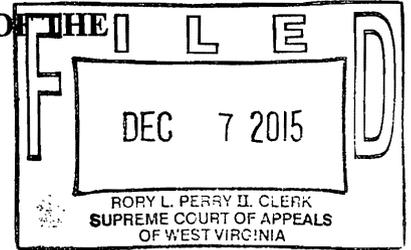


**BEFORE THE SUPREME COURT OF APPEALS OF THE  
STATE OF WEST VIRGINIA**



**LAWYER DISCIPLINARY BOARD,**

**Complainant,**

**v.**

**Nos. 14-0749 and 15-0009**

**HEIDI M. GEORGI STURM,**

**Respondent.**

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**BRIEF OF THE LAWYER DISCIPLINARY BOARD**

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## I. STATEMENT OF THE CASE

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

This is a disciplinary proceeding against Respondent Heidi M. Georgi Sturm, (hereinafter “Respondent”), arising as the result of a Statement of Charges issued against her and filed with the Supreme Court of Appeals of West Virginia on or about July 31, 2014. Respondent was served with the Statement of Charges on August 13, and filed a timely response thereto.

The matter was set for hearing on December 4, 2014. Because Disciplinary Counsel was aware of a second investigation that should be resolved in December of 2014, she filed a motion to continue the December 4, 2014 hearing date. The matter was continued and it was ordered that a scheduling conference would be held sometime in January of 2015 to set a new hearing date.

A second Statement of Charges was issued against Respondent and filed with the Supreme Court of Appeals of West Virginia on or about January 5, 2015. Respondent was served with the Statement of Charges on January 9, 2015, and filed a timely response thereto.

The matter then proceeded to hearing in Morgantown, West Virginia, on May 4, 2015. Respondent appeared *pro se*. Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. The Hearing Panel Subcommittee, comprised of James R. Akers, II, Esquire, Chairperson; Henry W. Morrow, Esquire; and Jon Blair Hunter, Laymember, presided over the proceedings.

The Hearing Panel Subcommittee heard testimony from Laverne G. Wright-Ochoa, Lael Brown, Kenneth L. Greynolds and Respondent and the arguments of counsel. The Hearing Panel Subcommittee also admitted into evidence the Office of Disciplinary Counsel’s Exhibits 1-38 and

Joint Exhibits 1 and 2 for Supreme Court No. 14-0749; and 1-12, Respondent's Exhibits 1-11, and Joint Exhibits 1 and 2 for Supreme Court No. 15-0009.

On or about September 16, 2015, the Hearing Panel Subcommittee issued its decision for both matters and filed with the Supreme Court of Appeals of West Virginia its "Report of the Hearing Panel Subcommittee" (hereinafter "Report") for each case. The Hearing Panel Subcommittee properly found that the evidence established that Respondent violated Rules 1.1, 1.3, 1.4(a), 1.4(b), 1.8(f), 1.14(a), 1.15(a), 1.16(d), 3.2, 8.1(b), 8.4(c) and 8.4(d) of the Rules of Professional Conduct for Supreme Court No. 14-0749; and Rules 1.3, 1.4(a) and 8.4(d) of the Rules of Professional Conduct for Supreme Court No. 15-0009.

The Hearing Panel Subcommittee issued the following recommendation as the appropriate sanction for Supreme Court No. 14-0749:

- A. That Respondent shall be reprimanded;
- B. That Respondent's practice shall be supervised for a period of two (2) years by an attorney agreed upon between the Office of Disciplinary Counsel and Respondent, which shall run concurrent to the supervised practice under Case No. 15-0009.<sup>1</sup> Respondent shall meet with her supervising attorney every two (2) weeks. The goal of the supervised practice will be to improve the quality and effectiveness of Respondent's law practice to the extent that Respondent's sanctioned behavior is not likely to recur;

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<sup>1</sup> Disciplinary Counsel notes that the recommendation in 15-0009 does not include supervised practice, and, therefore, there can be no concurrent supervised practice. However, the recommendation in 15-0009 makes clear in footnote 10 that the Hearing Panel was rejecting supervised practice in that case.

- C. That Respondent shall refund the Five Thousand Dollars (\$5,000.00) retainer fee to Ms. Wright-Ochoa; and
- D. That, pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure, Respondent shall pay costs of this disciplinary proceeding.

And the following sanction for Supreme Court No. 15-0009:

- A. That Respondent shall be reprimanded;
- B. That, pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure, Respondent shall pay costs of this disciplinary proceeding.

**B. FINDINGS OF FACT**

Heidi M. Georgi Sturm (hereinafter “Respondent”) is a lawyer practicing in Fairmont, which is located in Marion County, West Virginia. Hrg. Trans. p. 80. Respondent, having passed the bar exam, was admitted to The West Virginia State Bar on October 9, 2003. Hrg. Trans. p. 78. As such, Respondent is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.

**1. SUPREME COURT NO. 14-0749**  
**I.D. Nos. 12-05-267 & 12-05-268**  
**Complaints of Brown and Wright-Ochoa**

On or about August 17, 2010, Complainant Laverne G. Wright-Ochoa met with Respondent about retaining Respondent to file a Writ of *Habeas Corpus* for her son, Complainant Lael Brown. ODC Ex. 16, Bates stamp 84. Ms. Wright-Ochoa provided various documents to Respondent on that day regarding Mr. Brown’s case. *Id.* On or about August 23, 2010, Respondent mailed Ms. Wright-Ochoa an agreement for the representation. ODC Ex. 16, Bates stamp 84, 89-92. The agreement was entitled “Attorney-Client Hourly and/or Flat Fee Agreement.” ODC Ex. 16, Bates stamp 90-92. The

agreement said that Respondent was representing Complainant for a “Habeas Petition on behalf of son, Lael Brown.” ODC Ex. 16, Bates stamp 90. The hourly fees were set at One Hundred Seventy-Five Dollars (\$175.00) and stated that Respondent shall keep accurate time records. Id. The agreement also stated that “[f]ees will not be charged unless supported by contemporaneous time records.” Id. The general retainer fee was Five Thousand Dollars (\$5,000.00). Id. The agreement stated “[t]his amount is non-refundable and shall not be returned even if the client or the attorney chooses to end the legal relationship.” [emphasis in original]. Id. The agreement indicated “[t]hat [Respondent] agrees to prosecute the above legal proceeding with due diligence to a conclusion, whether it be by settlement or entry of judgment.” ODC Ex. 16, Bates stamp 92. Further, payments for the retainer were indicated to be Two Thousand Five Hundred Dollars (\$2,500.00) to be due immediately and two (2) monthly payments of One Thousand Two Hundred Fifty Dollars (\$1,250.00) to be paid in September and October of 2010. Id.

On or about August 26, 2010, Ms. Wright-Ochoa sent additional documents to Respondent. ODC Ex. 16, Bates stamp 217. On or about August 27, 2010, Ms. Wright-Ochoa signed the fee agreement. ODC Ex. 16, Bates stamp 84, 90-92. Ms. Wright-Ochoa sent the agreement back to Respondent along with a bank teller check for Two Thousand Two Hundred Dollars (\$2,200.00) and a personal check for Five Hundred Dollars (\$500.00) to cover the first payment. ODC Ex. 16, Bates stamp 101-102. Respondent received the two (2) checks soon after Ms. Wright-Ochoa sent them. Respondent deposited the Two Thousand Two Hundred Dollars (\$2,200.00) check into her business account and deposited the Five Hundred Dollar (\$500.00) check into her personal account. Id. On or about August 30, 2010, Ms. Wright-Ochoa sent additional documents to Respondent regarding Mr. Brown’s case. ODC Ex. 16, Bates stamp 145.

