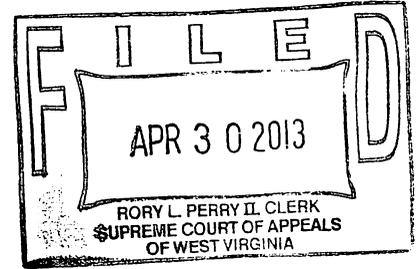


**BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**



OFFICE OF DISCIPLINARY COUNSEL,

Complainant,

v.

No. 12-0195

H. JOHN ROGERS,

Respondent.

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

A Petition Seeking Annulment of Respondent's Law License Pursuant to Rule 3.18 of the Rules of Lawyer Disciplinary Procedure was filed against Respondent H. John Rogers, Esquire, with the Clerk of the Supreme Court of Appeals on or about February 16, 2012. On or about March 13, 2012, Respondent filed a request for a mitigation hearing with the Chairperson of the Hearing Panel of the Lawyer Disciplinary Board pursuant to Rule 3.18(e) of the Rules of Lawyer Disciplinary Procedure. Disciplinary Counsel filed a Reply to Request for Mitigation Hearing on or about March 15, 2012. By Order entered on April 26, 2012, Respondent's request for a mitigation hearing was granted.

Disciplinary Counsel filed mandatory discovery on or about May 25, 2012. Respondent did not provide any mandatory discovery but did submit by letter dated June 18, 2012, a "List of Possible Witnesses and Exhibits Pursuant to Rule 3.4." Disciplinary Counsel then filed a Motion to Exclude Testimony of Improperly Identified and/or Unidentified Witnesses on July 30, 2012. The Hearing Panel Subcommittee held in abeyance its decision to rule on Disciplinary Counsel's motion but permitted Respondent to call "A. Castranova" as a witness by Order entered on August 16, 2012. The Hearing Panel Subcommittee also denied Respondent's motion that "the Office of Disciplinary Counsel has the burden of proof in this matter due to his "nolo plea" and his motion to dismiss to dismiss due to delay.

Thereafter, this matter proceeded to hearing in New Martinsville, West Virginia, on August 22, 2012. The Hearing Panel Subcommittee was comprised of Paul T. Camilletti, Esquire, Chairperson; Richard M. Yurko, Esquire, and Mr. Edward M. Mockler, Layperson. Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. Respondent appeared *pro se*. The Hearing Panel Subcommittee heard testimony from Jill Shade, Anthony Castranova, Timothy Haught, James Long, Sgt. Scott Adams, Luke Furbee, Jeff Shade, Jessie King and Respondent. In addition, the following exhibits were admitted: ODC Exhibits 1-12, HPS1 and R1.

On or about March 27, 2013, the Hearing Panel Subcommittee issued its decision in this matter and filed with the Supreme Court of Appeals of West Virginia the “Hearing Panel Subcommittee’s Findings of Fact, Conclusions of Law and Recommended Sanctions” (hereinafter “Findings”). The Hearing Panel Subcommittee properly found that Respondent did not provide evidence sufficient to mitigate the sanction of annulment of his license to practice law. Further, the Hearing Panel Subcommittee found that because Respondent knowingly and intentionally entered a plea of *nolo contendere* to the crimes of false swearing and of unlawfully, wilfully and maliciously making an application, or caused an application to be made to the Circuit Court of Wetzel County, and the Mental Hygiene Commissioner of said Court which sought and did result in the involuntary hospitalization of Mr. Shade and had been convicted of the same, Respondent violated Rule 8.4(b), Rule 8.4(c) and Rule 8.4(d) of the Rules of Professional Conduct.

The Hearing Panel Subcommittee issued the following recommendation as the appropriate sanction: (1) that Respondent's law license be annulled; (2) that prior to petitioning for reinstatement of his law license, Respondent shall undergo a comprehensive psychological examination by an independent licensed psychiatrist to determine if Respondent is fit to practice law; (3) that Respondent fully comply with any and all treatment protocol expressed by this licensed psychiatrist; (4) that prior to petitioning for reinstatement, Respondent pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure; and (5) that, upon reinstatement, Respondent's practice be supervised for a period of one (1) year.

Respondent filed an objection to the recommendation of the Hearing Panel Subcommittee Recommendation on or about April 9, 2013. On or about April 9, 2013, the Office of Disciplinary Counsel filed its no objection letter. By Order entered April 10, 2013, this Honorable Court, on its own motion, expedited the consideration of this matter, and ordered the parties to submit briefs pursuant to Rule 3.13 of the Rules of Lawyer Disciplinary Procedure, and set this case for oral argument pursuant to Rule 19 of the Revised Rules of Appellate Procedure.

B. FINDINGS OF FACT

Respondent is a member of the West Virginia State Bar who practices in New Martinsville, West Virginia, and, as such, is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. Respondent was admitted to The West Virginia State Bar on September 1, 1966.

