to complete the work he was paid to do by Mr. Donovan and that he would issue Mr. Donovan a full refund [ODC Ex. 59, bates 235-237].

At the hearing, Respondent admitted that he never filed anything on behalf of Mr. Donovan and that he currently still owed him a refund [Trans. p. 223]. Respondent also testified that Mr. Donovan's funds were probably in his operating account, despite those funds being unearned [Trans. p. 226]. Mr. Donovan did not appear or testify at the hearing.

8. Tony Bethea Complaint, I.D. No. 13-02-542

Mr. Bethea stated in his complaint, which was sworn and notarized on or about November 18, 2013, that Respondent had been appointed by the Circuit Court of Monongalia County to file a *writ*

of *habeas corpus* on his behalf [ODC Ex. 60, bates 238-243]. Court records indicated that Respondent was appointed on or about December 10, 2004 [ODC Ex. 64, bates 259]. Respondent was relieved as counsel by Order entered January 8, 2013, and Attorney Christopher Miller, Esquire, was appointed to represent Mr. Bethea in the matter [ODC Ex. 64, bates 260]. Mr. Bethea alleged in his complaint that despite several requests, Respondent had not turned over the files in his possession relating to Mr. Bethea's case to Mr. Miller [ODC Ex. 60, bates 238].

In his response to the complaint, verified on or about March 13, 2014, Respondent stated that Mr. Miller should have had access to the file at the courthouse. Respondent further stated that he delivered everything in his possession relating to Mr. Bethea's case to Mr. Miller on March 13, 2014 [ODC Ex. 63, bates 248-250]. At the hearing, Respondent testified that he could not recall specifics of when Mr. Bethea's counsel was provided with the files in Respondent's possession, but that his depression could have affected his ability to copy and turn over files during that time period [Trans. pp. 230-231]. Mr. Bethea was not present and did testify at the hearing.

9. Lisa A. Long Complaint, I.D. No. 13-02-578

Ms. Long stated in her complaint, which was sworn and notarized on or about November 24, 2013, that in mid-2012, she and her husband paid Respondent to file a bankruptcy action on their behalf [ODC Ex. 65, bates 261-263]. Ms. Long's complaint stated that despite complying with all of Respondent's requests, Respondent had taken no action in the matter [ODC Ex. 65, bates 262]. Ms. Long also stated that Respondent had not returned her phone calls [ODC Ex. 65, bates 262].

In his response to the complaint, verified on or about March 13, 2014, Respondent attributed the delay in the case to scheduling issues [ODC Ex. 68, bates 268-270]. Ms. Long did not appear or testify at the hearing. At the hearing, Respondent disputed that he had been unresponsive to Ms. Long's calls. He stated that the reason for delays in the case was that Ms. Long had failed to bring him

the documentation he needed to proceed with the case [Trans. pp. 232-234]. Respondent acknowledged at the hearing that Ms. Long was entitled to a refund, although he was not certain of how much she had paid him. Respondent contended that the retainer remained in his operating account [Trans. pp. 233-234].

10. Carly A. Wears Complaint, I.D. No. 14-02-058

Ms. Wears stated in her complaint, which was sworn and notarized on or about January 27, 2014, that she retained Respondent in August of 2013 to represent her in a child custody matter and paid him a retainer of Two Thousand Five Hundred Dollars (\$2,500.00) [ODC Ex. 70, bates 274]. Ms. Wears' complaint alleged that from late August to October, 2013, Respondent was routinely nonresponsive to Ms. Wears' calls of inquiry and rarely provided her with updates in the matter [ODC Ex. 70, bates 272-276]. Ms. Wears stated that she visited Respondent's office on or about October 10, 2013, and noticed a copy of discovery responses Respondent had prepared for her case. Ms. Wears observed that the Certificate of Service for the documents was for that same day, which was two months past the deadline given in the Temporary Order that had been entered in the matter [ODC Ex. 70, bates 275; Trans. pp. 53-55].

By letter dated October 23, 2013, Ms. Wears terminated Respondent's representation and requested that he return the remainder of her retainer in a timely manner [ODC Ex. 73, bates 287; Trans. pp. 59-60]. By letter dated November 27, 2013, Ms. Wears again requested a refund of her retainer from Respondent, along with a final bill and a copy of her file [ODC Ex. 73, bates 291; 293; Trans. p. 61]. Ms. Wears was provided with her file on or about December 10, 2013 [ODC Ex. 71, bates 278; Trans. p. 62].

By letter dated January 31, 2014, the ODC sent Respondent a copy of the complaint and directed him to file a verified response within twenty days. This letter also notified Respondent that

failed to respond may be regarded as an admission of the allegations and may form the basis for a Statement of Charges [ODC Ex. 76, bates 324-325]. Respondent failed to respond to Ms. Wears' complaint [Trans. p. 239]. At the hearing, Ms. Wears testified that communication with Respondent when she first hired him was, "really really awesome," but then it "slowed down to nonexistent," [Trans. p. 46]. Ms. Wears testified that communication was the biggest issue she had with Respondent [Trans. pp. 52; 62; 71; 77; ODC Ex. 74, bates 294]. Ms. Wears also testified that she never received a refund from Respondent or an itemization of his fee [Trans. pp. 56-57; 60].

Respondent admitted on the record at the hearing that he would stipulate to communication issues during his representation of Ms. Wears and further admitted that at times he had been nonresponsive to her calls [Trans. p. 237]. Respondent denied that he missed discovery deadlines in the case and testified that he had an agreement with opposing counsel to extend discovery. Hence, no harm to Ms. Wears had occurred [Trans. p. 237]. Respondent contended that he earned the full fee paid to him by Ms. Wears, but did not provide any documentation concerning the time he expended in the matter [Trans. pp. 238-239].

11. Office of Disciplinary Counsel Complaint, I.D. No. 14-02-183

By letter dated February 28, 2014, Attorney Delby B. Pool advised Disciplinary Counsel of a Family Court matter involving her client, Amy Dovola, and Ms. Dovola's former husband, who was represented by Respondent [ODC Ex. 77, bates 326-335]. Ms. Pool stated in her letter that the underlying matter reached a settlement on October 30, 2013, which required Respondent's client to pay Six Thousand Five Hundred Dollars (\$6,500.00) to Ms. Dovola within sixty days. Respondent also was to prepare the agreed order [ODC Ex. 77, bates 326]. Despite Mr. Dovola's representation to Ms. Pool and her client that the Six Thousand Five Hundred Dollars (\$6,500.00) had been timely

sent to Respondent, Ms. Pool represented that Respondent had not forwarded any such funds to Ms. Pool's client [ODC Ex. 77, bates 326].

Bank records indicated that a check in the amount of Six Thousand Five Hundred Dollars (\$6,500.00), made out to Respondent by Michael Dovola, was deposited into Respondent's Client Trust Account on or about December 12, 2013 [ODC Ex. 80, bates 371]. Ms. Pool maintained that she sent Respondent several reminders to forward the funds to her client [ODC Ex. 77, bates 326]. On or about January 17, 2014, Ms. Pool filed a Motion for Sanctions in the matter, in which she alleged that Respondent had not tendered the funds to Ms. Dovola, nor had he tendered the agreed order to the Court [ODC Ex. 77, bates 326; 330-335]. On or about February 12, 2014, Respondent provided Ms. Pool with a check from his client trust account made payable to Ms. Pool in the amount of Six Thousand Five Hundred Dollars (\$6,500.00) [ODC Ex. 77, bates 326; ODC Ex. 80, bates 364]. On or about February 18, 2014, Ms. Pool deposited the same in her IOLTA account and then disbursed the funds to her client the next day [ODC Ex. 77, bates 326]. On or about February 27, 2014, a copy of the check from Respondent was received in the mail by Ms. Pool from her bank marked, "NOT SUFFICIENT FUNDS" [ODC Ex. 77, bates 327; 333]. Ms. Pool notified Respondent of the bad check and advised Respondent to provide the funds to her immediately [ODC Ex. 77, bates 327].