On or about September 10, 2010, Ms. Wright-Ochoa sent an email to Respondent asking if there was any deadline to file the *habeas corpus* petition and wanting to know the progress of the case. ODC Ex. 16, Bates stamp 141, 226. On or about September 22, 2010, Ms. Wright-Ochoa sent a letter to Respondent about Respondent's failure to communicate with her and with Mr. Brown. ODC Ex. 16, Bates stamp 218. Ms. Wright-Ochoa attempted to contact Respondent after sending the additional documents without any response until a September 22, 2010 email from Respondent. ODC Ex. 16, Bates stamp 141. Respondent stated that she had been out of town for court and could not return any telephone calls. Id. Respondent sent another email on or about September 24, 2010, email wherein she indicated that she had received Ms. Wright-Ochoa's messages but had been unable to return them. ODC Ex. 16, Bates stamp 84, 140. Respondent said that she should have the *habeas corpus* petition completed by the next week. ODC Ex. 16, Bates stamp 140. Respondent indicated that she will need to review the petition with Mr. Brown to obtain his signature before she could file it with the Court. Id.

On or about September 25, 2010, Ms. Wright-Ochoa emailed Respondent about never receiving a copy of the fee agreement with Respondent's signature. ODC Ex. 16, Bates stamp 147. Ms. Wright-Ochoa also asked if she could meet with Respondent on October 1, 2010, since Ms. Wright-Ochoa would be in town for a hearing concerning Mr. Brown. Id. Ms. Wright-Ochoa also sent additional information to Respondent by email on or about September 25, 2010. ODC Ex. 16, bates tamp 228. On or about September 28, 2010, Respondent responded to Ms. Wright-Ochoa's September 25, 2010 email. ODC Ex. 16, Bates stamp 147. Respondent stated that she would leave a copy of the fee agreement for Ms. Wright-Ochoa to pick up. Id. Respondent was also going to leave a copy of the *habeas corpus* petition for Ms. Wright-Ochoa's review and another copy for Ms.

Wright-Ochoa to provide to Mr. Brown for review. Id. On or about September 28, 2010, Ms. Wright-Ochoa sent a letter to Respondent requesting to meet with Respondent. ODC Ex. 16, Bates stamp 150. Ms. Wright-Ochoa said that she had not spoken to Respondent since the first consultation in August of 2010. Id. On or about September 29, 2010, Ms. Wright-Ochoa sent an email indicating that she would be unable to stop at Respondent's office prior to meeting with Mr. Brown. ODC Ex. 16, Bates stamp 148. Ms. Wright-Ochoa indicated that she was upset because she wanted to speak with Respondent. Id. Also, on or about September 29, 2010, Ms. Wright-Ochoa sent the One Thousand Two Hundred Fifty Dollars (\$1,250.00) payment to Respondent along with more documents. ODC Ex. 16, Bates stamp 143. Respondent sent Mr. Brown a copy of the Petition for *Habeas Corpus* for review on or about September 29, 2010. ODC Ex. 16, Bates stamp 168. Respondent stated that she was going to visit with Mr. Brown soon to discuss the petition and to have Mr. Brown sign the same. Id.

On or about October 1, 2010, Ms. Wright-Ochoa sent an email to Respondent again asking for a meeting with Respondent because they had not spoken since the initial consultation in August of 2010. ODC Ex. 16, Bates stamp 85, 153. On or about October 4, 2010, Respondent responded to Ms. Wright-Ochoa's October 1, 2010 email. ODC Ex. 16, Bates stamp 85, 153. Respondent stated that she had other clients and matters to work on. Id. Specifically, Respondent said that she did "not have time to sit at [her] desk waiting for emails from [Ms. Wright-Ochoa]." Id. Respondent also explained that the process with a *habeas corpus* petition could take some time and a time line could possibly be established after the filing of the petition. Id. Respondent again said she would meet with Ms. Wright-Ochoa the next time she was in town. Id. On or about October 4, 2010, Ms. Wright-Ochoa received a copy of the draft *habeas corpus* petition to review. ODC Ex. 16, Bates stamp 164.

Ms. Wright-Ochoa sent her comments about the draft petition to Respondent and Respondent indicated that she would make the various changes. Id. A copy of the final petition would be provided to Ms. Wright-Ochoa in a few weeks. Id.

On or about October 7, 2010, Respondent sent a letter to Ms. Wright-Ochoa indicating that she had responded to Ms. Wright-Ochoa's request for an appointment through email. ODC Ex. 16, Bates stamp 154. The letter also indicated that Ms. Wright-Ochoa should call Respondent's office for set up an appointment for when Ms. Wright-Ochoa was in town. Id. On or about October 13, 2010, Respondent and Ms. Wright-Ochoa spoke over the telephone. ODC Ex. 16, Bates stamp 85, 155. Also, on or about October 13, 2010, Ms. Wright-Ochoa sent a confirmation letter regarding the telephone call. ODC Ex. 16, Bates stamp 155. On or about October 14, 2010, Respondent sent an email to Ms. Wright-Ochoa about clarifying issues brought up in a telephone call the day before. ODC Ex. 16, Bates stamp 175. Respondent said that she would make herself available to meet with Ms. Wright-Ochoa and would add the revisions that Ms. Wright-Ochoa suggested to the *habeas corpus* petition. Id. On or about October 16, 2010, Ms. Wright-Ochoa sent a response to Respondent's October 14, 2010 email. ODC Ex. 16, Bates stamp 176. Ms. Wright-Ochoa said that the issues were clarified and she agreed to send filing fees at the end of the month. Id.

On or about October 29, 2010, Ms. Wright-Ochoa sent the final payment of One Thousand Two Hundred Fifty Dollars (\$1,250.00) to Respondent along with a Two Hundred Dollar (\$200.00) check dated October 15, 2010, for the filing fee. ODC Ex. 16, Bates stamp 85, 171, 178. Ms. Wright-Ochoa indicated that Respondent never cashed the filing fee check. ODC Ex. 16, Bates stamp 85. On or about November 2, 2010, Ms. Wright-Ochoa sent an email to Respondent for additional documents. ODC Ex. 16, Bates stamp 227. On or about November 11, 2010, Ms. Wright-Ochoa sent

an email to Respondent asking for a meeting with Respondent to explain the case to Mr. Brown's father. ODC Ex. 16, Bates stamp 182. Respondent response to this email indicated that the *habeas corpus* petition would be ready by the end of the next week.

On or about November 24, 2010, Ms. Wright-Ochoa emailed Respondent to see if Respondent had visited Mr. Brown or completed the petition. ODC Ex. 16, Bates stamp 85. Respondent sent an response email on or about November 24, 2010 to Ms. Wright-Ochoa. ODC Ex. 16, Bates stamp 184. Respondent said that she was sorry that she had not provided the petition to Mr. Wright-Ochoa sooner, but she and her children had been sick, along with dealing with several family friends who passed away. *Id.* On or about December 14, 2010, Ms. Wright-Ochoa sent a letter to Respondent with additional documents. ODC Ex. 16, Bates stamp 220. On or about December 15, 2010, Ms. Wright-Ochoa sent Respondent an email about not hearing from Respondent. ODC Ex. 16, Bates stamp 221.