On or about January 25, 2010, the Grand Jury of the Circuit Court of Wetzel County, West Virginia, issued a Two Count Indictment against Respondent charging him with one count of “false swearing” in violation of W.Va. Code §§ 61-5-2 and 61-5-3 and one count of “malicious application to declare a person mentally ill or inebriate” in violation of W.Va. Code § 27-12-1. [Exhibit 3, Section A, Bates Nos. 123-124]. Specifically, Count One of the Indictment charged that on or about July 28, 2009, Respondent “unlawfully, wilfully and maliciously made application, or did cause an application to be made to the Circuit Court of Wetzel County, and the Mental Hygiene Commissioner of said Court, seeking the involuntary hospitalization of one Jeffrey Shade, and to thereby declare said Jeffrey Shade to be mentally ill, or an inebriate, in violation of Chapter 27, Article 12, Section 1 of the West Virginia Code of 1931, as amended, against the peace and dignity of the State.” [Id.] Count Two of the Indictment charged that on or about July 27, 2009, Respondent “did unlawfully, knowingly and intentionally, but not feloniously, swear falsely, under oath or affirmation lawfully administered, concerning a matter or thing in a petition and application for involuntary custody for mental health examination of one Jeffrey Shade, taken, sworn and subscribed before Debbie J. Rogers, Notary Public, State of West Virginia: to-wit: that the said [Respondent] did swear falsely in paragraph 12 therein as follows:

‘He physically assaulted me twice, at 9:30 a.m. and 5:00 p.m. on July 27 with no provocation.’

In violation of Chapter 61, Article 5, Sections 2 and 3 of the West Virginia Code of 1931, as amended, against the peace and dignity of the State.” [Id.]

As a result of the Application for Involuntary Custody for Mental Health Examination filed by Respondent, Mr. Shade was detained by the Wetzel County Sheriff's Department in the early hours of July 29, 2009, and taken to the Hillcrest Behavioral Health Center at Ohio Valley Medical Center (OVMC) in Wheeling, West Virginia. Hillcrest is a secure in-patient facility which offers behavioral health services for people needing psychiatric, behavioral or chemical dependency care. While being held at Hillcrest for what remained of the early morning hours of July 29, 2009, Mr. Shade was examined by medical staff and subjected to medical tests, including a drug screen. After the results were examined and considered by the medical staff, Mr. Shade was dismissed from the probable cause hearing and released from Hillcrest in the afternoon of July 29, 2009. [Exhibit 3, Section B at Bates Nos. 182-185, 188; Exhibit 3, Section B at Bates Nos. 253-331; *See also* Hrg. Trans. pp. 208-214].

Two witnesses to the incidents on July 27, 2009, stated that Mr. Shade did not assault Respondent. [Exhibit 3, Section B at Bates Nos. 155-159]. The evidence also indicated that in the earlier incident, after exchanging words with Mr. Shade, Respondent approached Mr. Shade and poked him in the chest. [Hrg. Trans. at p. 27]. The evidence also indicated that no physical touching occurred during the second incident when Respondent returned to Mr. Shade's business later that same day. [Hrg. Trans. at p. 206]. Witnesses stated that when Respondent returned to Mr. Shade's business in the afternoon, Respondent also pointed to Mr. Shade and called him "pure evil." [Hrg. Trans. at p. 206].

On or about November 30, 2011, Respondent pled *nolo contendere* to both counts of the Indictment in Wetzel County Magistrate Court in Case Nos. 10- M - 70 (false swearing)

and 10 - M - 103 (Malicious Application to Declare a Person Mentally Ill or Inebriate). [Exhibit 3, Section B at Bates Nos. 514-515; Exhibit 3, Section C at Bates Nos. 968-969].¹ By way of background, the Circuit Court of Wetzel County had granted Respondent's Motion to Remand the matter to Wetzel County Magistrate Court by Order entered February 10, 2010. [Exhibit 3, Section A at Bates Nos. 118-119].

By Order entered January 23, 2012, in regard to Case No. 10M-70 (False Swearing), Respondent was sentenced to serve ninety (90) days in the custody of the authorities of the Northern Regional Jail. However, this jail sentence was suspended. Respondent was ordered to pay a fine of One Hundred Fifty Dollars (\$150.00) and costs in the amount of Two Hundred Eighty Dollars (\$280.00). In regard to Case No. 10M-103 (Malicious Application to Declare a Person Mentally Ill or Inebriate), Respondent was also sentenced to ninety (90) days with eighty (80) days suspended. Respondent was also ordered to pay a fine of One Hundred Fifty Dollars (\$150.00) and costs in the amount of Two Hundred Eighty Dollars (\$280.00). Finally, Respondent was placed on Twenty-Four (24) months of unsupervised probation beginning on January 23, 2012. [Exhibit 3, Section B at Bates Nos. 521-523; Exhibit 3, Section C at Bates Nos. 1042-1044].

¹Exhibit 3 consists of three certified court records as follows: Section A - Circuit Court records [Bates Nos. 17-126]; Section B - Magistrate Court records for 10M-103 (Malicious Application to Declare a Person Mentally Ill or Inebriate) [Bates Nos. 126-528]; and Magistrate Court records for 10M-70 (false swearing) [Bates Nos. 529-1049]. The magistrate court records for the two counts are identical and for ease of reference, cites to a magistrate court record within this document, unless otherwise indicated, have only been made to Exhibit 3, Section B which is the magistrate record for 10M-103 for Malicious Application to Declare a Person Mentally Ill or Inebriate.