By letter dated March 31, 2014, the ODC sent Respondent a copy of the complaint and directed him to file a verified response within twenty days. This letter also notified Respondent that failed to respond may be regarded as an admission of the allegations and may form the basis for a Statement of Charges [ODC Ex. 78, bates 336-337]. Respondent failed to respond to the complaint [Trans. p. 248]. At the hearing, Respondent testified that during the end of 2013 he was not doing a good job of keeping track of his accounting or with putting money in the right accounts. He believed

that the check he provided to Ms. Pool was returned due to the fact he provided a refund to another client before putting the money to cover such into the correct account [Trans. pp. 240; 244-246]. Respondent denied that he had misappropriated any client funds and acknowledged the seriousness of client trust account violations [Trans. pp. 245-247]. Respondent testified that he ultimately made a cash payment to Ms. Pool and she withdrew her request for sanctions [Trans. p. 240].

12. Additional Testimony and Findings by the Hearing Panel Subcommittee

Russell “Jack” Torsney, Jr., a professional counselor and therapist, with a master’s degree in guidance and counseling, testified at the hearing as an expert psychologist retained by Respondent. Mr. Torsney has thirty (30) years experience as a counselor and psychologist [Trans. p. 165].<sup>12</sup> His private practice is located in Morgantown, West Virginia, and he also works as a counselor with the Federal Probation Office and with Community Corrections [Trans. p. 165]. Mr. Torsney has testified as an expert on multiple occasions in state and federal courts in northern West Virginia, and provides counseling for depression and similar matters on a daily basis [Trans. pp. 166-167]. He has known Respondent for more than ten years having encountered him professional in cases where Respondent represented a party involved in litigation.

Although Mr. Torsney did not provide counseling to Respondent during the period of time encompassed in the several disciplinary complaints which are the subject of this proceeding, he was asked to review the history of Respondent’s mental status during that time frame in an effort to evaluate Respondent’s emotional condition in that time frame [Trans. pp. 167-168]. Mr. Torsney actually had a recollection before he evaluated Respondent that he had observed Respondent during that time frame and observed a significant weight loss, which is a criteria for major depressive

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<sup>12</sup> Mr. Torsney is not a licensed psychologist, but he is nationally certified as a professional counselor, and is a licensed counselor and a licensed social worker.

disorders, and Respondent advised that he had not been on a diet [Trans. p. 168]. Mr. Torsney met with Respondent on one occasion, on January 15, 2015, in a session lasting approximately two hours. Respondent disclosed that he had suffered from feelings of hopelessness, worthlessness, and lack of the ability to enjoy anything for a period exceeding one year. Also, the history disclosed that Respondent stayed at home much of the time and avoided interaction with others.

The expert indicated that these were symptoms that are consistent with a significant situational depression [Trans. pp. 168-169]. Mr. Torsney noted that these symptoms often manifest themselves in persons who are depressed over the loss of a loved one whether through death or through a divorce. One characteristic is that the person may not be able to function in normal capacities. Another is suicidal ideation [Trans. p. 169]. He noted that Respondent disclosed that he had held suicidal thoughts during his depression and that he had both a plan and the means to carry out suicide. He also opined that the isolationism was a primary symptom in Respondent's depression [Trans. p. 170]. Mr. Torsney opined that Respondent had experienced significant depression during the time periods discussed herein. Mr. Torsney further opined that despite his opinion that Respondent currently maintained some symptoms of depression, that he had made progress and was currently fit to practice law. Mr. Torsney testified that Respondent's depression appeared more situational as opposed to clinical, that Respondent appeared to take responsibility for neglecting client matters, and that Respondent's goal moving forward was for these kinds of things not to happen. Mr. Torsney believed that it would be in Respondent's best interest to go forward with periodic counseling [Trans. pp. 165-185].

Respondent testified that with regard to overcoming his depression which resulted largely from the break-up of his fifteen-year marriage he indicated that he "just got out of it" [Trans. p. 120],

and he currently did not believe he was depressed [Trans. p. 129]. Respondent also testified that he did not abuse alcohol or other drugs [Trans. p. 122], and he has since remarried [Trans. p. 130]. Respondent testified that during the period of his depression he was not good at holding his clients' hands [Trans. pp. 120-121], but that he was able to represent his clients effectively. He just was not good communicating with them as he normally would have been [Trans. pp. 121, 250-251].

The HPS observed that Respondent indicated that had recovered from the loss of his marriage, and from the divorce. The findings of the HPS included that Respondent testified that his disciplinary issued occurred over a two-year period while he was depressed [Trans. p. 118], and that Respondent admitted that during that time period he lacked energy for "high maintenance" clients, but that he claimed he had recovered and changed his practice to avoid the pitfalls that existed during the time he was depressed [Trans. pp. 1202-121]. Respondent also indicated that his conduct was an anomaly and Respondent had pointed out that over his seventeen-year period of practicing law that it was only during this time frame that he had problems with ethics matters. Respondent said the depression devastated him, his practice, and his whole life. However, Respondent further indicated that he has made changes and is in the process of getting everything back together. Respondent testified that he was now emotionally and mentally capable of strong representation of his clients, and that he thought he had fixed things which caused problems with his lack of communication [Trans. pp. 250-251].

The HPS noted that the testimony from Complainant Wears inferred that Respondent's conduct was an anomaly and that Respondent was a very competent lawyer. The HPS found that this inference was raised from several excerpts in her testimony: she noted when she retained him in August, 2013, Respondent was the most promising and understanding of the several attorneys with whom she consulted when selecting counsel [Trans. p. 45], and Ms. Wears indicated that in the

beginning of the attorney client relationship, the communication “was really really awesome and then it kind of slowed down to nonexistent,” [Trans. pp. 46, 63]. Ms. Wears said that her biggest problem with him was communication, and when she asked him about the problem he indicated that he said he had just lost a secretary [Trans. pp. 52-53]. Ms. Wears testified that when she decided to terminate him, “. . . I just pretty much realized that he is either swamped with something going on in his own life or he just, you know, doesn’t really care or I don’t know what’s going on . . .” [Trans. p. 56].

When asked whether Respondent diligently handled her case, Ms. Wears responded, “I think he could have if he wasn’t busy. I don’t know. He just seemed super busy. I feel like when I hired him he was on top of his game and very confident and that’s the reason I hired him, but something happened in that time that - - I don’t know if he just had stuff going on in his own life or what was going on, but I mean something clearly changed from the time I hired him to the time that our proceedings started,” [Trans. p. 59]. Ms. Wears also commented on Respondent’s competence: “And I felt like when I hired him that it was the perfect person to hire, but - - I have no doubt in his competence at all as a lawyer, I just - - like I said several times, I feel like something happened along the line where maybe he had too much of a caseload, I don’t know. . .” [Trans. p. 64]. The HPS noted that Ms. Wears also testified that this incident did not affect her trust in the legal system [Trans. p. 65]. Although Ms. Wears was frustrated with Respondent’s lack of communication, Ms. Wears indicated that “if we had to go to court, he’s very thorough and very informative, but the majority of the time, I felt like I was kind of in the dark, which is - - that’s why, I mean I truly believe he’s very competent in what he does. I have no doubts that he’s a great lawyer. I just felt like, I don’t know, there wasn’t enough time,” [Trans. pp. 73-74].