Ms. Wright-Ochoa requested information about the *habeas corpus* petition in or around January of 2011. ODC Ex. 16, Bates stamp 85. On or about January 25, 2011, Respondent sent an email to Ms. Wright-Ochoa about her daughter needing surgery over the Christmas holidays in December of 2010. ODC Ex. 16, Bates stamp 186. Respondent said that she was still working on the *habeas corpus* petition. *Id.* On or about February 22, 2011, Ms. Wright-Ochoa sent Respondent an email about Mr. Brown being ineligible for parole at that time. ODC Ex. 16, Bates stamp 188, 225; Ex. 19, Bates stamp 346. On or about March 1, 2011, Ms. Wright-Ochoa sent an email to Respondent asking if there was any progress on the petition. ODC Ex. 16, Bates stamp 224. On or about March 4, 2011, Ms. Wright-Ochoa sent Respondent an email indicating that she was still waiting for a response. ODC Ex. 16, Bates stamp 188.

On or about March 22, 2011, Respondent responded by email to Ms. Wright-Ochoa that she should be able to send a completed *habeas corpus* petition by the end of March, 2011. Id. On or about July 12, 2011, Ms. Wright-Ochoa sent a certified letter to Respondent. ODC Ex. 16, Bates stamp 86, 190. The letter stated that Ms. Wright-Ochoa had not received a draft Petition for *Habeas Corpus* for Mr. Brown. ODC Ex. 16, Bates stamp 190. Further, it stated that the last response Ms. Wright-Ochoa had from Respondent was in March of 2011. Id. Ms. Wright-Ochoa pointed out that Respondent had not communicated with Ms. Wright-Ochoa and had not visited with Mr. Brown. Id.

On or about July 21, 2011, Mr. Brown sent a letter to Respondent wherein he requested a refund of the Five Thousand Dollars (\$5,000.00) paid to Respondent. ODC Ex. 16, Bates stamp 195-196. Mr. Brown acknowledged that he had received a letter from Respondent in October of 2010 wherein Respondent said that she would visit with Mr. Brown to go over the petition. ODC Ex. 16, Bates stamp 196. Mr. Brown stated that he had not heard from Respondent since that time. Id. Mr. Brown also requested an accounting of the fees and itemization of the costs. Id.

On or about August 2, 2011, Ms. Wright-Ochoa sent another certified letter to Respondent wherein she requested a refund of unearned attorney fees and an itemization of the costs earned in the matter. ODC Ex. 16, Bates stamp 194. On or about August 18, 2011, Mr. Brown filed a *pro se* Petition for *Habeas Corpus* in Monongalia County, West Virginia Circuit Court Case No. 11-C530. ODC Ex. 30, Bates stamp 1266; ODC Ex. 31, Bates stamp 1268-1276. On or about February 10, 2012, Ms. Wright-Ochoa called Respondent's office and discovered that Respondent's phone was disconnected. ODC Ex. 16, Bates stamp 86. Ms. Wright-Ochoa was able to have another attorney reach Respondent sometime after her telephone call on or about February 10, 2012. Id. Respondent indicated to the other attorney that her telephone had been suspended but it was now restored. Id.

After being relayed this information from the other attorney, on or about February 15, 2012, Ms. Wright-Ochoa called Respondent's office and left a message on two (2) occasions that day. Id. On or about February 16, 2012, Ms. Wright-Ochoa called Respondent's office and left another message for Respondent. Id. Respondent did not return any of those telephone calls. Id.

On or about May 3, 2012, Ms. Wright-Ochoa and Mr. Brown filed complaints against Respondent with the Office of Disciplinary Counsel. ODC Ex. 1; ODC Ex. 16. On or about May 4, 2012, the complaints filed by Ms. Wright-Ochoa and Mr. Brown were opened for investigation against Respondent. Respondent was asked to file a response. ODC Ex. 2; ODC Ex. 17. Respondent filed a response dated May 21, 2011<sup>2</sup>, and stated that she agreed to represent Ms. Wright-Ochoa's son, Mr. Brown, and was willing to accept payments for the retainer amount. ODC Ex. 3; ODC Ex. 18. Respondent said that Ms. Wright-Ochoa was very involved in the case and sent a lot of documents on a regular basis. ODC Ex. 18, Bates stamp 234. Respondent stated that she spent at least eighteen (18) to twenty (20) hours on the case along with doing research on issues related to the case. Id. Respondent said that she met with Ms. Wright-Ochoa on Saturdays when she was in town and usually lasted one (1) to two (2) hours. Id. Respondent stated that Ms. Wright-Ochoa's emails were long as were her letters. Id. Plus, Respondent said she received a lot of emails and letters from Ms. Wright-Ochoa. Id. Respondent provided a copy of the draft *habeas corpus* petition to Ms. Wright-Ochoa but said that is not what she normally does in cases. Id. Ms. Wright-Ochoa had made clear to Respondent that she wanted to be involved in every issue of the case. Id. Respondent said that Ms. Wright-Ochoa made multiple additions to the draft petition. Id. Respondent stated that she did not hear from Ms. Wright-Ochoa for several months. ODC Ex. 18, Bates stamp 235. At that

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<sup>2</sup> The year appears to be a typo as the response was received on May 24, 2012.

point, Respondent provided another copy of the draft petition but did not receive any response from Ms. Wright-Ochoa. Id. Respondent said that she did not want to file the *habeas corpus* petition without Ms. Wright-Ochoa's approval. Id. Respondent stated that she was ready to file the petition if Ms. Wright-Ochoa would give her permission to do so. Id. In regards to Mr. Brown, Respondent stated that she sent Mr. Brown a letter with a copy of the draft petition for review but Mr. Brown never responded to Respondent. ODC Ex. 3, Bates stamp 24.

By letter dated June 12, 2012, Disciplinary Counsel requested Respondent to provide answers to the following questions regarding Ms. Wright-Ochoa's complaint: 1) what was the status of the petition; 2) why was Respondent's telephone service cut off; 3) Respondent's response to the allegation of her failure to return communication; and 4) asked Respondent to provide an accounting of the work performed in the case. ODC Ex. 20. Respondent failed to respond to the letter. By letter dated June 26, 2012, Disciplinary Counsel requested Respondent to respond as to whether she explained the *habeas corpus* process to Mr. Brown and again requested a statement of account for work that she performed for Mr. Brown. ODC Ex. 7. Respondent failed to respond to the letter.

By letters dated August 9, 2012, Disciplinary Counsel sent additional letters by both certified and regular mail to Respondent requesting answers to the above stated questions. ODC Ex. 8; ODC Ex. 23. Respondent responded by letter dated August 16, 2012 and provided the following accounting:

Telephone, email conferences:	4.1 hours
Review of documents from L.W.O	11.3 hours
Research	7.8 hours
Draft Petition	8.7 hours
In-person conferences with clients	1.7 hours.

ODC Ex. 9; ODC Ex. 24. Respondent said she spend additional time, but she did not bill for that.  
Id.

In or around February of 2013, Mr. Brown was released from incarceration. ODC Ex. 33, Bates stamp 1282. By letter dated January 30, 2014, Disciplinary Counsel requested Respondent provide a status report on Mr. Brown's case. ODC Ex. 11. Respondent failed to respond to the letter. By letter dated February 25, 2014, Disciplinary Counsel sent another letter by certified and regular mail to Respondent requesting the same information. ODC EX. 13. Respondent responded that she had not had any contact with Ms. Wright-Ochoa due to the complaint pending and could provide a copy of the petition to Ms. Wright-Ochoa. ODC Ex. 14.