Respondent was ordered to self-report to the authorities of the Northern Regional Jail on Monday, January 30, 2012, at 9:00 a.m. to serve his jail sentence. [Id.] On or about, January 25, 2012, Respondent filed a “Petition for a Stay of Execution Pending Appeal of Sentence” with the Circuit Court of Wetzel County. By Order entered January 27, 2012, the Circuit Court of Wetzel County entered an Order granting Respondent’s “Petition for a Stay of Execution Pending Appeal of Sentence.” The Court stated that Respondent was not required to report to the Northern Regional Jail on Monday, January 30, 2012.²

On or about January 25, 2012, the Office of Disciplinary Counsel had filed a “Petition Seeking Immediate Suspension of a Lawyer and Appointment of Trustee Pursuant to Rules 3.27 and 3.29 of the Rules of Lawyer Disciplinary Procedure” due to what appeared to be Respondent’s imminent incarceration. Upon learning that Respondent had filed an appeal of the conviction with the Circuit Court of Wetzel County, the Office of Disciplinary Counsel filed a “Motion to Withdraw the Petition Seeking Immediate Suspension of a Lawyer and Appointment of Trustee Pursuant to Rules 3.27 and 3.29 of the Rules of Lawyer Disciplinary Procedure” on or about January 30, 2012. By Order entered February 9, 2012, the Supreme Court of Appeals of West Virginia Court granted the “Motion to Withdraw the Petition Seeking Immediate Suspension of a Lawyer and Appointment of Trustee Pursuant to Rules 3.27 and 3.29 of the Rules of Lawyer Disciplinary Procedure” and the matter [No. 12-0101] was withdrawn from this Honorable Court’s docket.

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Respondent also filed an appeal of his criminal conviction to the Supreme Court of Appeals of West Virginia, but failed to timely perfect the same. By Order entered February 6, 2013, this Honorable Court found that “no good cause has been shown for the Court to extend the time period for perfecting the appeal.” This Honorable Court dismissed Respondent’s appeal of his criminal convictions.

C. CONCLUSIONS OF LAW

Rule 3.18(c) of the Rules of Lawyer Disciplinary Procedure provides that “[a] plea or verdict of guilty or a conviction after a plea of *nolo contendere* shall be deemed to be a conviction within the meaning of this rule.” Rule 3.18(d) of the Rules of Lawyer Disciplinary Procedure provides that “[a] lawyer shall be deemed to have been convicted within the meaning of this rule upon the entry of the order or judgment of conviction and such lawyer’s license may be suspended or annulled thereupon notwithstanding the pendency of an appeal from such conviction.” “Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics’ burden of proving an ethical violation arising from such conviction.” Syl. Pt. 2, Committee on Legal Ethics v. Six, 181 W.Va. 52, 380 S.E.2d 219 (1989). Respondent’s convictions for False Swearing and Filing a Malicious Application to Declare a Person Mentally Ill or Inebriate are final. Respondent’s untimely filed appeal of these criminal convictions was dismissed by Order entered February 6, 2013.

Because he knowingly and intentionally entered a plea of *nolo contendere* to the crimes of false swearing and of unlawfully, wilfully and maliciously making an application,

or caused an application to be made to the Circuit Court of Wetzel County, and the Mental Hygiene Commissioner of said Court which sought and did result in the involuntary hospitalization of Mr. Shade and has been convicted of the same, Respondent has violated Rule 8.4(b), Rule 8.4(c) and Rule 8.4(d) of the Rules of Professional Conduct which state in pertinent part:

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

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

II. SUMMARY OF ARGUMENT

Respondent intentionally and knowingly entered a plea of *nolo contendere* to the misdemeanor crimes of false swearing and filing a malicious application to declare a person mentally ill or inebriate and these convictions reflect adversely on his honesty, trustworthiness, and fitness as a lawyer in all respects and his misconduct is in direct violation of the Rules of Professional Conduct. 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). As a duly

licensed attorney and an officer of the Court, Respondent has an affirmative duty to comport his actions to that of the laws of this State and has therefore, based upon his outrageous conduct in this matter, violated his duties to the public, the legal system and the profession.

Under the provisions of Rule 3.18 of the Rules of Lawyer Disciplinary Procedure, Respondent has been deemed convicted of the misdemeanor crimes of false swearing and filing a malicious application to declare a person mentally ill or inebriate. In order to effectuate the goals of the disciplinary process, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board recommended that Respondent's license to practice law be annulled; that prior to petitioning for reinstatement of his law license, Respondent shall undergo a comprehensive psychological examination by an independent licensed psychiatrist to determine if Respondent is fit to practice law; that Respondent fully comply with any and all treatment protocol expressed by this licensed psychiatrist; that prior to petitioning for reinstatement, Respondent pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure; and that, upon reinstatement, Respondent's practice be supervised for a period of one (1) year.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 19 of the Revised Rules of Appellate Procedure, this Honorable Court's April 10, 2013 Order set this matter for oral argument for June 4, 2013.