### **C. CONCLUSIONS OF LAW OF THE HPS AND OBJECTIONS OF ODC**

With regard to the Miller complaint, the HPS found that Respondent neglected Ms. Miller's case and failed to take appropriate action in the matter, in violation of Rule 1.3 of the Rules of Professional Conduct,<sup>13</sup> and that Respondent failed to keep Ms. Miller informed as to the status of the matter and failed to respond to her requests for information, in violation of Rule 1.4 of the Rules of Professional Conduct.<sup>14</sup> The HPS declined to find that Respondent had violated Rule 3.2 of the Rules of Professional Conduct<sup>15</sup> as charged in the Miller matter. The HPS stated that from the sworn testimony adduced at the hearing, it appeared that Respondent did file a petition in circuit court to have Ms. Miller's brother removed as a fiduciary. The HPS recognized that the normal procedure for removal of a fiduciary in an estate proceeding has its origin before the county commission rather than in the circuit court. However, the HPS gave credit to Respondent's testimony that he had previously successfully utilized the jurisdiction of the circuit courts to handle such matters and, as a result, found that a violation of Rule 3.2 seemed unwarranted under the evidence adduced at the hearing. The ODC does not object to these findings.

However, the HPS also declined to find that Respondent violated Rules 1.15(b) and 1.16(d) of the Rules of Professional Conduct<sup>16</sup> in the Miller matter. Because Ms. Miller failed to appear at the hearing, the HPS stated that the evidence was not entirely clear as to the circumstances surrounding the return of her file and, as a result, the charged violations of Rule 1.15 and 1.16 were not proven by clear and convincing evidence. Moreover, the HPS found that the evidence presented

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<sup>13</sup> See n. 2 *supra*.

<sup>14</sup> See n. 3 *supra*.

<sup>15</sup> See n. 4 *supra*.

<sup>16</sup> See n. 5 and n. 6 *supra*.

suggested that Ms. Miller was unwilling to accept the partial refund that Respondent felt was due to her and instead wanted a full refund. Further, the HPS determined that the record indicated that Respondent made efforts to return Ms. Miller files after the complaint was filed by Ms. Miller, but the files were returned because of a problem with the address she had provided.

ODC asserts, however, it was undisputed that in an email dated August 11, 2012, Ms. Miller requested that Respondent supply her with “. . . a complete read out of expenses since date of retaining [Respondent’s] services . . . a complete statement of charges & records showing services rendered . . .” [ODC Ex. 1, bates 19]. When asked at the hearing if he had complied with this request of Ms. Miller, Respondent replied that he did not think he did [Trans. pp. 139-140]. As such, there is clear and convincing evidence present of a violation of Rule 1.15(b). In addition, there is no evidence that Respondent ever attempted to provide Ms. Miller with a refund of her unearned retainer at any time, despite Respondent’s testimony that he owed her approximately One Thousand One Hundred Dollars (\$1,100.00) [Trans. p. 147]. Therefore, Respondent clearly did not comply with the provision of Rule 1.16(d) which requires upon the termination of representation the refunding to a client any advance payment of fee that has not been earned. Moreover, Respondent believed he deposited the funds he received from Ms. Miller into his operating account upon receipt [Trans. p. 146]. The ODC contends that such presents a violation of the misrepresentation aspect of Rule 8.4(c) of the Rules of Professional Conduct<sup>17</sup> because Respondent placed Ms. Miller’s funds in his operating account which potentially he could utilize rather than in an IOLTA account from which he could only draw funds when they were earned.<sup>18</sup>

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<sup>17</sup> See n. 8 *supra*.

<sup>18</sup> The Statement of Charges filed in this matter did not contain this rule violation. The Barber Court found, however, that there was not a due process violation when the Hearing Panel found a violation of uncharged conduct when “it was related to or was within the scope of the conduct and rule violations

With regard to the Hughes complaint, the HPS found that Respondent neglected Ms. Hughes' case and failed to take any action in the matter, in violation of Rule 1.3 of the Rules of Professional Conduct,<sup>19</sup> that Respondent failed to respond to the inquiries of Ms. Hughes, in violation of Rule 1.4 of the Rules of Professional Conduct,<sup>20</sup> that Respondent engaged in dilatory practices and failed to make reasonable efforts consistent with the stated and agreed upon objectives of Ms. Hughes, in violation of Rule 3.2 of the Rules of Professional Conduct,<sup>21</sup> and that Respondent failed to return the unearned fee paid to him by Ms. Hughes until after she filed an ethics complaint against him, in violation of Rule 1.16(d) of the Rules of Professional Conduct.<sup>22</sup> The ODC does not object to these findings.

In the Morris complaint, the HPS found that Respondent neglected Ms. Morris' case and failed to take appropriate action in the matter, in violation of Rule 1.3 of the Rules of Professional Conduct,<sup>23</sup> that Respondent failed to keep Ms. Morris informed as to the status of the matter and failed to respond to her requests for information, in violation of Rule 1.4 of the Rules of Professional Conduct,<sup>24</sup> that Respondent engaged in dilatory practices and failed to make reasonable efforts consistent with the stated and agreed upon objectives of Ms. Morris, in violation of Rule 3.2 of the

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specifically charged.” Lawyer Disciplinary Board v. Barber, 211 W.Va. 358, 365, 566 S.E.2d 245, 252 (2002), *quoting* The Florida Bar v. Fredericks, 731 So.2d 1249 (Florida 1999).

<sup>19</sup> *See* n. 2 *supra*.

<sup>20</sup> *See* n. 3 *supra*.

<sup>21</sup> *See* n. 4 *supra*.

<sup>22</sup> *See* n. 6 *supra*.

<sup>23</sup> *See* n. 2 *supra*.

<sup>24</sup> *See* n. 3 *supra*.

Rules of Professional Conduct,<sup>25</sup> and that Respondent failed to promptly deliver to Ms. Morris the unearned portion of her retainer or render a full accounting regarding such property pursuant to her request, in violation of Rule 1.15(b) of the Rules of Professional Conduct.<sup>26</sup> The HPS also found that, because the burden of proof is always upon the attorney to show the reasonableness of the fees charged,<sup>27</sup> and Respondent failed to present any records or evidence that he earned the full fee paid to him by Ms. Morris, Respondent had violated Rule 1.16(d) of the Rules of Professional Conduct.<sup>28</sup> The ODC does not object to these findings.

With regard to the Goodnight complaint, the HPS found that from Respondent's testimony it became clear that he represented Mr. Goodnight in multiple criminal offenses as well as the abuse and neglect case referenced in the complaint. The HPS also found that Respondent was able to secure an excellent result for Mr. Goodnight in his criminal case and that Mr. Goodnight's less favorable result in the abuse and neglect case resulted from Mr. Goodnight's bad behavior and nothing that Respondent did with respect to communication or appearances at "MDT" meetings.<sup>29</sup> As a result, the

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<sup>25</sup> See n. 4 *supra*.

<sup>26</sup> See n. 5 *supra*.

