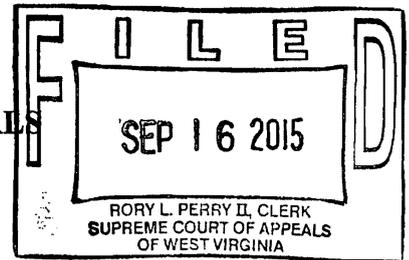


BEFORE THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA



In Re: HEIDI M. GEORGI STURM, a member of
The West Virginia State Bar

Bar No.: 9371
Supreme Court No.: 14-0749
I.D. Nos.: 12-05-267 & 12-05-268

REPORT OF THE HEARING PANEL SUBCOMMITTEE

I. PROCEDURAL HISTORY

Formal charges were filed against Respondent Heidi M. Georgi Sturm with the Clerk of the Supreme Court of Appeals on or about July 31, 2014, and served upon Respondent via certified mail by the Clerk on August 13, 2014. Disciplinary Counsel filed her mandatory discovery on or about September 2, 2014. Respondent filed her Answer to the Statement of Charges on or about September 10, 2014. Respondent provided her mandatory discovery on or about November 7, 2014. 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.

Thereafter, this matter was set for hearing and such proceeded to hearing in Morgantown, West Virginia, on May 4, 2015. The Hearing Panel Subcommittee was comprised of James R. Akers, II, Esquire, Chairperson, Henry W. Morrow, Esquire, and Jon Blair Hunter, Layperson. Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. Respondent appeared *pro se*. The Hearing Panel Subcommittee heard

testimony from Laverne G. Wright-Ochoa, Lael Brown and Respondent. ODC Exhibits 1-38 and Joint Exhibits 1 and 2 were admitted into evidence.

Based upon the evidence and the record, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board hereby makes the following Findings of Fact, Conclusions of Law and Recommended Sanctions regarding the final disposition of this matter.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. 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.

I.D. No. 12-05-267 & 12-05-268 Complaints of Lael Brown and Laverne G. Wright-Ochoa

2. 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.
3. 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.

4. On or about August 26, 2010, Ms. Wright-Ochoa sent additional documents to Respondent. ODC Ex. 16, bates stamp 217.
5. 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.
6. 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.

7. 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
8. 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.
9. 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.
10. 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.
11. 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.
12. 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 stamp 228.

13. 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.
14. 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.
15. 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.

16. 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.
17. 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.
18. 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.
19. 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.

20. 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.
21. 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.
22. On or about November 2, 2010, Ms. Wright-Ochoa sent an email to Respondent for additional documents. ODC Ex. 16, bates stamp 227.
23. 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.
24. 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.

25. On or about December 14, 2010, Ms. Wright-Ochoa sent a letter to Respondent with additional documents. ODC Ex. 16, bates stamp 220.
26. On or about December 15, 2010, Ms. Wright-Ochoa sent Respondent an email about not hearing from Respondent. ODC Ex. 16, bates stamp 221.
27. Ms. Wright-Ochoa requested information about the *habeas corpus* petition in or around January of 2011. ODC Ex. 16, bates stamp 85.
28. 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.
29. 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.
30. 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.
31. 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.
32. 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.
33. 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.

34. 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.
35. 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.
36. 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.
37. 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.

38. 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.
39. 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.
40. Respondent filed a response dated May 21, 2011¹, 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.

¹ The year appears to be a typo as the response was received on May 24, 2012.

ODC Ex. 18, bates stamp 235. At that 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.

41. 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.
42. 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.
43. 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.
44. 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 claimed she spent additional time on the file but did not bill for it. Id.

45. In or around February of 2013, Mr. Brown was released from incarceration. ODC Ex. 33, bates stamp 1282.
46. 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.
47. 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.
48. Following these events Respondent provided evidence that she altered her billing practices, such as through the use of contemporaneous timekeeping. Hrg. Trans. at pp. 87-88.
49. 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 as Mr. Brown and not Ms. Wright-Ochoa, despite the fact that Ms. Wright-Ochoa paid the retainer. Hrg. Trans. p. 84.
50. Respondent no longer accepts habeas work as part of her practice. Hrg. Trans. pp. 104-105.