IV. ARGUMENT

A. STANDARD OF PROOF

“Where there has been a final criminal conviction, proof on the record of such conviction satisfies the [Office of Disciplinary Counsel’s] burden of proving an ethical violation arising from such conviction.” Syl. Pt. 2, Committee on Legal Ethics v. Six, 181 W.Va. 52, 380 S.E.2d 219 (1989). Rule 3.18(c) of the Rules of Lawyer Disciplinary Procedure provides that “[a] plea or verdict of guilty or a conviction after a plea of *nolo contendere* shall be deemed to be a conviction within the meaning of this rule.” Clearly, ODC has met its burden of proof establishing an ethical violation as Respondent knowingly and intelligently entered pleas of *nolo contendere* to the misdemeanor offenses of false swearing and filing a malicious application to declare a person mentally ill or inebriate and these convictions stand as final due to the dismissal of Respondent’s appeal of his criminal convictions as untimely filed.

Where disbarment of an attorney’s law license is sought based upon a conviction, due process requires the attorney be given a right to request an evidentiary hearing to produce mitigating factors. The purpose of such a hearing is not to collaterally attack the conviction, but to introduce mitigating factors which may have bearing on the punishment to be imposed. *See Committee on Legal Ethics v. Boettner*, 186 W.Va. 136, 394 S.E.2d 735, 1990 W.Va. LEXIS 86 (1990) cert. denied., 506 U.S. 872, 506 U.S. 873, 113 S.Ct. 209, 121 L.Ed. 2d 149, 1992 U.S. LEXIS 5417 (1992). Rule 3.18(g) of the Rules of Lawyer Disciplinary Procedure

further indicates that the “Office of Disciplinary Counsel may introduce evidence of aggravating factors at any mitigation hearing.”

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

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

On the morning of July 27, 2009, Respondent burst into Jeffrey Shade's coffee shop, Barristas Café, and started to yell, cuss, and gesture at Mr. Shade and other customers. Mr. Shade testified that when Respondent came into his coffee shop, he yelled "I showed those motherfuckers down at the courthouse this morning . . ." and then Respondent pointed at Mr. Shade and said "[a]nd you're next on my list." [Hrg. Trans. at pp. 204-206]. At that point, Mr. Shade asked Respondent to leave. While Respondent left the café, Mr. Shade testified that he had, in the past, talked to Respondent about his behavior in the café and that he had previously asked Respondent "to please not harass our customers and – because there had been a short history of him saying things to our customers and using profanity, which isn't good for business." [Hrg. Trans. at p. 204.]

Mr. Shade testified that Respondent then came back to his café later that same day and again started yelling and gesturing at people and saying things like “hear no evil,” “see no evil,” and “pure evil.” [Hrg. Trans. at p. 206]. Mr. Shade said he told Respondent that “[he had] crossed the line. There’s no more of this. I want you out of here. I don’t want you to ever come back again.” [Hrg. Trans. at p. 206.]³ Mr. Shade testified that no physical altercation took place at his café that day. [Hrg. Trans. at p. 206]. However, another witness, Jill Shade, testified that earlier in the day when Respondent said “[a]nd you’re next” while pointing at Mr. Shade, Respondent came forward and “poked” Mr. Shade in the shoulder. [Hrg. Trans. at p. 27].

The following day, July 28, 2009, Respondent filed a notarized Application for Involuntary Custody for Mental Health Examination against Mr. Shade alleging that Mr. Shade was suicidal, that he was currently on psychedelic drugs, and that “[Mr. Shade] physically assaulted [Respondent] twice, @ 9:30 a.m. and 5:00 p.m. on July 27th with no provocation.” [Exhibit 3, Section B, at Bates Nos. 182-185, 188].⁴ As a result of the Application for Involuntary Custody for Mental Health Examination Respondent had filed against Mr. Shade, Mr. Shade was detained by the Wetzel County Sheriff’s Department in the early hours of July 29, 2009, and taken to the Hillcrest Behavioral Health Center at Ohio

³Mr. Shade also contacted the New Martinsville Police Department on July 27, 2009, and reported that Respondent had threatened him. [Exhibit 3, Section B, at Bates No. 239].

⁴Respondent testified at the August 22, 2012 hearing in this matter that “I was manhandled . . . Jeff nailed me again with this bear hug from behind and wrestled me around and he shoved me out the front door.” [Hrg. Trans. at pp. 94-95].

Valley Medical Center (OVMC) in Wheeling, West Virginia, where he was stripped, examined and admitted. [Hrg. Trans. at pp. 208-210]. Mr. Shade also testified that when he was detained by the sheriff's deputies, he was with his son who had just performed in a play at the Lincoln Theater, a local theater in New Martinsville. [Hrg. Trans. at p. 208]. Mr. Shade said that he had to ask the sheriff's deputy permission to call his son's mother or grandmother "to come get my son before you wheel me off." [Id.] Hillcrest is a secure inpatient facility which offers behavioral health services for people needing psychiatric, behavioral or chemical dependency care. Mr. Shade testified that while he was there, he was, in fact, guarded by hospital security guards. [Hrg. Trans. at p. 210]. While at Hillcrest for what remained of the early morning hours of July 29, 2009, Mr. Shade was examined again by medical staff and subjected to medical tests, including drug screens. [Hrg. Trans. at p. 212]. Mr. Shade's drug screen was negative for all drugs tested. Exhibit 3, Section B at Bates No. 288]. After the results were examined and considered by Hillcrest medical staff, it was determined that Mr. Shade was not suffering from conditions necessitating commitment alleged in the false application filed by Respondent, Mr. Shade was dismissed from the probable cause hearing and released from Hillcrest in the afternoon of July 29, 2009. [Exhibit 3, Section B at Bates No. 274, and Bates Nos. 253-331].