<sup>27</sup> See Syl. pt. 2, Committee on Legal Ethics of West Virginia State Bar v. Tatterson, 177 W.Va. 356, 352 S.E.2d 107 (1986).

<sup>28</sup> See n. 6 *supra*.

<sup>29</sup> "Multidisciplinary team" or "MDT" is defined W.Va. Code §49-1-3(h) as follows, "a group of professionals and paraprofessionals representing a variety of disciplines who interact and coordinate their efforts to identify, diagnose and treat specific cases of child abuse and neglect. Multidisciplinary teams may include, but are not limited to, medical, educational, child care and law-enforcement personnel, social workers, psychologists and psychiatrists. Their goal is to pool their respective skills in order to formulate accurate diagnoses and to provide comprehensive coordinated treatment with continuity and follow-up for both parents and children."

HPS found that ODC had not proven the alleged violations of Rules 1.1, 1.3, and 1.4 of the Rules of Professional Conduct<sup>30</sup> on this complaint by clear and convincing evidence.

The ODC objects to the findings made by the HPS with respect to the Goodnight complaint. Respondent did not dispute that he failed to represent Mr. Goodnight's interests at "MDT" meetings, acknowledging that while there could have been scheduling conflicts for some, others occurred during the time period Respondent was depressed and Respondent could not make the trip to Fairmont from Morgantown [Trans. p. 194]. The evidence is also clear that the presiding Circuit Court Judge made the determination that Respondent had been unable to fulfill his obligations as counsel to Mr. Goodnight due to failing to be present for "MDT" meetings and by not being responsive to telephone calls made to him to determine the status of his client so that permanency planning for children could be completed, and the Court appointed new counsel for Mr. Goodnight [ODC Ex. 33, bates 152-153; Trans. pp. 190-191]. The fact that Respondent's admitted conduct in failing to appear for meetings on behalf of Mr. Goodnight or in not responding to Mr. Goodnight's calls may have had no affect on the ultimate disposition of the case is inconsequential. The ODC asserts that the evidence presented in this case clearly and convincingly established that Respondent's conduct fell short of Rules 1.1, 1.3, and 1.4 of the Rules of Professional Conduct.<sup>31</sup>

In the Benkiel complaint, the HPS found that because Respondent incorrectly advised Mr. Benkiel as to the law in another jurisdiction and failed to take any action on Mr. Benkiel's case before the statute of limitations expired, Respondent violated Rules 1.1 and 1.3 of the Rules of Professional Conduct.<sup>32</sup> The HPS further found that Respondent failed to keep Mr. Benkiel informed as to the

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<sup>30</sup> See n. 1, n. 2 and n. 3 *supra*.

<sup>31</sup> See n. 1, n. 2 and n. 3 *supra*.

<sup>32</sup> See n. 1 and n. 2 *supra*.

status of the matter and failed to respond to his requests for information, in violation of Rule 1.4 of the Rules of Professional Conduct.<sup>33</sup> Finally, the HPS found that Respondent engaged in dilatory practices that brought the administration of justice into disrepute and failed to make reasonable efforts consistent with the stated and agreed upon objectives of Mr. Benkiel, in violation of Rule 3.2 of the Rules of Professional Conduct,<sup>34</sup> and that Respondent failed to comply with the ODC's lawful request for information, in violation of Rule 8.1(b) of the Rules of Professional Conduct.<sup>35</sup> The ODC does not object to these findings.

In the Britton complaint, the HPS found that Respondent failed to take prompt action with regard to Mr. Britton's case after being retained, in violation of Rule 1.3 of the Rules of Professional Conduct,<sup>36</sup> and that Respondent failed to keep Mr. Britton informed as to the status of the matter and failed to respond to his requests for information, in violation of Rule 1.4 of the Rules of Professional Conduct.<sup>37</sup> The HPS further found that Respondent engaged in dilatory practices and failed to make reasonable efforts consistent with the stated and agreed upon objectives of Mr. Britton, in violation of Rule 3.2 of the Rules of Professional Conduct,<sup>38</sup> and that Respondent failed to comply with the ODC's lawful request for information, in violation of Rule 8.1(b) of the Rules of Professional Conduct.<sup>39</sup> The ODC does not object to these findings.

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<sup>33</sup> See n. 3 *supra*.

<sup>34</sup> See n. 4 *supra*.

<sup>35</sup> See n. 7 *supra*.

<sup>36</sup> See n. 2 *supra*.

<sup>37</sup> See n. 3 *supra*.

<sup>38</sup> See n. 4 *supra*.

<sup>39</sup> See n. 7 *supra*.

With regard to the Donovan complaint, the HPS found that Respondent failed to take any action with regard to Mr. Donovan’s case after being retained, in violation of Rule 1.3 of the Rules of Professional Conduct.<sup>40</sup> The HPS also found that Respondent failed to keep Mr. Donovan informed as to the status of the matter and failed to respond to his requests for information, in violation of Rule 1.4 of the Rules of Professional Conduct.<sup>41</sup> The HPS further found that Respondent engaged in dilatory practices and failed to make reasonable efforts consistent with the stated and agreed upon objectives of Mr. Donovan, in violation of Rule 3.2 of the Rules of Professional Conduct,<sup>42</sup> that Respondent failed to promptly return unearned fee paid to him by Mr. Donovan, in violation of Rule 1.16(d) of the Rules of Professional Conduct,<sup>43</sup> and that Respondent failed to comply with the ODC’s lawful request for information, in violation of Rule 8.1(b) of the Rules of Professional Conduct.<sup>44</sup> Finally, the HPS found that because Respondent placed Mr. Donovan’s funds in his operating account which potentially he could utilize rather than in an IOLTA account from which he could only draw funds when they were earned, he violated the misrepresentation aspect of Rule 8.4(c) of the Rules of Professional Conduct.<sup>45</sup> The ODC does not object to these findings.

With regard to the Bethea complaint, the HPS found that Respondent neglected Mr. Bethea’s case and failed to take any action in the matter, in violation of Rule 1.3 of the Rules of Professional

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<sup>40</sup> *See* n. 2 *supra*.

<sup>41</sup> *See* n. 3 *supra*.

<sup>42</sup> *See* n. 4 *supra*.

<sup>43</sup> *See* n. 6 *supra*.

<sup>44</sup> *See* n. 7 *supra*.

<sup>45</sup> *See* n. 8 *supra*.

Conduct.<sup>46</sup> The HPS further found that because of Respondent's dilatory practices and his failure to make reasonable efforts consisted with the stated and agreed upon objectives of Mr. Bethea, and because such action brought the administration of justice in disrepute ultimately requiring that the Circuit Court Judge remove him as counsel, he violated Rule 3.2 of the Rules of Professional Conduct.<sup>47</sup> Finally, the HPS found that Respondent failed to promptly surrender papers and property to which the Mr. Bethea and his new counsel were entitled, in violation of Rule 1.16(d) of the Rules of Professional Conduct.<sup>48</sup> The ODC does not object to these findings.