Following these events Respondent provided evidence that she altered her billing practices, such as through the use of contemporaneous timekeeping. Hrg. Trans. pp. 87-88. Respondent further testified that after this matter she changed her business practices to better clarify the fact that in these types of cases she represents individuals such and Mr. Brown and not Ms. Wright-Ochoa, despite the fact that Ms. Wright-Ochoa paid the retainer. Hrg. Trans. p. 84. Respondent no longer accepts *habeas* work as part of her practice. Hrg. Trans. pp. 104-105. Respondent's testimony regarding significant personal problems and issues from which she suffered at the time of these events was uncontroverted by the Office of Disciplinary Counsel.<sup>3</sup>

**2. SUPREME COURT NO. 15-0009**

**I.D. No. 14-05-346**

**Complaint of Greynolds**

Respondent had a prior professional relations with Complainant Kenneth L. Greynolds, having represented him in prior criminal matters before the case at issue. On December 12, 2012,

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<sup>3</sup> The Hearing Panel chose to not repeat the issues in their recommendation, but Disciplinary Counsel states that the issues dealt with Respondent's ex-husband's drug issues that affected their children.

Respondent was Mr. Greynolds' lawyer in a case set for trial that day. Hrg. Trans. pp. 13-14. Mr. Greynolds admitted the Respondent was prepared to try his relevant criminal case on that day. However, Mr. Greynolds believed a plea agreement was in his best interest due to possible application of the recidivist statute, West Virginia Code §61-11-18. In fact, Mr. Greynolds testified it was a "certainty" he would be subject to recidivist status if he lost the criminal case at issue. Hrg. Trans. p. 14. This allegedly may have resulted in a life sentence for Mr. Greynolds. ODC Ex. 4, Bates stamp 17.

Mr. Greynolds accepted a plea offer and pled guilty to three (3) felonies on or about December 12, 2012. ODC Ex. 7, Bates stamp 55-59. At his combined plea and sentencing Mr. Greynolds was read his post-conviction rights and still had a copy of that document in his possession when he testified to the Hearing Panel. Hrg. Trans. pp. 14-15.<sup>4</sup> Mr. Greynolds subsequently decided to appeal that conviction. Respondent was court appointed to represent Mr. Greynolds on his appeal by Order entered on January 15, 2013. ODC Ex. 1, Bates stamp 4; ODC Ex. 7, Bates stamp 35, 36. As customary, Respondent was ordered to contact Mr. Greynolds forthwith. *Id.* Respondent alleges she did so by sending Mr. Greynolds a letter describing that he had no legitimate grounds for an appeal. ODC Ex. 9, Bates stamp 78. In her January 17, 2013 letter she wrote, "I have reviewed the case file and the plea and sentencing order. There are no grounds for you to appeal this order. There

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<sup>4</sup> The Hearing Panel noted that during the December 12, 2012 hearing, Mr. Greynolds was asked a number of standard questions prior to the imposition of sentence. Among them were questions regarding Respondent's representation. Mr. Greynolds affirmed that he was satisfied with Respondent's work and that he had "no qualms about the manner in which she represented [him]." At that hearing it is clear that Mr. Greynolds entered into what is referred to as an *Alford* or *Kennedy* plea, whereupon he was not required to provide testimony or evidence of his commission of any crimes. Rather, Mr. Greynolds pled guilty upon the premise that he may lose at trial. "An accused may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even though he is unwillingly to admit participation in the crime, if he intelligently concludes that his interests require a guilty plea and the record supports the conclusion that a jury could convict him." See Kennedy v. Frazier, 178 W.Va. 10, 357 S.E.2d 43 (1987).

is no question as to jurisdiction, the sentence or whether you wished to enter the plea. Therefore, there are no legitimate grounds upon which to appeal.” ODC Ex. 9, Bates stamp 78.

Mr. Greynolds denied receiving that correspondence. Hrg. Trans. p. 15; ODC Ex. 10, Bates stamp 79. Respondent thereafter took no action on Mr. Greynolds’ behalf. Mr. Greynolds next wrote to the presiding judge on two occasions. The first, in or around June of 2013, stated that he had attempted to contact Respondent on several occasions without success. ODC Ex. 7, Bates stamp 37-39. The second, in or around June of 2014, asked for new counsel to be appointed.<sup>5</sup> ODC Ex. 7, Bates stamp 41-42. By letter dated June 10, 2014, Judge Aloï responded to Mr. Greynolds, stating that the time frame to file an appeal had passed and he would not appoint new counsel to represent Mr. Greynolds. ODC Ex. 1, Bates stamp 5; ODC Ex. 7, Bates stamp 43.

On or about June 25, 2014, Mr. Greynolds filed an ethics complaint alleging that Respondent had violated his “post conviction rights” by (1) failing to file for suspension of the execution of his sentence and thereby preventing his release on probation; (2) failing to file for correction or reduction of his sentence; (3) failing to file a notice of appeal with the Supreme Court of Appeals of West Virginia; and (4) failing to file a petition for writ of error. ODC Ex. 1. He also alleged that Respondent had failed to file a motion to suppress video evidence prior to the trial, and that in January of 2013 she withheld his legal correspondence which would have reduced the amount of time he received. *Id.* By letter dated June 30, 2014, Disciplinary Counsel wrote to Respondent asking for a response to the complaint. ODC Ex. 2. Respondent failed to file a response.

By letter dated July 29, 2014, sent via certified and regular mail, Disciplinary Counsel again requested a response to the complaint by August 8, 2014. ODC Ex. 3. On August 7, 2014, the Office

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<sup>5</sup> Respondent reserved the right to argue the facts in this paragraph in the “Stipulations Regarding Findings of Fact” entered into for this case.

of Disciplinary Counsel received Respondent's response, which was dated August 1, 2014. ODC Ex. 4. In her response, Respondent stated that Mr. Greynolds had a significant criminal history, and was advised by the prosecutor that the State would file a recidivism action if he did not accept a plea offer. ODC Ex. 4, Bates stamp 16-17. Respondent stated that she had filed a motion to suppress the video evidence<sup>6</sup>, which was to be ruled upon when the trial commenced. ODC Ex. 4, Bates stamp 17. Respondent stated that she was ready to proceed to trial on December 12, 2012, and that same morning, Mr. Greynolds decided to accept the plea offer. *Id.* Respondent said that following the plea and sentencing hearing she provided a copy of the order to Mr. Greynolds, but it was returned to sender. ODC Ex. 4, Bates stamp 18. She then forwarded the mail to him at Huttonsville Correctional Center. *Id.* As discussed earlier, it was at that same time Respondent claims she advised Mr. Greynolds that she would not be able to appeal his conviction because there was no issue relating to the jurisdiction, the sentence, or the voluntariness of entry of the plea. *Id.* Respondent stated that because she had to certify the appeal by signing a statement that she had "performed a review of the case that is reasonable under the circumstances and I have a good faith belief that an appeal is warranted." Respondent did not believe she could make such a representation and claimed she advised Mr. Greynolds in her January 17, 2013 letter that she could not file his appeal. ODC Ex. 8, Bates stamp 73.<sup>7</sup>

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<sup>6</sup> A check of the Marion County Circuit Court Clerk's file shows that "Defendant's Motion In Limine" was filed with the Court on or about December 5, 2012. ODC Ex. 7, Bates stamp 44.