51. Respondents' 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.²
52. Because she neglected Mr. Brown's case and failed to timely file a Petition for *Habeas Corpus* for Mr. Brown, Respondent has violated Rules 1.1 and 1.3³ of the Rules of Professional Conduct which provide as follows:

Rule 1.1. Competence.

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

and

Rule 1.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.⁴

53. Because Respondent failed to respond to Mr. Brown's requests for information and failed to explain the matter to Mr. Brown, Respondent has violated Rules 1.4(a) and (b) of the Rules of Professional Conduct which provides as follows:

Rule 1.4. Communication.

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

² Out of respect for Respondent and her family those issues are not repeated here. Suffice to say, they were certainly of the kind and type that would distract any lawyer from his or her job.

³ 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.

⁴ Respondent admitted to this Rule violation in her stipulations. *See* Joint Exhibit 1.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.⁵

54. Because Respondent failed to seek Mr. Brown's consent after consultation to accept compensation from Ms. Wright-Ochoa for Mr. Brown's case and failed to prevent any interference with her independence of professional judgment and the attorney client relationship, Respondent violated Rule 1.8(f) of the Rules of Professional Conduct, which provides as follows:

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 1.6.⁶

55. Because Respondent failed to reasonably maintain a normal client-attorney relationship with Mr. Brown when she understood that he had an impairment, she has violated Rules 1.14(a) of the Rules of Professional Conduct, which provides as follows:

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.⁷

⁵ Respondent admitted to this Rule violation in her stipulations. *See* Joint Exhibit 1.

⁶ Respondent admitted to this Rule violation in her stipulations. *See* Joint Exhibit 1.

⁷ Respondent admitted to this Rule violation in her stipulations. *See* Joint Exhibit 1.

56. Because Respondent failed to properly deposit all of the retainer fee the client's trust account, she has violated Rules 1.15(a) of the Rules of Professional Conduct, which provides as follows:

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.⁸

57. Respondent provided evidence that she worked on and completed a draft version of Mr. Brown's *habeas* petition. However, it is uncontested that the petition was never finalized, much less filed on his behalf. The Hearing Panel therefore concludes that Respondent was compensated for what it determines was an unearned fee. Because Respondent failed to provide a refund of the unearned Five Thousand Dollars (\$5,000.00) which was likewise not supported by contemporaneous time records pursuant to the fee agreement, she has violated Rule 1.16(d) of the Rules of Professional Conduct, which provides as follows:

Rule 1.16 Declining or terminating representation

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

⁸ Respondent admitted to this Rule violation in her stipulations. *See* Joint Exhibit 1.

54. Because Respondent failed to make reasonable efforts consistent with the stated and agreed upon objectives of her client, Mr. Brown, prior to his release, Respondent has violated Rule 3.2 of the Rules of Professional Conduct which provides as follows:

Rule 3.2. Expediting litigation.

A lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client.⁹

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

Rule 8.1. Bar admission and disciplinary matters.

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

* * *

(b) . . . knowingly fail to respond to a lawful demand for information from . . . disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.¹⁰

59. Because Respondent failed to file the Petition for *Habeas Corpus* for Mr. Brown, prior to his release, she violated of Rule 8.4(c) and (d) of the Rules of Professional Conduct, which provides as follows:

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.¹¹

⁹ Respondent admitted to this Rule violation in her stipulations. *See* Joint Exhibit 1.

¹⁰ Respondent admitted to this Rule violation in her stipulations. *See* Joint Exhibit 1.

¹¹ Respondent admitted to this Rule violation in her stipulations. *See* Joint Exhibit 1.

III. DISCUSSION

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).

A. 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.

The evidence in this case establishes by clear and convincing proof that Respondent violated her duties to her client. Respondent was hired to file a *habeas* petition for Lael Brown on or about August 27, 2010. ODC Ex. 16, bates stamp 84, 90-92. Respondent never had any contact with Mr. Brown apart from one (1) letter he received from her in October of 2010. ODC Ex. 16, bates stamp 196. Thereafter, Respondent made no attempt to contact Mr. Brown. Mr.