With regard to the Long complaint, the HPS gave credit to Respondent's testimony in which he explained that the reason for delays in the case was that Ms. Long had failed to bring him the documentation he needed to proceed with the case [Trans. pp. 232-234]. The HPS agreed that documentation was a necessary component to any bankruptcy proceeding, and with the absence of Ms. Long at the hearing, the HPS did not find that the ODC had proven violations of Rules 1.3 and 1.4 of the Rules of Professional Conduct by clear and convincing evidence.<sup>49</sup> The ODC does not object to this finding. The HPS did find with respect to this complaint that Respondent had engaged in dilatory practices and failed to make reasonable efforts consistent with the stated and agreed upon objectives of Ms. Long, in violation of Rule 3.2 of the Rules of Professional Conduct.<sup>50</sup> The HPS also found that because Respondent intentionally placed his client's funds in his operating account which he could utilize rather than in an IOLTA account from which he could only draw funds when they

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<sup>46</sup> See n. 2 *supra*.

<sup>47</sup> See n. 4 *supra*.

<sup>48</sup> See n. 6 *supra*.

<sup>49</sup> See n. 2 and n. 3 *supra*.

<sup>50</sup> See n. 4 *supra*.

were earned, he violated the misrepresentation ground of Rule 8.4(c) of the Rules of Professional Conduct.<sup>51</sup> The ODC likewise does not object to these findings.

With regard to the Wears complaint, the HPS gave credit to Respondent's explanation of why deadlines for the filing of certain pleadings in the matter had been missed and, as a result, did not find that Respondent's conduct with respect to this part of ODC's evidence amounted to a violation of Rule 1.3 of the Rules of Professional Conduct.<sup>52</sup> However, the HPS did find that Respondent failed to keep Ms. Wears informed as to the status of the matter, failed to respond to her requests for information, and failed to be available to explain to her important legal issues, in violation of Rule 1.4 of the Rules of Professional Conduct.<sup>53</sup> The HPS further found that because the burden of proof is always upon the attorney to show the reasonableness of the fees charged,<sup>54</sup> and Respondent failed to present any records or evidence that he earned the full fee paid to him by Ms. Wears, Respondent had violated Rule 1.16(d) of the Rules of Professional Conduct.<sup>55</sup> The HPS also found that Respondent failed to comply with the ODC's lawful request for information, in violation of Rule 8.1(b) of the Rules of Professional Conduct,<sup>56</sup> and that Respondent intentionally placed his client's funds in his operating account which he could utilize rather than in an IOLTA account from which

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<sup>51</sup> See n. 8 *supra*.

<sup>52</sup> See n. 2 *supra*.

<sup>53</sup> See n. 3 *supra*.

<sup>54</sup> See Syl. pt. 2, Committee on Legal Ethics of West Virginia State Bar v. Tatterson, 177 W.Va. 356, 352 S.E.2d 107 (1986).

<sup>55</sup> See n. 6 *supra*.

<sup>56</sup> See n. 7 *supra*.

he could only draw funds when they were earned, in violation of the misrepresentation aspect Rule 8.4(c) of the Rules of Professional Conduct.<sup>57</sup> The ODC does not object to these findings.

Finally, with regard to the complaint lodged by the ODC, the HPS gave credit to Respondent's testimony wherein he denied he had misappropriated any client funds [Trans. pp. 245-247], and made the determination that Respondent had not intentionally and knowingly converted funds to his own use in the matter. Nonetheless, the HPS found the length of the delay in transferring the funds to Ms. Pool to have been unreasonable. The HPS found that Respondent failed to promptly tender the agreed order to the Family Court and failed to promptly forward funds from his client to Ms. Dovola, in violation of Rule 1.3 of the Rules of Professional Conduct.<sup>58</sup> The HPS also found that Respondent engaged in dilatory practices that brought the administration of justice into disrepute in the matter and failed to make reasonable efforts consistent with the stated and agreed upon objectives of his client, in violation of Rule 3.2 of the Rules of Professional Conduct.<sup>59</sup> The HPS further found that Respondent failed to promptly deliver to Ms. Dovola funds to which she was entitled, in violation of Rule 1.15(b) of the Rules of Professional Conduct,<sup>60</sup> and that Respondent failed to file a verified response to this complaint and failed to comply with the ODC's lawful request for information, in violation of Rule 8.1(b) of the Rules of Professional Conduct.<sup>61</sup> The ODC does not object to these findings.

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<sup>57</sup> See n. 8 *supra*.

<sup>58</sup> See n. 2 *supra*.

<sup>59</sup> See n. 4 *supra*.

<sup>60</sup> See n. 5 *supra*.

<sup>61</sup> See n. 7 *supra*.

The HPS additionally concluded that the clear and convincing evidence established that Respondent's problems in the various matters giving rise to these disciplinary complaints were an "anomaly and an aberration" from the manner in which he conducted his law practice during the remaining seventeen years of his practice. The HPS also found that this "aberrant behavior" was the result of situation depression and that the depression created a "legitimate and substantial mitigating factor." The HPS further found that Respondent's violations were largely precipitated by the breakup of his marriage and the related depression, rather than by a lack of commitment to and concern for his clients. Finally, the HPS found that Respondent's violations were not the result of some intentional or malevolent behavior or personality disorder. Nonetheless, the HPS determined that Respondent had committed thirty-nine distinct violations of the Rules of Professional Conduct.

As discussed above, the ODC asserts that the clear and convincing evidence supports findings of additional violations of the Rules of Professional Conduct regarding the conduct of Respondent. In addition, the ODC disputes the conclusion that the conduct discussed herein presented an anomaly or aberration, or was an isolated incident. Respondent contended that he became depressed in late 2012, and the symptoms persisted throughout most of 2013 [Trans. p. 113]. However, three of the eleven complaints discussed at the disciplinary hearing involved conduct that occurred prior to late 2012. Respondent admitted that he did nothing with regard to Mr. Benkiel's case, and the statute of limitations ultimately expired on or about April 23, 2012 [Trans. p. 200]. Respondent also admitted that he never filed an expungement for Mr. Donovan after being paid Respondent Six Hundred Dollars (\$600.00) to do so on or about November 17, 2011 [ODC Ex. 55, bates 227-228; Trans. p. 223]. In addition, the HPS found from the evidence that, following Respondent's appointment as counsel to Mr. Bethea on or about December 10, 2004, Respondent neglected Mr. Bethea's case and failed to take any action in the matter, bringing the administration of justice in disrepute ultimately

requiring that he be removed as counsel by the Circuit Court. Indeed, ODC asserts that such evidence established a pattern of neglect encompassing numerous years, and the HPS erred in its finding otherwise.

## **II. SUMMARY OF ARGUMENT**

The HPS of the Lawyer Disciplinary Board correctly found that Respondent committed multiple violations of the Rules of Professional Conduct. The HPS recommended that Respondent be suspended for a period of ninety (90) days; that he be required to make restitution, as well as provide accountings of services for various complainants; that he shall be supervised for a period of one year after his reinstatement; that Respondent undergo counseling with reports submitted to the ODC; and that he pay the expenses of the proceedings. Respectfully, the ODC asserts that while there was no error in findings of fact made by the HPS, the ODC disputes certain conclusions of law made by the HPS as well as the HPS's recommendation as to sanction. The ODC asserts that the suspension period proposed by the HPS is inadequate considering the clear and convincing evidence against Respondent and precedent of this Honorable Court. ODC also requests that this Honorable Court make clear that should this proceeding result in a suspension of Respondent's law license for any amount of time, he should be reinstated through the procedure set forth in Rule 3.32 of the Rules of Lawyer Disciplinary Procedure. In ordering a strong sanction in this attorney disciplinary proceeding, the Court will be serving its goals of protecting the public, reassuring the public as to the reliability and integrity of attorneys, and safeguarding its interests in the administration of justice.