<sup>7</sup> The Hearing Panel noted that Respondent provided evidence of the State of West Virginia's position in another case (in the same county and before the same Judge as Mr. Greynolds' matter) when she filed post-conviction motions on behalf of an unrelated client. In that case, the State argued the defendant breached the terms of the plea agreement by seeking certain post-conviction relief. The State, therefore, sought to set aside the plea and reinstate all charges. The defendant then withdrew his post-conviction motions. Respondent testified she was concerned Mr. Greynolds would face a similar response. Hrg. Trans. pp. 106-109.

Respondent has been admonished on one (1) occasion for a violation of Rule 1.3 of the Rules of Professional Conduct and on one (1) occasion for a violation of Rule 8.4(d) of the Rules of Professional Conduct. ODC Ex. 12, Bates stamp 85; 89-90.

**C. CONCLUSIONS OF LAW**

The Hearing Panel found Respondent neglected Mr. Brown's case and failed to timely file a Petition for *Habeas Corpus* for Mr. Brown in violation of Rules 1.1 and 1.3<sup>8</sup> of the Rules of Professional Conduct. There was also a violation of Rule 1.3 regarding her failure to file an appeal for Mr. Greynolds after she had been appointed by the court to do so. Respondent was found by the Hearing Panel to have failed to respond to Mr. Brown's requests for information and failed to explain the matter to Mr. Brown, in violation of Rules 1.4(a) and (b)<sup>9</sup> of the Rules of Professional Conduct. The violation of Rule 1.4(a) was also found by the Hearing Panel regarding Respondent's failure to respond to Mr. Greynolds' requests for information about the status of his appeal.

The failure to seek Mr. Brown's consent after consultation to accept compensation from Ms. Wright-Ochoa for Mr. Brown's case, and failure to prevent any interference with Respondent's

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<sup>8</sup> The Supreme Court of Appeals of West Virginia approved comprehensive amendments to the West Virginia Rules of Professional Conduct. The amendments became effective January 1, 2015; however, this document applies to the version of the Rules that was in effect at the time of Respondent's transgressions. The substance of the new Rules would not result in a different disposition in this case.

Rule 1.1. Competence.

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

Rule 1.3. Diligence.

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

Respondent admitted to the violation of Rules 1.1 and 1.3 in her stipulations. *See* Joint Exhibit 1.

<sup>9</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.

Respondent admitted to the violations of Rules 1.4(a) and 1.4(b) in her stipulations. *See* Joint Exhibit 1.

independence of professional judgment and the attorney client relationship was in violation of Rule 1.8(f)<sup>10</sup> of the Rules of Professional Conduct according to the Hearing Panel's findings. The Hearing Panel also found that Respondent failed to reasonably maintain a normal client-attorney relationship with Mr. Brown when she understood that he had an impairment in violation of Rule 1.14(a)<sup>11</sup> of the Rules of Professional Conduct.

Regarding Mr. Brown's and Ms. Wright-Ochoa's complaints, Respondent was found by the Hearing Panel to have failed to properly deposit all of the retainer fee into the client's trust account in violation of Rule 1.15(a)<sup>12</sup> of the Rules of Professional Conduct. The Hearing Panel noted that while Respondent provided evidence that she worked on and completed a draft version of Mr. Brown's *habeas* petition, it was uncontested that the petition was never finalized, much less filed on his behalf. The conclusion from the Hearing Panel was that Respondent was compensated with an unearned fee. The failure to promptly provide a refund of the unearned Five Thousand Dollars

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<sup>10</sup> Rule 1.8. Conflict of Interest: Prohibited Transactions.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

Respondent admitted to the violation of Rule 1.8(f) in her stipulations. *See* Joint Exhibit 1.

<sup>11</sup> Rule 1.14. Client under a disability.

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

Respondent admitted to the violation of Rule 1.14(a) in her stipulations. *See* Joint Exhibit 1.

<sup>12</sup> Rule 1.15. Safekeeping property.

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

Respondent admitted to the violation of Rule 1.15(a) in her stipulations. *See* Joint Exhibit 1.

(\$5,000.00) which was likewise not supported by contemporaneous time records pursuant to the fee agreement was in violation of Rule 1.16(d)<sup>13</sup> of the Rules of Professional Conduct.

There was also a finding by the Hearing Panel that Respondent failed to make reasonable efforts consistent with the stated and agreed upon objectives of her client, Mr. Brown, prior to his release in violation of Rule 3.2<sup>14</sup> of the Rules of Professional Conduct. The failure of Respondent to timely comply with the Office of Disciplinary Counsel's lawful requests for information was found by the Hearing Panel to be in violation of Rule 8.1(b)<sup>15</sup> of the Rules of Professional Conduct. The Hearing Panel found that Respondent's failure to file the Petition for *Habeas Corpus* for Mr. Brown, prior to his release was in violation of Rules 8.4(c) and (d)<sup>16</sup> of the Rules of Professional Conduct. Another violation of Rule 8.4(d) was found after Respondent failed to perfect Mr. Greynolds' appeal and failed to withdraw when she believed there were no grounds for the appeal. Mr. Greynolds' rights to his appeal were impacted, and no appeal was filed for Mr. Greynolds.

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<sup>13</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>14</sup> Rule 3.2. Expediting litigation.

A lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client. Respondent admitted to the violation of Rule 3.2 in her stipulations. *See* Joint Exhibit 1.

<sup>15</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.

Respondent admitted to the violation of Rule 8.1(b) in her stipulations. *See* Joint Exhibit 1.

<sup>16</sup> Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

\* \* \*

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

(d) Engage in conduct that is prejudicial to the administration of justice.

Respondent admitted to violation of Rules 8.4(c) and 8.4(d) in her stipulations. *See* Joint Exhibit 1.

## **II. SUMMARY OF ARGUMENT**

The Hearing Panel Subcommittee of the Lawyer Disciplinary Board correctly found that Respondent committed multiple violations of the Rules of Professional Conduct. The Hearing Panel recommended that Respondent be reprimanded; that she undergo supervised practice for two (2) years; refund the Five Thousand Dollars (\$5,000.00) to Ms. Wright-Ochoa; and that she pay the expenses of the proceedings. The Office of Disciplinary Counsel, respectfully, asserts there has been no error in the findings of fact or conclusions of law made by the Hearing Panel. Further, there has been no error in the recommendation of the sanctions. There was a typo in the recommendation for Case No. 14-0749 which recommended supervised practice to run concurrent with supervised practice in Case No. 15-0009, when the recommendation in Case No. 15-0009 specifically denied supervised practice. Regardless of that typo, the recommendation is adequate considering the clear and convincing evidence against Respondent and precedent of this Honorable Court. All factors from the amount of injury, the level of misconduct, as well as mitigating and aggravating factors, were properly considered by the Hearing Panel to recommend a reprimand as opposed to a period of suspension.

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

The Office of Disciplinary Counsel does not object to oral argument in this matter. The issues raised by Respondent and the findings made by the Hearing Panel Subcommittee do not address any new issues of law that would require Disciplinary Counsel to request oral argument pursuant to Rule 20 of the Rules of Appellate Procedure. 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

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.