As a duly licensed attorney and an officer of the Court, Respondent has an affirmative duty to comport his actions to that of the laws of this State and due to his actions in this matter, has therefore violated his duties to the public, the legal system and the profession. Respondent's actions in this matter do not in any way comport with the behavior expected

by the public of an attorney licensed by the State of West Virginia and clearly have a dramatic impact on the public's confidence in the integrity of the members of the West Virginia State Bar. Respondent pled *nolo contendere* to, and was convicted of the misdemeanor crimes of false swearing and filing a malicious application to declare a person mentally ill or inebriate. The clear and convincing evidence in this matter proves that Respondent violated his duties owed to the public and Respondent's actions clearly wasted the State's judicial resources in violation of the duties he owes to the legal system as a member of the Bar.

2. Respondent acted intentionally and knowingly.

The clear and convincing evidence establishes that Respondent acted intentionally and knowingly when he filed the Application for Involuntary Custody for Mental Health Examination containing false information with the Circuit Court of Wetzel County, West Virginia against Mr. Shade and when he entered his no contest pleas to the criminal charges of false swearing and filing a malicious application to declare a person mentally ill or inebriate. [*See generally*, Hrg. Trans. at pp. 99-100]. Moreover, on or about July 29, 2009, Respondent also filed a notarized complaint against Mr. Shade with the West Virginia Massage Therapy Licensing Board containing the same false information he included in the Application for Involuntary Custody for Mental Health Examination. [Exhibit 3, Section B, Bates Nos. 221-228].

3. The amount of actual or potential injury caused by the lawyer's misconduct.

First and foremost, Respondent's actions in filing the false Application for Involuntary Custody for Mental Health Examination deprived Mr. Shade of his personal freedom. Respondent's reprehensible actions in pursuing a personal feud against Mr. Shade in the magistrate court of Wetzel County wasted the time and the valuable resources of both the medical and judicial systems of Wetzel County and the State of West Virginia.⁵

4. Aggravating factors.

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

The Hearing Panel Subcommittee found that the following aggravating factors exist in this proceeding: (1) dishonest or selfish motive; (2) refusal to acknowledge the wrongful nature of conduct; (3) substantial experience in the practice of law; and (4) illegal conduct.

⁵Respondent did move to dismiss the false complaint he filed with the West Virginia Massage Therapy Licensing Board but not before a state investigator traveled to New Martinsville to interview both Mr. Shade and Respondent. [Hrg. Trans. at p. 216].

In this proceeding, Respondent continued to assert that the false statements he made in the notarized Application for Involuntary Custody for Mental Health Examination about Mr. Shade assaulting him and Mr. Shade's current drug use were a true and accurate portrayal of the events that took place on July 27, 2009, at Barristas Café. However, both Mr. Shade and Jill Shade testified that either there was no physical altercation or that Respondent was the person who initiated any physical contact. [Hrg. Trans. at pp. 27, 206]. Despite these witness statements, Respondent again testified at the August 22, 2012 hearing that "[he] was the victim in this case and Jeff is a charismatic figure who has a devoted band of followers, none of whom would cross him as I did." [Hrg. Trans. at p. 98]. Respondent also testified at the hearing that "[he] was manhandled . . . Jeff nailed me again with this bear hug from behind and wrestled me around and he shoved me out the front door." [Hrg. Trans. at pp. 94-95]. Respondent's statements are clearly not expressions of remorse for his misconduct.

In addition, Respondent's continued assertions that his *nolo contendere* plea was an "un-counseled plea" and that the same should excuse his behavior and not be held against him is disingenuous. Respondent has been a licensed attorney for nearly fifty (50) years and he testified at the mitigation hearing that he entered into the *nolo contendere* plea as a means to end the criminal proceedings against him so that he could fight the "big fight" against the Office of Disciplinary Counsel. [Hrg. Trans. at pp. 99-100]. Respondent also entered his pleas despite his belief that "[he] was quite confident of [his] ability to obtain acquittal." [Id.] Respondent also continued to express "surprise" that his *nolo contendere* pleas and

convictions thereto would subject him to a jail sentence. [Id.] Finally, Respondent's appeal of his criminal convictions were dismissed for being untimely filed.

Mitigating 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 mitigating factors in a lawyer disciplinary proceeding 'are any considerations, or factors that may justify a decrease in the degree of discipline to be imposed.'" Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E. 2d 550 (2003) *quoting* ABA Model Standards for Imposing Lawyer Sanctions, 9.21 (1992). Respondent would suggest the following mitigating factors in this case: (1) absence of a dishonest or selfish motive; (2) full and free disclosure to the Disciplinary Board or cooperative attitude toward proceedings; (3) character and reputation; (4) imposition of other penalties and sanctions; and (5) remorse. [Transcript at 8-9]. However, the Office of Disciplinary Counsel contends and the Hearing Panel Subcommittee found that the evidence demonstrates that there is no remorse exhibited by Respondent, and in fact, Respondent's lack of remorse and his continued insistence that he was the "victim" in this matter is an aggravating factor.