## **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to Rule 19 of the Revised Rules of Appellate Procedure, this Honorable Court's October 26, 2015 Order set this matter for oral argument on Tuesday, February 9, 2016.

## **IV. ARGUMENT**

**A. STANDARD OF PROOF**

The charges against an attorney must be proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. Syl. pt. 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995). Substantial deference is to be given to the Lawyer Disciplinary Board's findings of fact unless the findings are not supported by reliable, probative, and substantial evidence on the whole record. Lawyer Disciplinary Board v. Cunningham, 195 W. Va. 27, 464 S.E.2d 181 (1995). At the Supreme Court level, "[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board." Cunningham, 195 W. Va. at 39, 464 S.E.2d at 189.

In lawyer disciplinary matters, a *de novo* standard of review applies to questions of law, questions of application of the law to the facts, and questions of appropriate sanction to be imposed. Roark v. Lawyer Disciplinary Board, 207 W. Va. 181, 495 S.E.2d 552 (1997); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994). The Supreme Court of Appeals gives respectful consideration to the Lawyer Disciplinary Board's recommendations as to questions of law and the appropriate sanction, while ultimately exercising its own independent judgment. McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381. The Supreme Court of Appeals is the final arbiter of formal legal ethic charges and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law. Syl. pt. 3, Committee on Legal Ethics v. Blair, 174 W. Va. 494, 327 S.E.2d 671 (1984); Syl. pt. 7, Committee on Legal Ethics v. Karl, 192 W. Va. 23, 449 S.E.2d 277 (1994).

ODC asserts that the findings of fact made by the HPS in its Recommendation were correct, sound, fully supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board, and should not be disturbed. ODC asks that this Honorable Court,

while giving respectful consideration to the HPS's recommendations concerning questions of law and the appropriate sanction, impose a stronger sanction upon Respondent in this matter due to the extent of his serious violations of the Rules of Professional Conduct.

**B. ANALYSIS PURSUANT TO RULE 3.16 OF THE RULES OF LAWYER DISCIPLINARY PROCEDURE**

Syllabus Point 4 of Office of Lawyer Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998) holds that Rule 3.16 of the Rules of Lawyer Disciplinary Procedure provides as follows:

In imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court [West Virginia Supreme Court of Appeals] or Board [Lawyer Disciplinary Board] shall consider the following factors: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors.

A review of the record in this matter indicates that Respondent has transgressed all four factors set forth in Jordan.

**1. Respondent has violated duties owed to his clients, to the public, to the legal system and to the legal profession.**

The HPS found that the evidence demonstrated that Respondent committed multiple violations of the Rules of Professional Conduct, including: (1) failing to act with reasonable diligence and promptness in representing his clients; (2) failing to communicate with his clients; (3) failing to return client files or refund unearned fees in a timely fashion; (4) failing to respond to the requests of information from the ODC; and (5) engaging in conduct prejudicial to the administration of justice. Accordingly, the Hearing Panel Subcommittee determined that Respondent had violated duties to his clients, the public, the legal system and legal profession.

Lawyers owe their clients duties of loyalty, communication, and diligence. In regard to the ten complaints filed by Respondent's former clients, all contained allegations that Respondent had fallen short of his duties to effectively communicate with them in their respective matters. Moreover, the record clearly reflects that Respondent continually failed his clients' expectations in those matters by failing to communicate with them and by failing to diligently work on their cases. Respondent also failed to perform work for which he already had received a fee. Ms. Wears, Ms. Morris, Ms. Miller and Ms. Hughes were forced to obtain new counsel at additional cost after no progress was being made in their respective cases, and their demands for refunds fell on deaf ears. Respondent neglected to provide accountings for his work when asked and only complied with Ms. Hughes' request for a refund of her retainer fee belatedly. In Mr. Donovan and Mr. Benkiel's cases, Respondent failed to perform any work on their behalves for a significant period of time. Respondent admitted that he was unaware how much he had been paid in some instances, and during the end of 2013 he was not doing a good job of keeping track of his accounting or with putting money in the right accounts [Trans. p. 240].

In addition, the HPS found that Respondent violated his duties to the legal system and the legal profession. Many of Respondent's actions clearly negatively impacted his former clients' faith in other lawyers and the legal system. Mr. Britton testified that the experience, "puts a bad taste in his mouth towards, you know, lawyers" [Trans. p. 34]. Mr. Benkiel testified regarding a "distrust of the process," and that he had "less of a trust" among the legal profession [Trans. p. 93]. The HPS did point out, however, that Ms. Wears concluded that Respondent's conduct did not adversely affect her trust in the legal profession and attributed his actions to the fact that something must have been going on in Respondent's life [Trans. pp. 58-59].

Finally, the HPS found that Respondent violated a duty to the legal system by failing to respond to the ODC and by failing to promptly address the *habeas corpus* directives of the Circuit Court of Monongalia County in the Bethea matter. Respondent failed to file timely responses to the complaints of Mr. Britton, Mr. Donovan, and Ms. Long. Regarding the complaints of Ms. Wears and the ODC, Respondent failed to file any responses at all. Because the legal profession is largely self-governing, it is vital that lawyers abide by the rules of substance and procedure which shape the legal system. Respondent's noncompliance with these rules as exhibited in the record clearly violates his duties to the legal system and profession.

**2. The HPS found that Respondent acted negligently in some matters and knowingly in other matters.**

The HPS found that the evidence related to the ethical violations involving Respondent's clients strongly suggested that his actions and inactions resulted more from negligence and from a mental disability rather than from willful neglect or intentional and knowing behavior. Despite Respondent's acknowledgment that he was aware of his clients attempts to contact him, the HPS believed Respondent's failure to respond resulted from his state of mind, not lack of concern or from an intentional and knowing disregard for this clients. The HPS also determined that the matter involving Mr. Benkiel evidenced negligence in the handling of an out-of-state personal injury case, although it noted that the unusual proposal to satisfy Mr. Benkiel's claim certainly had an intentional and knowing component. Failure to perform legal work for his clients despite accepting retainers or being court-appointed for the work, however, is grossly negligent at best, as were Respondent's failures to respond to the repeated requests for information from the ODC that he acknowledged receiving.

**3. Respondent's misconduct has caused injuries.**

The HPS concluded that Respondent created intangible, but real injuries by failing to communicate with his clients and some real harm by failing to perform work in their cases. At the hearing, witnesses expressed how they were harmed by Respondent's conduct. Ms. Wears testified that it was "stressful" when she could not reach Respondent or have her questions answered [Trans. p. 48]. She testified that with Respondent as her counsel, she felt like she was left "kind of in the dark" [Trans. p. 73]. Ms. Morris testified regarding her repeated attempts at contacting Respondent, stating that it was "really frustrating," and resulted in "stress," and "annoyance" [Trans. pp. 12-14]. In addition to intangible emotional injuries of anxiety and aggravation, the delays Respondent created in the underlying matters also created potential injury in each of the referenced complaints. Moreover, as previously mentioned, Ms. Wears, Ms. Morris, Ms. Miller and Ms. Hughes all incurred additional costs of retaining new counsel after terminating Respondent.