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. McCorkle, Id.; 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, 464 S.E.2d at 189; McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381.

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. *See*, Syl. Pt. 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995).

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).

**B. ANALYSIS OF SANCTION UNDER RULE 3.16 OF THE RULES OF LAWYER DISCIPLINARY PROCEDURE**

Syl. Point 4 of Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998) holds: Rule 3.16 of the Rules of Lawyer Disciplinary Procedure provides that when imposing a sanction after a finding of lawyer misconduct, the Court shall consider: (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 extensive record in this matter indicates that Respondent has transgressed all four factors set forth in Jordan.

The Supreme Court of Appeals of West Virginia 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, 451 S.E.2d 440 (1994). Factors to be considered in imposing appropriate sanctions are found in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure. These factors consist of: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. *See also*, Syl. Pt. 4, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998).

**1. Respondent violated duties to her clients, to the public, to the legal system and to the legal profession.**

Lawyers owe duties of candor, loyalty, diligence and honesty to their clients. Members of the public should be able to rely on lawyers to protect their property, liberty, and their lives. Lawyers are officers of the court and, as such, must operate within the bounds of the law and abide by the rules of procedure which govern the administration of justice in our state. Furthermore, a lawyer's duties also include maintaining the integrity of the profession.

Respondent violated her duties to her client by not being diligent or communicating with her client. On August 27, 2010, Respondent was hired to file a *habeas corpus* petition for Lael Brown. ODC Ex. 16, Bates stamp 84, 90-92. The only contact Respondent had with Mr. Brown after that date was one (1) letter sent in October of 2010. ODC Ex. 16, Bates stamp 196. Before and after October of 2010, Respondent had no contact with her client Mr. Brown. The letter Respondent sent to Mr. Brown indicated that Respondent would come to visit with Mr. Brown, but she never did visit Mr. Brown. Hrg. Trans. p. 17-18. After a year without any visit from Respondent, Mr. Brown sent a letter to Respondent to request a refund of the Five Thousand Dollars (\$5,000.00). ODC Ex. 16, Bates stamp 195-196. Mr. Brown also requested an itemization and accounting. *Id.* There was no response from Respondent to that letter. Mr. Brown then filed a *pro se habeas* petition in August of 2011. ODC Ex. 30, Bates stamp 1266; ODC Ex. 31, Bates stamp 1268-1276. In January of 2013, Mr. Brown was released from incarceration because he completed his sentence, not because of any *habeas corpus* petition. Hrg. Trans. p. 20.

The rules also provide that when an attorney accepts compensation from someone other than the client, the attorney must maintain a normal attorney client relationship. It is clear from the facts in this case that Respondent never spoke to Mr. Brown and, therefore, never obtained his permission

to accept compensation from someone other than the client. Also, Respondent allowed Ms. Wright-Ochoa to control and make decisions in the case, instead of relying on the decisions and instructions of Mr. Brown. Hrg. Trans. p. 117-118. The contract signed between Respondent and Ms. Wright-Ochoa indicated that Respondent would work on and file the *habeas corpus* petition for Five Thousand Dollars (\$5,000.00). The *habeas corpus* petition was never filed even though Respondent was paid and kept the Five Thousand Dollars (\$5,000.00).

Ms. Wright-Ochoa had previously went through an experience with an attorney regarding her son, Mr. Brown. That other attorney had taken Twenty-Seven Thousand Dollars (\$27,000.00) to work on Mr. Brown's criminal matter, but she felt she had been "scammed" in the matter. Hrg. Trans. p. 23-26. It appeared to Ms. Wright-Ochoa that the same thing was happening with Respondent. Ms. Wright-Ochoa indicated that she began to have communication issues almost as soon as she paid Respondent. While Respondent did communicate with Ms. Wright-Ochoa at first, the communication stopped and a *habeas corpus* petition was never filed for Mr. Brown. Respondent admitted in her testimony that she was waiting for Ms. Wright-Ochoa to approve the *habeas corpus* petition and she never filed it because of that. Hrg. Trans. p. 84. However, Respondent's client, Mr. Brown, was never provided a copy of the *habeas* petition. Respondent did not keep contemporaneous time records in the matter because she could not specify the specific dates, time, or work. Hrg. Trans. p. 87-88. The *habeas* petition was never filed for Mr. Brown even though the contract stated that Respondent would file the petition for the Five Thousand Dollars (\$5,000.00).

There were also duties to the client violated by in regards to Mr. Greynolds' appeal. Respondent did not respond to letters or telephone calls from Mr. Greynolds. Hrg. Trans. 11-12. She also did not diligently handle the appeal for Mr. Greynolds. This Honorable Court has stated:

That since the Rules of Appellate Procedure have been modified to more clearly provide a right of appeal in all cases, the frequency of such creative methods to obtain review has increased. Although the appellate procedures have undergone change to insure that the disposition of each perfected appeal is reflected in a written decision, nothing has changed as to the professional responsibility of lawyers to proceed only on meritorious issues. The change in the appellate rules was in no way intended to impose a greater or lesser burden on the legal community. Pursuant to principles contained in Rule 3.1 of the West Virginia Rules of Professional Conduct, [footnote 6] an appellate remedy should not be pursued unless counsel believes in good faith that error has been committed and there is a *reasonable basis* for the extension, modification, or reversal of existing law. [footnote 7].

State v. McGill, 230 W.Va. 85, 736 S.E.2d 85 (2012). The footnotes explain that in certain instances appointed counsel must file an Anders brief.<sup>17</sup> Respondent had a belief that because she did not find any reason to support an appeal, she did not have to file the appellate brief. However, Respondent now understands that such a she “should’ve sent a letter to the court and asked to withdraw [from Mr. Greynolds’ case] because [she] found no reason to appeal.” Hrg. Trans. p. 93. Mr. Greynolds indicated that he lost his ability to file an appeal in his case. Hrg. Trans. p. 13.

In the Brown cases, Respondent’s misconduct has affected the legal profession and the legal system because she failed to respond to Disciplinary Counsel, failed to promptly return client funds, and failed to place the retainer fee into her client trust account.

## **2. Respondent acted negligently.**

The Hearing Panel found that the evidence established that Respondent acted negligently in these matters. The Hearing Panel noted that the ABA Standards for Imposing Lawyer Sanctions define negligence as the failure of a lawyer to heed a substantial risk that circumstances exist or that

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<sup>17</sup> In Anders v. State of California, 87 S.Ct. 1396 (1967), the United States Supreme Court found that even in cases where attorneys find no merit to an appeal, the attorney must still file a brief that argues any possible issue along with a motion to withdraw in order for the defendant to receive “equality and fair process.” There was a concern that an attorney may violate the Rules regarding non-frivolous filings if the attorney did not find any merit to the appeal, but the attorney must ensure that the constitutional rights of defendants are upheld.

a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in that situation.

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

Mr. Brown suffered injury by Respondent's misconduct through his continued incarceration. The *habeas* petition was only brought before a court due to Mr. Brown filing a *pro se* petition. It was another two and a half years after Respondent was retained that Mr. Brown was released from incarceration for serving his sentence. Respondent's own testimony showed that she believed and still believes that there were grounds to file the *habeas* petition. Hrg. Trans. p. 116. Respondent stated that the draft petition she had prepared in the matter was adequate, but she never filed it. *Id.* at p. 121. Respondent went on to testify that the petition could have been filed in September of 2010, and a new sentence could have occurred in 2011. Mr. Brown was not released from incarceration until January of 2013, and the Hearing Panel found argument that Mr. Brown served time in jail when he could have been released through the filing of the *habeas* petition.<sup>18</sup>

The Hearing Panel found that Mr. Greynolds suffered an injury. The injury was a result of the Respondent's failure to withdraw, to attempt to withdraw, or to file an *Anders* brief in Mr. Greynolds' case. There was little likelihood of success regarding Mr. Greynolds' appeal, but he nonetheless lost any ability to argue his appeal.

