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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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

LAWYER DISCIPLINARY BOARD,

Complainant,

v. **Nos. 13-0508 & 13-1148**

RONALD S. ROSSI,

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

These are disciplinary proceedings against Respondent Ronald S. Rossi, (hereinafter "Respondent"), arising as the result of two separate Statement of Charges issued against him. The first Statement of Charges, case No. 13-0508, was filed with the Supreme Court of Appeals of West Virginia on or about May 20, 2013, and Respondent was served with the Statement of Charges on May 23, 2014. The second Statement of Charges, case No. 13-1148, was filed on November 14, 2013, and Respondent was served with the same on November 19, 2013.

Respondent filed his Answer to the Statement of Charges in case No. 13-0508 on or about June 24, 2013, but subsequently failed to provide his mandatory discovery, which was due on or before July 12, 2013. A hearing in case No. 13-0508 was scheduled for August 27, 2013. However, due to scheduling issues, the matter was rescheduled for October 15, 2013. Respondent waived the 120 day deadline by which to hold the hearing in case No. 13-0508. Because Respondent still had not provided any discovery, Disciplinary Counsel filed a Motion to Exclude Testimony of Witnesses And/or Documentary Evidence or Testimony of Mitigating Factors in case No. 13-0508 on September 16, 2013. On September 16, 2013, Disciplinary Counsel also filed a "Motion to Take Witness Testimony by Telephone" in case No. 13-0508.

A telephonic pre-hearing was held in case No. 13-0508 on October 1, 2013. Respondent stated he was not aware he would be allowed to present character witnesses, and also objected to the taking of witness testimony via telephone. The Hearing Panel Subcommittee denied both motions and, in order to give Respondent time to arrange for video conferencing for the witness, rescheduled the hearing in case No. 13-0508 to December 3, 2013.

A second Statement of Charges was filed against Respondent in case No. 13-1148 on November 14, 2013. The same Hearing Panel Subcommittee was assigned to hear this matter. On November 25, 2013, the Panel determined that holding a hearing on both sets of charges on the same date would be in the interests of judicial economy. A new hearing date of February 6, 2014, was set for both case No. 13-0508 and case No. 13-1148. Disciplinary Counsel filed a Motion for Telephone Testimony on January 28, 2014 to take the testimony of the complainant in case No. 13-1148. The Hearing Panel Subcommittee granted that motion on January 29, 2014.

Thereafter, this matter proceeded to hearing in both cases in Martinsburg, West Virginia, on February 6, 2014, before a Hearing Panel Subcommittee of the Lawyer Disciplinary Board. The Hearing Panel Subcommittee was comprised of Paul T. Camilletti, Esquire, Chairperson, John W. Cooper, Esquire, and Cynthia L. Pyles, 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 Hayden Williams, Cynthia Williams, Cody Ashby, Jeanette Renee Ashby, Sherman L. Lambert, Sr., Jon Pike, Steven Edwards, Jennings S. Coburn, Sr., Olive Coburn, Roxanne Coburn Vogtman, Glen R. Davis and Respondent. In addition, ODC Exhibits 1-100 and Respondent's Exhibit R1 were admitted into evidence for case No. 13-0508, and ODC Exhibits 1-4 were admitted into evidence for case No. 13-1148.

On or about June 27, 2014, the Hearing Panel Subcommittee issued its decision for both matters and filed with the Supreme Court of Appeals of West Virginia its "Report of the Hearing Panel Subcommittee" (hereinafter "Report") for each case. The Hearing Panel Subcommittee properly found that the evidence established that Respondent committed multiple violations of Rules 1.3, 1.4(a), 1.4(b), 1.16(d) and 8.1(b) of the Rules of Professional Conduct for case No. 13-0508; and violations of Rules 1.3, 1.4(a), 1.4(b), 3.2, 8.1(b), 8.4(c) and 8.4(d) of the Rules of Professional Conduct for case No. 13-1148.