There is no question that Mr. Benkiel suffered real harm from Respondent's representation. Respondent valued Mr. Benkiel's lost claim at a minimum of Twenty Five Thousand Dollars (\$25,000.00) [Trans. p. 205]. To date, Mr. Benkiel has not received any compensation for the injuries from his accident or from the damages resulting from Respondent's legal negligence in missing a statute of limitations and failing to associate with counsel licensed in Pennsylvania. Furthermore, some Complainants continue to be owed refunds for fees that they paid to Respondent where Respondent failed to perform work or did not complete it. Respondent estimated that Ms. Miller is entitled to a refund of One Thousand One Hundred Dollars (\$1,100.00) [Trans. p. 147]. Respondent also owes Mr. Donovan a refund of Six Hundred Dollars (\$600.00) due to his failure to take any action in the matter after receiving payment.

In addition, Respondent did not provide any documentation that he earned the full fees paid to him by Ms. Morris, Mr. Britton, Ms. Long, or Ms. Wears and, as a result, they also may be entitled

to refunds. Respondent indicated that he was not aware that even with regard to so-called non-refundable retainers and “flat fees,” the burden of proof is always upon the attorney to show the reasonableness of the fees charged, and, regardless of the fee structure, upon termination of representation Rule 1.16(d)<sup>62</sup> requires that the lawyer promptly refund any advance payment that has not been earned [Trans. pp. 148-149]. These former clients are entitled to receive refunds for fees Respondent did not earn in their respective cases.

The potential harm to the public, the legal system and the legal profession at the hands of Respondent is significant. Respondent’s conduct has brought the legal system and profession into disrepute, and his conduct clearly undermines the integrity and public confidence in the administration of justice. It is particularly concerning that Respondent denies that the failure to respond to ethics complaints or to other requests from the ODC is detrimental to the practice of law [Trans. p. 220].

**4. There are 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, the Scott 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).

Rule 9.22(c) of the *ABA Model Standards for Imposing Lawyer Sanctions* indicates that a pattern of misconduct constitutes an aggravating factor. The HPS correctly found that Respondent has exhibited a pattern and practice of misconduct on multiple occasions by failing to communicate

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<sup>62</sup> See n. 6 *supra*.

with his clients; failing to diligently pursue claims on behalf of clients; and failing to respond to requests for information from ODC. The Scott Court noted that the *ABA Model Standards for Imposing Lawyer Sanctions* also recognizes “multiple offenses” as an aggravating factor in a lawyer disciplinary proceeding. *Id.*, 213 W.Va. at 217, 579 S.E.2d at 558. The HPS found that Respondent committed thirty-nine violations of the Rules of Professional Conduct in this matter.

Finally, substantial experience is deemed to be an aggravating factor, while lack of experience as a lawyer is considered to be a mitigating factor. *See, In re Brown*, 166 W.Va. 226, 273 S.E.2d 567 (1980). Respondent was admitted to the practice of law in West Virginia in 1997, and, at the time of his misconduct, he had been practicing law for over fifteen years. Thus, Respondent had substantial experience as a lawyer and such should also be considered as an aggravating factor by this Court. The HPS did not include multiple offenses or Respondent’s substantial experience as a lawyer as aggravating factors in its Recommendation, but these factors are clearly present and justify an increase in the degree of discipline to be imposed in this case.

**5. There are potential mitigating factors present.**

In addition to adopting aggravating factors, the Scott court also adopted mitigating factors in lawyer disciplinary proceedings concluding 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, 555 (2003) *quoting ABA Model Standards for Imposing Lawyer Sanctions*, 9.31 (1992). In this case, the HPS found the following mitigating factors present: absence of a prior disciplinary record; absence of a dishonest or selfish motive; full and free disclosure to disciplinary board and cooperative attitude toward proceedings; mental disability; and obvious and repeated expressions of contrition and remorse during Respondent’s testimony.

Notably, the HPS made the determination that Respondent established by clear and convincing evidence that he was suffering from “significant situational depression during the time frame of these complaints.” In Syllabus Point 3 of Lawyer Disciplinary Board v. Dues, 218 W.Va. 104, 624 S.E.2d 125 (2005), the Court stated,

[I]n a lawyer disciplinary proceeding, a mental disability is considered mitigating when: (1) there is 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.

The HPS found there to be clear and convincing evidence to establish each of the factors set forth in Dues. The HPS concluded that Respondent suffered from a “significant mental disability and this mental disability caused and substantially contributed to the misconduct.” The HPS further found that Respondent had demonstrated through his testimony and that of Mr. Torsney that a “meaningful and sustained period of successful rehabilitation has occurred,” and that Respondent’s recovery appeared to have arrested the misconduct. The HPS also believed that the recurrence of similar misconduct on the part of Respondent was unlikely.

The ODC does not dispute that the mitigating factors of absence of prior discipline, full and free disclosure to disciplinary board, cooperative attitude toward proceedings, and remorse are present in this case. The ODC disagrees with the finding that Respondent’s asserted mental disability of depression should be mitigating, however, and disputes that the second, third, and fourth factors of Dues, supra, can be satisfied by the record in this case.

As previously noted, three of the eleven ethics complaints addressed at the disciplinary hearing involved conduct occurring prior to the time Respondent claimed that his depression symptoms first began. So, while the ODC agrees that there is evidence that Respondent was affected

by a mental disability at some point, it asserts that the evidence does not demonstrate that his mental disability caused all of the misconduct at play in this matter.

The ODC further asserts that there is insufficient evidence that a meaningful and sustained period of successful rehabilitation has occurred on the part of Respondent. Unlike the respondent lawyer in Dues, *supra*, Respondent has not undergone any sustained treatment by mental health professional. Respondent never sought out or met with a professional concerning his symptoms of depression until well after these disciplinary proceedings were underway and the matter was set for hearing. Mr. Torsney testified that he met with Respondent on one occasion, on January 15, 2015, in a session lasting approximately two hours, wherein Respondent disclosed that he had suffered from feelings of hopelessness, worthlessness, and lack of the ability to enjoy anything for a period [Trans. pp. 172-173]. Mr. Torsney believed that Respondent needed counseling and, although his symptoms appeared to be on the decline, Mr. Torsney thought that Respondent still suffered from depression [Trans. p. 174]. At the hearing, Respondent offered no plan or strategy to maintain a strong emotional condition going into the future in order to prevent a relapse. He simply stated that he currently was not depressed [Trans. p. 129]. Moreover, the ODC contends that there is a lack of evidence that Respondent's claimed recovery has arrested the misconduct and that recurrence of similar misconduct is unlikely. Because the evidence fails to establish each of the factors set forth in Dues, Respondent's alleged depression should not be a mitigating factor in this case.

### C. 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, 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), the 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.

The Supreme Court of Appeals 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 its interests in the administration of justice. Lawyer Disciplinary Board v. Taylor, 192 W.Va. 139, 144, 451 S.E.2d 440, 445 (1994). Indeed, the principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Syl. pt. 3, Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984).

Based upon the conduct discussed herein, the HPS recommended that, in addition to other sanctions, Respondent's license should be suspended for ninety (90) days. While the ODC agrees that a suspension is appropriate in this case, the ODC asserts that the suspension period proposed by the HPS is inadequate considering the evidence against Respondent and precedent of this Court. The ODC also asserts that a ninety (90) day suspension in this matter does not serve as both an instruction on the standards for ethical conduct or an effective deterrent against similar misconduct to other attorneys.

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." Respondent's actions in these matters clearly rise to such a level

to justify a suspension. This is not a case of simple negligence in communication and neglect of legal representation. This disciplinary matter involves multiple instances of Respondent being unresponsive to his clients, failing to take appropriate action on their cases, and causing them real injuries. Consideration must also be given to Respondent's apparent disregard of his duty to respond to lawful demands for information from disciplinary authority. This clearly exhibits a pattern and practice of a lack of concern for some of the fundamental aspects of the practice of law outlined in the Rules of Professional Conduct.