Further, the Hearing Panel found that the legal system and the legal profession were brought into disrepute due to Respondent's misconduct, which included instances of failing to respond to requests from Disciplinary Counsel for information about these complaints.

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<sup>18</sup> The Hearing Panel did not make a finding that proposed grounds for the *habeas* were objectively valid or that the petition would have succeeded. The Panel also did not make a finding that Mr. Brown served more time in jail than he should have absent the *habeas*. Rather, the finding by the Hearing Panel was that by Respondent's admission there were reasonable grounds for the petition and that the petition may have been heard and arguably succeeded by mid-2011.

**4. There are aggravating and mitigating 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. 216, 579 S.E. 2d 550, 557 (2003) quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.21 (1992). Respondent admitted in her stipulations in this case that she has experience in the practice of law and prior disciplinary action by the Investigative Panel of the Lawyer Disciplinary Board. See Joint Exhibit 1.

The Scott Court also adopted mitigating factors in a lawyer disciplinary proceeding and stated that mitigating factors “are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.” Lawyer Disciplinary Board v. Scott, 213 W.Va. 216, 579 S.E.2d 550, 557 (2003). The following mitigating factors were found to be present by the Hearing Panel: a cooperative attitude toward proceedings, no dishonest motive, remorse, no prior disciplinary proceedings before this Honorable Court, and personal problems. As to the Brown case, Respondent entered into stipulations regarding almost all of the recommended sanctions, except the return of the Five Thousand Dollars (\$5,000.00) paid to her by Ms. Wright-Ochoa. Further, Respondent made modifications in her billing and practice methods after receiving these complaints. The Hearing Panel also noted that Respondent was under duress during the time of the underlying misconduct. This duress was dealing with her ex-husband’s drug usage and the affect it had upon their children. Respondent’s ex-husband had these drug issues for several years and Respondent had to deal with their children’s questions and concerns about their father. The drug usage became worse before

Respondent's ex-husband finally became clean. The Hearing Panel found that such duress provided a reasonable explanation of the communication lapses with the clients.

#### V. SANCTION.

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syllabus Pt. 3, *in part*, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), *cited in* Committee on Legal Ethics v. Morton, 186 W.VA. 43, 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 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); and Syl. pt. 2, Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999). "A sanction is to not only punish the attorney, but should also be designed to reassure the public confidence in the integrity of the legal profession and deter other lawyers from similar conduct." Syl. pt 2, Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993); Syl. pt 3, Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Syl. pt. 5, Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Syl pt. 3, Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); and Syl pt. 3, Lawyer

Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000). The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syl.pt. 3, in part, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), cited in Committee on Legal Ethics v. Morton, 186 W.Va. 43, 45, 410 S.E.2d 279, 281 (1991).

The Hearing Panel found that Respondent demonstrated conduct that fell below the minimum standard for attorneys, and discipline must be imposed. Further, it was noted that the American Bar Association has recognized that a reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to a client, the public, or the legal profession and causes injury or potential injury to a client, the public or the legal system. See, ABA Model Standards for Imposing Lawyer Sanctions, § 4.13.

The Hearing Panel noted the previous public reprimands that were issued along with supervised practice that was previously order this Honorable Court for conduct involving lack of diligence and lack of communication along with failure to respond to disciplinary counsel. See Lawyer Disciplinary Board v. Geraldine Roberts, 217 W.Va. 189, 617 S.E.2d 539 (2005): lawyer reprimanded for violations of Rules 1.1, 1.2(a), 1.3, 1.4, 1.16, and 8.1(b) and ordered to undergo supervised practice for an additional year; Lawyer Disciplinary Board v. Brentton W. Wolfingbarger, No. 29973 (WV 3/13/02): lawyer reprimanded for violations of Rules 1.4 and 8.1 and ordered to undergo supervised practice for eighteen (18) months (unreported case); Lawyer Disciplinary Board v. Lee F. Benford, No. 31795 (WV 1/19/05): lawyer reprimanded for violations of Rules 1.3, 1.4(a), and 8.1(b) and ordered to undergo supervised practice for two (2) years (unreported case); Lawyer Disciplinary Board v. Reggie R. Bailey, No. 31799 (WV 3/9/05): lawyer

reprimanded for violations of Rules 1.3, 1.4 and 8.1 and ordered to undergo one (1) year of supervised practice (unreported case); Lawyer Disciplinary Board v. Richard L. Vital, No. 32229 (WV 5/25/05): lawyer reprimanded for violations of Rules 1.3, 1.4, and 8.1(b) and ordered to undergo supervised practice for two (2) years (unreported case); Lawyer Disciplinary Board v. David S. Hart, No. 33328 (WV 9/14/07): lawyer reprimanded for violations of Rules 1.3, 1.4, and 8.1(b) (unreported case); Lawyer Disciplinary Board v. April D. Conner, No. 35434 (WV 10/27/10): lawyer reprimanded for violations of Rules 1.3, 1.4, 8.1(b), 1.15(b), and Rules 1.16(b) and ordered to undergo supervised practice for one (1) year (unreported case); Lawyer Disciplinary Board v. Daniel R. Grindo, 231 W.Va. 365, 745 S.E.2d 256 (2013): lawyer reprimanded for violations of Rules 1.3, 3.2, and 3.4(c); Lawyer Disciplinary Board v. Donna M. Price, No. 11-1345 (WV 3/25/14): lawyer reprimanded for violations of Rules 1.1 and 1.3 (unreported case); Lawyer Disciplinary Board v. Donna M. Price, No. 13-0478 (WV 5/27/14): lawyer reprimanded for violations of Rule 8.1(b) (unreported); and Lawyer Disciplinary Board v. Jeffrey S. Rodgers, No. 13-0721 (WV 10/15/14): lawyer reprimanded for violations of Rules 1.3, 1.4(a), 1.4(b), 1.15(a), 1.15(b), 8.4(c), and 8.4(d).

This Court has had recent cases dealing with both appellate issues and *habeas* issues. This Court recently suspended an attorney for ninety (90) days for failure to file appeals. Lawyer Disciplinary Board v. Connor, 234 W.Va. 648, 769 S.E.2d 25 (2015). In that case, the attorney had failed to file appeals for two (2) clients along with failing to work or refund a retainer for a third client. Id. The attorney was found to have violated Rules 1.2(a), 1.3, 1.4, 1.15, 3.2, 8.1, and 8.4, and this Court found that the conduct was negligent. Id. Part of the misconduct included a finding that the attorney was “guilty of contempt by failing to perfect [the client’s] appeal and for failure to appear before this Court as ordered.” Id. at 651-652, 28-29. A noted aggravating factor for that

attorney was a previous disciplinary case before this Honorable Court in which the attorney was reprimanded. See Lawyer Disciplinary Board v. Connor, No. 35434 (WV 10/27/10) (unreported). Another additional aggravating factor that was considered by this Court was the attorney's "pattern of ignoring directives from this Court . . . weighs in favor of an increased sanction." Lawyer Disciplinary Board v. Connor, 234 W.Va. 648, 657, 769 S.E.2d 25, 34 (2015). The attorney had failed "to file any responsive pleadings in violation of this Court's directive" regarding the briefing schedule set forth by this Court. The only mitigating factor was the attorney's remorse. Id. at 654, 31.