Respondent offered his mitigation evidence by way of the introduction of Hearing Panel Subcommittee (HPS) Exhibit 1 into evidence, a document which Respondent read into the record at the hearing. [Trans. at pp. 88-103]. Specifically, Respondent stated that Mr. Shade's father asked Respondent to "keep an eye out for [Mr. Shade]" [Hrg. Trans. at p. 89]. Respondent also suggested that his purpose in filing the application for involuntary

commitment against Mr. Shade was to assist Mr. Shade in his recovery from drug addiction. [Hrg. Trans. at pp. 92-97]. Respondent testified that “[s]ince I know that [Mr. Shade] was a serious drug user, generally, I thought that a wake-up call would be beneficial in dealing with an addict’s general denial I knew that the scenario would be that he gets up to Hillcrest and lies about it, so — which teaches [Mr. Shade] something.” [Hrg. Trans. at p. 97]. Respondent also testified that “[my] heart is pure, and that’s my defense here.” [Hrg. Trans. at pp. 98-99]. Respondent also testified that “Number Two, this is my defense: I acted throughout like a reasonable person, knowledgeable in the ways of drug addition and alcoholism based on the facts at hand, I made the charge, which is the subject of this proceeding. . . .” [Hrg. Trans. at p. 99].

Respondent’s statements are not supported by the evidence. Not only did Respondent not tell the truth about the events at the café, Respondent also distorted the truth regarding Mr. Shade’s alleged drug use and state of mind in his notarized application. Respondent stated in his false Application for Involuntary Custody for Mental Examination that “over the years [he] had observed Shade ingest drugs, use large quantities of alcohol.” Respondent also described Mr. Shade’s bad “drug trip” which Respondent allegedly witnessed on or about June 22, 2009, and that Mr. Shade told him that he was “suicidal since before his girlfriend left” [Exhibit 3, Section B, Bates No. 182]. However, Mr. Shade testified at the August 22, 2012 hearing that he had neither expressed any suicidal thoughts to anyone nor was addicted to drugs at the time. [Hrg. Trans. at pp. 211-212]. Mr. Shade also said that he was, likewise, not violent at the time as alleged by Respondent in his false Application for

Involuntary Custody for Mental Examination. [Id.]. Moreover, the drug screen administered to Mr. Shade while he was detained at Hillcrest was negative for all drugs tested. [Exhibit 3, Section B, Sealed Bates No. 288]. The Hearing Panel Subcommittee properly determined that the aggravating factors in this matter outweigh any mitigating factors presented by Respondent.

C. SANCTION

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

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).

Absent any aggravating or mitigating circumstances, the *ABA Model Standards for Imposing Lawyer Sanctions* provide that violations of duties owed to the public (5.1 Failure to Maintain Personal Integrity) and the legal system (6.1 False Statements, Fraud, and Misrepresentation):

Standard 5.11. Disbarment is generally appropriate when . . . (a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, . . . ; or (b) the lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Standard 6.11. Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

The evidence presented meets and exceeds the clear and convincing standard to find that the most severe discipline that can be imposed against a lawyer's license to practice law should be imposed against Respondent. Respondent has violated the Rules of Professional Conduct and the aggravating factors far outweigh any effect of mitigating factors. Respondent's violations in this case constitute a flagrant abuse of judicial resources and his criminal convictions for false swearing and filing a malicious application to declare a person mentally ill or inebriate touch the very essence of the public's perception of the integrity of legal profession. In an apparent personal scheme to harass Mr. Shade after Mr. Shade asked Respondent to leave his business, Respondent lied, deceived, and filed notarized documents containing false statements in the court system of the State of West Virginia. Moreover, Respondent's misconduct caused Mr. Shade to be deprived of his personal freedom and constituted a waste of the judicial and medical resources.

It cannot be stressed enough that Respondent's false statements in the notarized court documents resulted in the involuntary commitment of a citizen of this State. Due to Respondent's misconduct, Jeffrey Shade was detained by Sheriff's deputies in front of his child, taken to the Ohio Valley Medical Center and Hillcrest, stripped, forcibly confined, and then subjected to medical and psychiatric examinations, all based upon Respondent's false accusations. Respondent's violations of the Rules of Professional Conduct seriously undermine his trustworthiness and fitness to practice law in the State of West Virginia. Respondent used his understanding and knowledge of the law and our legal system to carry out a personal vendetta that resulted in the a citizen of this State being involuntarily

committed. Respondent's statements in his defense are not credible and he has submitted no evidence to suggest that he should not receive discipline other than the ultimate sanction afforded by the Supreme Court of Appeals of West Virginia in lawyer disciplinary matters: annulment of his law license.

“Disbarment of an attorney to practice law is not used solely to punish the attorney but is for the protection of the public and the profession.” Syl. pt. 2, In re Daniel, 153 W.Va. 839, 173 S.E.2d 153 (1970); and Syl. pt. 6, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998). In Smoot, this Court recently stated that the “[p]ublic expects lawyers to exhibit the highest standards [of] integrity and honesty. Lawyers have a duty not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice. Lawyers are officers of the court and must operate within the bounds of the law and act in a manner to maintain the integrity of the Bar. Lawyer Disciplinary Board v. Smoot, 228 W.Va. 1, 716 S.E.2d at 505, *quoting* Lawyer Disciplinary Bd. v. Stanton, 225 W.Va. 671, 678, 695 S.E.2d 901, 908 (2010). Therefore, sanctions are not imposed only to punish the attorney, but also are designed to reassure the public's confidence in the integrity of the legal profession and to deter other lawyers from similar conduct. Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993); Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000).