A review of the record clearly shows that the HPS does not include multiple offenses or Respondent's substantial experience as a lawyer as aggravating factors in its Recommendation. In addition, the HPS's finding that Respondent's alleged depression was mitigating to his conduct is improper. Taking this into account, the ninety (90) day suspension recommended by the HPS is too lenient for the behavior proven in these proceedings, even considering the other evidence Respondent offered in mitigation. It should be clear that mitigating factors were not envisioned to insulate a violating lawyer from discipline.

When a lawyer has been suspended for a period of three months or less, unless otherwise provided in the order of suspension, the lawyer's reinstatement to the practice of law shall be automatic per Rule 3.31 of the Rules of Lawyer Disciplinary Procedure. Although Respondent has represented that he is now removed from the period of depression that resulted in these complaints, the ODC contends that Respondent has not provided clear and convincing evidence that he is worthy of public confidence at this time and can be entrusted with the duties of a member of the legal profession. Increasing Respondent's suspension to a period of more than three months will require that Respondent petition to be reinstated to the practice of law through the procedure set forth in Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, and Respondent will have to demonstrate in that process that he presently possesses the integrity, moral character and legal competence to assume the

practice of law. See Lawyer Disciplinary Board v. Hess, 201 W.Va. 195, 495 S.E.2d 563 (1997). By requiring reinstatement through the procedure set forth in Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, this Court will clearly safeguard the public's interest in the administration of justice in this matter.

In Committee on Legal Ethics v. Mullins, the Supreme Court of Appeals of West Virginia 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.” 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. Hart, 235 W.Va. 523, 775 S.E.2d 75 (2015) (three-year suspension warranted for attorney violating rules governing diligence and promptness, client communication, and handling of client funds); Lawyer Disciplinary Board v. Rossi, 234 W.Va. 675, 769 S.E.2d 464 (2015) (three-year suspension was warranted for attorney who failed to perform work and failed to cooperate with disciplinary investigation); Lawyer Disciplinary Board v. Aleshire, 230 W.Va. 70, 736 S.E.2d 70 (2012) (three-year suspension for unresponsiveness to clients coupled with monetary damage); 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); 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)).

As is the case in most lawyer disciplinary proceedings, many of the aforementioned cases may be partially distinguishable to Respondent's conduct discussed herein. For example, the three-year suspensions ordered in Hart, Rossi, and Alshire, *supra*, involved wilful misconduct and additional aggravating factors. In looking to other jurisdictions, however, suspensions for at least six months for similar misconduct appear to be the norm. In In re Nelson (Kan. 2004), the court, citing to Standard 4.42, indefinitely suspended a lawyer for failure to act with reasonable diligence in several cases, including failing to clear title for client's residence during a period of four years and knowingly failing to provide written response to disciplinary authorities. The panel in that matter found as aggravating factors the respondent lawyer's previous discipline and subsequent violation of his supervised probation, pattern of misconduct, multiple offenses, and substantial experience in the practice of law, in addition to several mitigating circumstances, including personal and emotional problems contributing to the violations, and previous good character and reputation. *See also* In re Disciplinary Proceeding Against Kagele, 72 P.3d 1067 (Wash. 2003) (eight different instances of failure to act diligently and promptly to pursue client matters established pattern of neglect warranting one-year suspension under Standard 4.42(b)); In re Francis, 79 P.3d 1285 (Kan. 2003) (one-year suspension under Standard 4.42 for knowing failure to follow up on settlement-check issue in which settlement check was returned for insufficient funds and lawyer's dilatory response); People v. Schmeiser, 35 P.3d 560 (Colo. O.P.D.J. 2001) (one-year suspension for neglecting case and allowing critical deadlines to pass, resulting in clients being exposed to interest and penalties from taxing authorities and having to secure replacement counsel); In re Renfro, 800 So. 2d 371 (La. 2001) (lawyer's neglect of client matter resulted in actual harm of additional time and expense for client obtaining alternative counsel and warranted six-month suspension); People v. Powell, 37 P.3d 545 (Colo. O.P.D.J. 2001)

(lawyer suspended for a year and a day for failure to keep clients reasonably informed about the status of a legal matter and properly comply with reasonable requests for information).

A pattern of neglect warranting suspension under Standard 4.42(b) often requires courts in, in addition to imposing a suspension, add a term of probation to monitor the lawyer's law practice. *See, e.g., Burgess, supra; In re Brion*, 212 P.3d 748 (Alaska 2009) (lawyer's knowing lack of diligence and pattern of neglect warranted three-year suspension, stayed after one year, under Standard 4.42); *In re Bankston*, 791 So. 2d 1263 (La. 2001) (suspension for one year and one day, followed by a one-year period of probation, ordered regarding misconduct that included failure to communicate with a client about an adverse court order authorizing seizure of the client's automobile, in addition to failure to refund unused court costs of \$334 and failing to respond to disciplinary counsel).

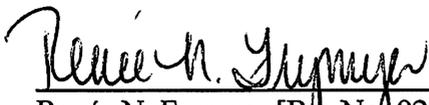
For the public to have confidence in our disciplinary and legal systems, lawyers such as Respondent must be removed from the practice of law for a period of time. A license to practice law is a revokable privilege and when such privilege is abused, the privilege should be revoked. A severe sanction is also necessary to deter lawyers who may be considering or who are engaging in similar conduct, and is necessary to protect the public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard the interest in the administration of justice.

## V. CONCLUSION

Accordingly, for the reasons set forth above, the ODC requests that this Honorable Court adopt the following sanctions: (1) that Respondent's law license be suspended for at least one year; (2) that prior to reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, Respondent shall issue refunds to Debra Miller in the amount of One Thousand One Hundred Dollars (\$1,100.00), Martin Donovan in the amount of Six Hundred Dollars (\$600.00); Mark Benkiel in the amount of Twenty Four Thousand Dollars (\$24,000.00); and issue itemized statements of account to Jessica Morris, Daniel Britton, Lisa Long, and Carly Wears, in addition to providing them with refunds

where appropriate, and provide proof thereof to the ODC; (3) that prior to reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, Respondent file a report with the ODC of a licensed psychologist or psychiatrist verifying that Respondent's mental status is such that he is capable of performing his profession as a lawyer; (4) that, upon reinstatement, Respondent's practice shall be supervised for a period of one (1) year by an attorney agreed upon between the ODC and Respondent; and (5) Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

*Respectfully submitted,*  
The Office of Disciplinary Counsel  
By Counsel



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**CERTIFICATE OF SERVICE**

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This is to certify that I, Renée N. Frymyer, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 30<sup>th</sup> day of November, 2015, served a true copy of the foregoing “**Brief of the Office of Disciplinary Counsel**” upon Respondent Thorn H. Thorn, Esquire, by mailing the same via United States Mail with sufficient postage, to the following address:

Thorn H. Thorn, Esquire  
1403 Saratoga Avenue  
Morgantown, West Virginia 26505

And upon the Hearing Panel Subcommittee members at the following addresses:

John W. Cooper, Esquire  
Post Office Box 356  
Parsons, West Virginia 26297

Henry W. Morrow, Esquire  
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Jon Blair Hunter  
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Renée N. Frymyer