Brown stated that he never met with Respondent and Respondent never visited him, even after she had indicated that she would in a letter she had sent him. Hrg. Trans. pp. 17-18. Mr. Brown sent a letter to Respondent in July of 2011, almost a year after Respondent had been retained, at which time he requested a refund of the Five Thousand Dollars (\$5,000.00) paid to Respondent, along with an accounting and itemization of the costs. ODC Ex. 16, bates stamp 195-196. Respondent never responded 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. Ultimately, Mr. Brown was released from incarceration in January of 2013 after completing his sentence. Hrg. Trans. p. 20.

Respondent failed to communicate with Mr. Brown throughout the entire representation, apart from one (1) letter Mr. Brown received from her. Respondent never went to see Mr. Brown while he was incarcerated and never responded to his request for a refund or itemization of the work she performed in the case. Respondent never sought Mr. Brown's permission to accept compensation from Ms. Wright Ochoa for his case and failed to maintain a normal attorney client relationship with Mr. Brown by allowing Ms. Wright Ochoa to make decisions regarding the *habeas* petition. Hrg. Trans. p. 117-118. Further, she never filed a *habeas* petition for Mr. Brown even though she was paid Five Thousand Dollars (\$5,000.00) to do so.

Ms. Wright Ochoa testified about her previous experience with an attorney who had taken Twenty-Seven Thousand Dollars (\$27,000.00) from her to work on her son Lael Brown's case. Hrg. Trans. p. 23-26. Ms. Wright Ochoa was upset with her past experience with an attorney because she felt "scammed." Hrg. Trans. p. 24. Ms. Wright Ochoa felt the same way in this matter. Ms. Wright Ochoa raised communications issues in September of 2010, which was only a month after Ms. Wright Ochoa hired Respondent. Hrg. Trans. p. 30-31. Ms. Wright Ochoa was "worried and wondering if [she] was being scammed again by another attorney representing [her] son." Hrg. Trans. p. 31-32. Respondent ultimately responded to Ms. Wright Ochoa and kept

in contact with her for a period of time, Respondent never filed a *habeas* petition for or properly communicated with Lael Brown.

Respondent testified that she had completed the *habeas* petition for Mr. Brown, but she waited for Ms. Wright Ochoa to approve the petition prior to filing it. Hrg. Trans. p. 84. Respondent never provided a copy of the *habeas* petition to Mr. Brown. Respondent admitted that she did not keep contemporaneous time records in Mr. Brown's case, due in part to the failure to have specific dates, time or specific items that Respondent worked on the matter. Hrg. Trans. p. 87-88. Respondent also admitted that she never filed the *habeas* petition. Hrg. Trans. p. 88. Respondent argued that she earned the Five Thousand Dollars (\$5,000.00) paid to her for Mr. Brown's case even though she "did not fulfill [her] obligations." Hrg. Trans. p. 89.

The legal profession suffered by Respondent's failure to properly place client funds in her IOLTA account, failure to promptly return client funds, and failure to respond to Disciplinary Counsel. The integrity of the legal profession and legal system suffers when lawyers do not abide by the rules of procedure which govern the administration of justice in our state. Respondent admittedly failed to comply with requests from Disciplinary Counsel. She had no answer for why other than to say she was overwhelmed. Hrg. Trans. p. 120. She failed to place the client funds into her IOLTA account. Respondent provided inadequate documentation to support her fee and upon client request did not refund any portion of the Five Thousand Dollars (\$5,000.00) even though she failed to fulfill her duty.

B. Respondent acted negligently.

The evidence establishes that Respondent acted negligently in these matters. 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 a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in that situation.

C. The amount of real injury is great.

Respondent failed to file the *habeas* petition, which resulted in actual injury to Mr. Brown because of his continued incarceration. Mr. Brown eventually filed his own *habeas* petition in an effort to have his issues brought before a court. Mr. Brown was incarcerated for another two and a half years after Respondent was retained before he was released for time served.