While there is case law in West Virginia that suggests that a multi year suspension is more appropriate for two misdemeanor convictions, the facts of this case are egregious. In Committee on Legal Ethics v. Roark, Respondent, who at the time of the offense was a public official making his misconduct more egregious, was suspended for a period of three (3) years based upon his plea of guilty to six (6) counts of the federal misdemeanor offense of possession of cocaine. Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989). In Committee on Legal Ethics v. White, Respondent, who at the times was a prosecutor and therefore subject to a higher ethical standard, was suspended for a period of two (2) years based upon his plea to three (3) federal misdemeanor charges for possession of cocaine, marijuana and percocet. Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993). In Office of Disciplinary Counsel v. Galford, Respondent was suspended for a period of one (1) year based upon his plea of *nolo contendere* to a charge of conspiracy to commit a misdemeanor based on suggested forgery of a client's will. Office of Disciplinary Counsel v. Galford, 202 W.Va. 587, 505 S.E. 2d 650 (1998).

However, the egregious facts in this case meet and exceed the ABA standard for annulment and this Court has ordered disbarment in cases involving conviction of a crimes that reflect adversely on a lawyer's honesty, trustworthiness, or fitness to practice law such as bribery of a juror, election fraud, conversion of funds, and obtaining money under false pretenses. *See* Committee on Legal Ethics v. Hobbs, 190 W.Va. 606, 439 S.E.2d 629 (1993); *citing* In re Barron, 155 W.Va. 98, 181 S.E.2d 273 (1971); In re Brown, 166 W.Va. 226, 273 S.E.2d 567 (1980); In re Smith, 158 W.Va. 13, 206 S.E.2d 920 (1974); Committee on Legal

Ethics v. Gorrell, 185 W.Va. 419, 407 S.E.2d 923 (1991); Committee on Legal Ethics v. Folio, 184 W.Va. 503, 401 S.E.2d 248 (1990); Committee on Legal Ethics v. Lambert, 189 W.Va. 84, 428 S.E.2d 65 (1993); Committee on Legal Ethics v. Wilson, 185 W.Va 598, 408 S.E.2d 350 (1991). *See also*, Lawyer Disciplinary Board v. Albers, 219 W.Va. 704, 639 S.E.2d 769 (2006), wherein this Court has also considered an indefinite suspension of nearly three years as having been appropriate for an attorney, with no prior disciplinary record, for conduct leading to convictions for misdemeanor trespass of property.

The attorney's outrageous personal behavior in this matter is more akin to the attorneys' misconduct in Lawyer Disciplinary Board v. Blevins, 222 W.Va. 653, 671 S.E.2d 658 (2008) and Lawyer Disciplinary Board v. Stanton, 225 W.Va. 671, 695 S.E.2d 901 (2010). In both of these cases, the attorneys' licenses were annulled. In Blevins, the attorney stated that he was "role playing" when he solicited a two time felon to obtain a "throw away" gun and provided information about his clients whereabouts to his criminal associates in an a scheme to collect fees allegedly due him. The attorney asserted that his misconduct did not harm anyone because he ultimately called off the scheme. However, the Court disagreed and found that a "no harm no foul" rule does not exist in the Rules of Professional Conduct and that Blevins' "fanciful role-playing" explanation "begs belief" and that the conduct of the attorney was "profoundly disturbing." Blevins, 222 W.Va. at 660-661, 671 S.E.2d at 665-666. Respondent's conduct in this matter also "begs belief" and is "profoundly disturbing." Moreover, Respondent's misconduct did result in harm. The target of Respondent's false

application, Mr. Shade, was deprived of his personal freedom and subjected to medical and psychological tests.

In Stanton, the attorney made “deliberate misrepresentations . . . to correctional officers of a secure prison facility in order to gain access to an incarcerated person in the State’s custody, the subsequent abuse of trust occasioned by the attorney’s taking advantage of the inmate and whether the conduct is a violation of the Rules of Professional Conduct.” Stanton, 225 W.Va. at 677, 695 S.E.2d at 907. This Court found that the attorney’s conduct was a serious violation of the Rules of Professional Conduct and disbarred the attorney. In particular, the Court noted that “[j]ail or prison officials should not have to over-analyze the motivations of an attorney who seeks to meet with an incarcerated individual whom he states or implies is his client. Mutual trust and understanding is required so that the mandates of representation may be achieved.” Id., 225 W.Va. at 678, 695 S.E.2d at 908. Like the prison officials in Stanton, the individuals who all played a part in Respondent’s personal vendetta, including Mr. Shade, sheriffs’ deputies, medical personnel, and judicial officials, should not have look behind Respondent’s motivation when he uses his status as an licensed attorney to conduct his personal business. Respondent’s continued assertions that he was the victim in this episode or that he only trying to help Mr. Shade are just not plausible given the totality of circumstances. The same proclamations that the Court said about Mr. Stanton’s deceit can, likewise be said about Respondent’s misconduct:

Mr. Stanton’s conduct as an attorney in misrepresenting himself as counsel for Ms. Auvil in order to gain access to her for improper reasons was more than deceit. His conduct fell so far

below what should reasonably be expected of attorneys as to be shocking to this Court. His actions fueled a wave of questions by the public, the incarcerated, jail authorities and fellow members of the legal profession. This Court is faced with having to reassure all affected parties that the likelihood of this conduct, and similar conduct by other members of the bar, is going to be met with harsh consequences. Furthermore, this Court must insist in protecting the vulnerable, especially those in State custody, from the lustful advances of attorneys as well as maintaining the good relationship between the criminal bar and the state's jail and prison authorities. . . . Accepting any sanction other than disbarment does not send a clear and resounding message to the bar, the public and other interested parties, . . . who must work with attorneys on a daily basis.