The other case, which dealt with a *habeas* matter, was Lawyer Disciplinary Board v. Richard W. Hollandsworth, No. 14-0022 (WV 9/18/14) (unreported) resulted in a ninety (90) day suspension. The attorney had been appointed to represent a client in a *habeas* matter. The attorney failed to contact his client and the circuit refused to appoint new counsel for the client, but did order the attorney to contact the client. After some time, the client filed a Writ of Mandamus with this Court about the circuit court's refusal to appoint new counsel. This Honorable Court granted the Writ of Mandamus and ordered the Circuit Court to appoint new counsel. The attorney was found to have acted knowingly in that case, as opposed to negligently. Further, the attorney "failed to take any remedial measures to rectify his lack of communication and diligence when confronted with the same by both the Circuit Court and [this Honorable Court]." Id. It was found that Respondent "failed to comply with the Circuit Court's Order . . . directing him to file an amended petition." Id. There were no mitigating factors listed in the attorney's case.

In this case before the Honorable Court, the Hearing Panel found that Respondent acted with negligence. Further, there is no evidence that Respondent failed to abide by a court Order. It was

noted with great significance in both Connor and Hollandsworth that the attorneys' failed to abide by court orders. Such a significant issue is not present in this case. While Respondent was ordered to handle the appeal for Mr. Greynolds, she believed, at that time, in her determination that there were no issues upon which to file an appeal ended the matter. She did not ignore Mr. Greynolds in an effort to ignore his case and concerns. Respondent believed that she had followed the court appointment in representing Mr. Greynolds regarding the appeal. Respondent testified that she now understands that such an appeal should still be sought for a client with certain procedures to be followed.

Several mitigating factors are present in this case that were not present in Connor or Hollandsworth. Respondent was found to have a cooperative attitude toward the proceedings, had no dishonest motive, showed remorse, had no prior disciplinary proceedings before this Honorable Court, and had personal problems. Hollandsworth did not have any mitigating factors and Connor only had the mitigating factor of remorse. Also, the personal problems that Respondent was facing during the time frame of the complaints involved her ex-husband and her children, which continued for several years. *See* Hrg. Trans. p. 97-101. This unfortunate situation prevented Respondent from properly focusing on her legal work for these two (2) clients. While Respondent worked to deal with the personal problems, it is noted that this was not a personal problem under the control of Respondent. These issues were forced upon her due to her ex-husband's drug issues, and because the same affected the children they shared, she was forced to deal with issues. This was not something she could stop because she saw how it was affecting her legal work. Her ex-husband's drug issues became significantly worse during the years before he finally became clean.

It should also be noted that the attorney in Connor had previously been reprimanded by this Court. In this case, Respondent has no history of a previous disciplinary case before this Honorable Court. Respondent does have previous admonishments by the Investigative Panel and such is similar to the attorney in Hollandsworth who ended up with a ninety (90) day suspension. However, again, the attorney in Hollandsworth was found to have acted knowingly in failing to abide by court orders. Such misconduct and the degree of misconduct is not present in Respondent's case. The Hollandsworth case also did not have any mitigating factors that would lessen the sanction of the attorney that is present in Respondent's case.

As for the repayment of the Five Thousand Dollars (\$5,000.00) to Ms. Wright-Ochoa, the Hearing Panel found that Respondent had failed to prove that she earned the Five Thousand Dollars (\$5,000.00) paid to her. In finding that, the Hearing Panel noted the following:

“It may be that lawyers who do work under a contingency fee contract do not keep time records. It should be obvious from this case that keeping good time records would be the more prudent course. The burden of proof is always upon the attorney to show the reasonableness of the fees charged. The same burden to prove reasonableness remains with the attorney under any fee structure. Attorneys who fail to effectively document their efforts on behalf of a client run the risk of being unable to convince a reviewing court, based on their word alone, of the reasonableness of the fee charged or, in cases where it applies, the full and proper value of fees to be awarded on a *quantum merit* basis.”

Bass v. Cotelli Rose, 216 W.Va. 587, 592, 609 S.E.2d 848, 853 (2004) (*citing* Syl. Pt. 2, Committee on Legal Ethics of West Virginia State Bar v. Tatterson, 177 W.Va. 356, 352 S.E.2d 107 (1986)).

It was clear to the Hearing Panel that Respondent failed to “effectively document” her work or even keep “contemporaneous records” as required by her own representation agreement. ODC Ex. 16, Bates stamp 90-92. Respondent did not submit any contemporaneous time records for the work in

Mr. Brown's case. While work was put forth by Respondent in Mr. Brown's case, it was not completed as was required by the representation agreement. No *habeas* petition was ever filed by Respondent for Mr. Brown. By the plain language of the representation agreement, Respondent did not earn the fee, and she failed to prove that she earned the fee.

## VI. CONCLUSION

In reaching its recommendation as to sanctions, the Hearing Panel Subcommittee considered the evidence, the facts and recommended sanction, the aggravating factors and mitigating factors. For the reasons set forth above, the Hearing Panel Subcommittee recommended the following sanctions:

**For Supreme Court No. 14-0749:**

- A. That Respondent shall be reprimanded;
- B. That Respondent's practice shall be supervised for a period of two (2) years by an attorney agreed upon between the Office of Disciplinary Counsel and Respondent.<sup>19</sup> Respondent shall meet with her supervising attorney every two (2) weeks. The goal of the supervised practice will be to improve the quality and effectiveness of Respondent's law practice to the extent that Respondent's sanctioned behavior is not likely to recur;
- C. That Respondent shall refund the Five Thousand Dollars (\$5,000.00) retainer fee to Ms. Wright-Ochoa; and

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<sup>19</sup> Disciplinary Counsel has removed the language about the supervised practice running concurrently with the supervised practice in 15-0009 as it was indicated in footnote 10 of Case No. 15-0009 that supervised practice was not being ordered. Disciplinary Counsel understands such language is a contradiction.

D. That, pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure, Respondent shall pay costs of this disciplinary proceeding.

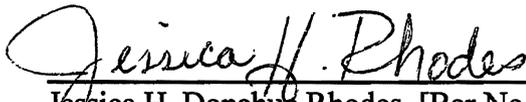
**For Supreme Court No. 15-0009:**

A. That Respondent shall be reprimanded;

B. That, pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure, Respondent shall pay costs of this disciplinary proceeding.

Accordingly, the Office of Disciplinary Counsel urges that this Honorable Court uphold the sanctions recommended by the Hearing Panel Subcommittee.

*Respectfully submitted,*  
The Lawyer Disciplinary Board  
By Counsel

  
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**CERTIFICATE OF SERVICE**

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This is to certify that I, Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 7<sup>th</sup> day of December, 2015, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" upon Respondent Heidi M. Georgi Sturm, by mailing the same via United States Mail with sufficient postage, to the following address:

Heidi M. Georgi Sturm, Esquire  
301 Adams Street, Suite 803  
Fairmont, West Virginia 26554

  
\_\_\_\_\_  
Jessica H. Donahue Rhodes