Respondent admitted there were reasonable grounds to file the *habeas* petition and still believes so. Hrg. Trans. at p. 116. She believes the draft petition she completed was adequate, however, she never filed it. Id. at p. 121. Respondent believes the *habeas* could have been filed by the end of September 2010. She then believed that new sentencing may have been granted by mid-2011. Mr. Brown remained in jail until January 2013. It is therefore arguable that Mr. Brown served time in jail when he could have otherwise been released following a successful *habeas* petition.¹²

Respondent's misconduct, including instances of failing to respond to requests from Disciplinary Counsel for information about these complaints, has brought the legal system and legal profession into disrepute.

D. 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).

¹² The Hearing Panel is not making a finding that proposed grounds for the *habeas* were objectively valid or that the petition would have succeeded. The Panel is likewise not making a finding that Mr. Brown served more time in jail than he should have absent the *habeas*. Rather, the finding simply is 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.

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 are present: a cooperative attitude toward proceedings and remorse. Respondent agreed to most the recommended sanctions proposed by the Office of Disciplinary Counsel with the exception of the return of her retainer fee. *See* Joint Exhibit 1. Respondent appears have to demonstrated no dishonesty or selfish motive. Respondent had no prior adverse disciplinary findings, although contemporaneous with this hearing she was also subject to a Complaint in I.D. No. 14-05-346 (the “Greynolds” case), to be decided separately. Respondent modified her billing and practice methods in response to this Complaint. As noted, Respondent was also under duress at the time of this matter due to significant personal events outside of her control. *See* Hearing Transcript Pages 97 through 101, inclusive. Those events were likewise not the fault of the Complainants but they provide a reasonable explanation for some of Respondent’s communications lapses.

IV. SANCTION

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syllabus Pt. 3, *in part*, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), *cited in* Committee on Legal Ethics v. Morton, 186 W.VA. 43, 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.

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

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“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).

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for attorneys, and discipline must be imposed.

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.

A public reprimand was issued and supervised practice was ordered by the Supreme Court of Appeals for conduct involving lack of diligence and lack of communication along with failure to respond to disciplinary counsel in Lawyer Disciplinary Board v. Geraldine Roberts, 217 W.Va. 189, 617 S.E.2d 539 (2005). *See also*, 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).

Respondent failed to prove that she earned the Five Thousand Dollars (\$5,000.00) paid to her.

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)). Respondent failed to “effectively document” her work or to even keep “contemporaneous records” as required by her own representation agreement. ODC Ex. 16, bates stamp 90-92. Respondent stated in her representation agreement that she would not charge for fees unless they were supported by “contemporaneous time records.” *Id.* There are no contemporaneous time records for work in Mr. Brown’s case. While Respondent provided work in Mr. Brown’s case she also agreed to handle the matter through conclusion. Respondent failed to do so and, therefore, failed to earn the fee of Five Thousand Dollars (\$5,000.00).

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

- 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. 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 Ochoa¹³; and
- D. That, pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure, Respondent shall pay costs of this disciplinary proceeding.

¹³ This finding may have been different, for example, if Mr. Brown had timely been given the draft *habeas* but failed to approve it. In this case he appears to have never seen it, at least not from the hands of the Respondent. This situation is analogous to an architect completing plans but never turning them over to the owner, even after the architect was paid. Or, to use a different example, if an artist accepted payment but without justification never gave a finished painting to the buyer then a refund would be in order. While this Panel is willing to accept that Respondent did the work she alleges, she did not fulfill her contractual duties and must refund the fees at issue. This is especially true since this case involved Mr. Brown's liberty interests rather than drawings or a piece of art.

The Hearing Panel Subcommittee hereby recommends that the Supreme Court of Appeals of West Virginia adopt the recommendations as set forth above.



James R. Akers, II, Esquire, Chairperson
Hearing Panel Subcommittee
Date: 9-14-15



Henry W. Morrow, Esquire
Hearing Panel Subcommittee
Date: September 4, 2015



Jon Blair Hunter, Laymember
Hearing Panel Subcommittee
Date: 9/10/15