Stanton, 225 W.Va. at 679-680, 695 S.E.2d at 909-910.

In Albers, this Court noted that “[t]he Panel found, and we agree, that Respondent violated Rule 8.4 of the West Virginia Rules of Professional Conduct inasmuch as she ‘engage[d] in conduct that is prejudicial to the administration of justice’ when she engaged in behavior in her personal life which ultimately led to her incarceration” Albers, 219 W.Va. at 708, 639 S.E.2d at 800. In this instant case, Respondent clearly failed to maintain his personal integrity in his dealings with Mr. Shade. Furthermore, his filing of a false and malicious application to declare Mr. Shade mentally ill or inebriate had serious consequences with Mr. Shade’s personal liberty and had the potential to seriously injure Mr. Shade’s livelihood. Moreover, Respondent’s no contest pleas to the criminal acts of false swearing and filing a malicious application to declare a person mentally ill or inebriate constitute a conviction that reflects adversely on his honesty, trustworthiness and fitness to practice law.

As the Court has noted:

Woven throughout our disciplinary cases involving attorneys is the thought that they occupy a special position because they are actively involved in administering the legal system whose ultimate goal is the evenhanded administration of justice. Integrity and honor are critical components of a lawyer's character as are a sense of duty and fairness. Because the legal system embraces the whole of society, the public has a vital expectation that it will be properly administered. From this expectancy arises the concept of preserving public confidences in the administration of justice by disciplining those lawyers who fail to conform to professional standards.

In re Brown, 166 W.Va. 226, 232, 273 S.E.2d 567, 570 (1980) (footnote omitted).

Other jurisdictions have likewise looked upon similar misconduct with disfavor and disbarred the attorneys who engaged in it. The Supreme Court of New Mexico, facing a matter in which an attorney had been pled guilty to and been convicted of the crimes of tampering with evidence (a felony) and in making a false report (a misdemeanor), disbarred the attorney. In the Matter of McCullough, 103 N.M. 542, 710 P.2d 736 (1985). The Court noted that the attorney's actions in planting evidence in another attorney's vehicle and then filing a false report with law enforcement officials that the other attorney was dealing narcotics, were "an effort to either discredit his competitor in the eyes of this woman or, alternatively, to deprive his competitor of the freedom needed to pursue his intentions,...." McCullough, 103 N.M. at 543, 701 P.2d at 737. The New Mexico Supreme Court found that "disbarment is the appropriate sanction under the circumstances. An attorney is sworn to uphold the law. When he acts to subvert the very system he had pledged to serve, it is obvious that he should no longer be allowed to practice law. This would be true even absent a criminal conviction." *See also*, In re Caranchini, 956 S.W.2d 910 (Mo. 1997) (attorney

disbarred after being sanctioned federal district court for multiple offenses of making false statements in court pleadings having no basis in fact).

V. CONCLUSION

For the public to have confidence in our disciplinary and legal systems, lawyers who engage in the type of misconduct exhibited by Respondent must be removed from the practice of law for some period of time. A license to practice law is a revokable privilege and when such privilege is abused as it clearly was in this case, the privilege should be revoked. Such sanction is also necessary to deter other lawyers from engaging in similar conduct and to restore the faith of the victim in this case and of the public, in general, as to the integrity of the legal profession. This type of misconduct has a dramatic impact on the public's confidence in the integrity of the Bar and annulment is the appropriate sanction.

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:

1. That Respondent's law license be annulled;
2. That prior to petitioning for reinstatement of his law license, Respondent shall undergo a comprehensive psychological examination by an independent licensed psychiatrist to determine if Respondent is fit to practice law;
3. That Respondent fully comply with any and all treatment protocol expressed by this licensed psychiatrist;

4. That prior to petitioning for reinstatement, Respondent pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure; and
5. That, upon reinstatement, Respondent's practice be supervised for a period of one (1) year.

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

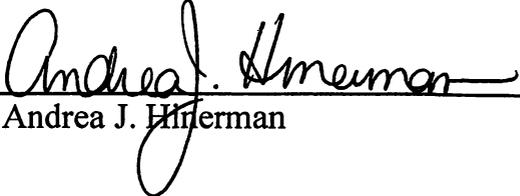
Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel


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CERTIFICATE OF SERVICE

This is to certify that I, Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 30th day of April, 2013, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" upon Respondent H. John Rogers by mailing the same via United States Mail with sufficient postage, to the following address:

H. John Rogers, Esquire
317 Foundry Street, Suite 101
New Martinsville, West Virginia 26155



Andrea J. Hinerman