The Hearing Panel Subcommittee issued the following recommendation as the appropriate sanctions for both Statements of Charges:

A. That Respondent's law license be suspended for one year for case No. 13-0508 and case No. 13-1148, and each suspension would run concurrent with the other;

B. That Respondent shall be required to petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure;

C. That upon reinstatement, Respondent will remain on probation for a period of one year;

D. That Respondent's practice shall be supervised for a period of one year by an attorney agreed upon between the Office of Disciplinary Counsel and Respondent. 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 unlikely to recur;

E. That Respondent shall complete nine hours of CLE during the next reporting period, 2014-2016, in addition to what he is otherwise required to complete to maintain his active license to practice in the area of ethics and law office management; and

F. That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

B. <u>FINDINGS OF FACT</u>

Ronald S. Rossi (hereinafter "Respondent") is a lawyer practicing in Martinsburg, which is located in Berkeley County, West Virginia. Hrg. Trans. p. 203. Respondent was admitted to The West Virginia State Bar on October 15, 1997, after passing the bar exam. Hrg. Trans. p. 202. 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. The Williams Complaint
I.D. No. 11-05-312[1]

Hayden A. Williams paid Respondent Two Thousand Dollars ($2,000.00) on July 30, 2010, to represent him in a dispute over a "rent to own"agreement. Case No. 13-0508, ODC Ex. 1, bates stamp 4-5, 7. Mr. Williams said that he made numerous attempts to contact Respondent via telephone, email and in-person, with little success. Case No. 13-0508, ODC Ex. 1, bates stamp 1-2, 3. Based on his conversation with Respondent at the time Respondent was retained, Mr. Williams was under the impression that suit would be filed quickly. However, when Mr. Williams checked with the court some ten months later, he discovered that no suit had been filed. Case No. 13-0508, ODC Ex. 1, bates stamp 3. Mr. Williams wrote to Respondent on June 2, 2011, discharging him from the case and asking for a return of all documents and a refund of the Two Thousand Dollar ($2,000.00) retainer. Id.

By letter dated July 12, 2011, Disciplinary Counsel wrote to Respondent asking for a response to the ethics complaint. Case No. 13-0508, ODC Ex. 2. Respondent did not respond. By letter dated August 10, 2011, via certified and regular mail, Disciplinary Counsel again wrote to Respondent asking for a response to the ethics complaint. Case No. 13-0508, ODC Ex. 3. By letter dated August 31, 2011, Respondent wrote to Disciplinary Counsel and admitted that he did not communicate with Mr. Williams. Case No. 13-0508, ODC Ex. 5. Respondent stated that he had reached a point in his practice where he became overwhelmed and fell into a deep depression. Id. Respondent was in a solo practice at that time, and said he was seeking employment so he did not have to deal with the issues of running a business. Id.

By letter dated September 6, 2011, Respondent advised Disciplinary Counsel that he had refunded the retainer to Mr. Williams. Case No. 13-0508, ODC Ex. 7. By letter dated October 4,

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[1] This complaint comes from the Statement of Charges in 13-0508.

2011, Mr. Williams stated that he did receive the refund from Respondent, but never received the client file. Case No. 13-0508, ODC Ex. 9. Mr. Williams stated that he had retained new counsel and the matter was now successfully resolved. Id. He also expressed his frustration about the rental income lost while the matter was pending. Id. By letter dated October 14, 2011, Disciplinary Counsel wrote to Respondent asking him to provide the client file to Mr. Williams and provide verification that he had done so. Case No. 13-0508, ODC Ex. 10. Respondent did not respond. By letter dated November 23, 2013, sent via certified and regular mail, Disciplinary Counsel again wrote to Respondent asking that he provide the client file to Mr. Williams. Case No. 13-0508, ODC Ex. 11. By letter dated December 5, 2011, Respondent verified that he had returned the client file to Mr. Williams. Case No. 13-0508, ODC Ex. 12. By letter dated December 16, 2011, Mr. Williams verified that he had received his client file. Case No. 13-0508, ODC Ex. 14.

Because subsequent complaints were filed against Respondent alleging that he accepted a retainer fee but did not perform the work, by letter dated July 27, 2012, Disciplinary Counsel wrote to Respondent asking what steps he had taken to deal with his depression issues and to alleviate the issues that caused the ethics complaints to be filed. Case No. 13-0508, ODC Ex. 18. Respondent did not respond. By letter dated September 24, 2012, sent via certified and regular mail, Disciplinary Counsel again wrote to Respondent asking what steps he had taken to deal with his depression issues and to alleviate the issues that caused the ethics complaints to be filed. Case No. 13-0508, ODC Ex. 21. By letter dated September 30, 2012, Respondent wrote to Disciplinary Counsel advising that he treated briefly with Dr. Kradel in Martinsburg, but was unable to continue treatment because he did not have health insurance. Case No. 13-0508, ODC Ex. 22. Respondent stated he was also actively seeking employment.[2] Id.

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[2] In October of 2012, Respondent obtained employment with the Berkeley County Prosecutor's Office.

On December 14, 2012, the Investigative Panel of the Lawyer Disciplinary Board issued an "Investigative Panel Closing" for the Williams complaint with an admonishment for violations of Rules 1.3, 1.4(a), 1.4(b) and 8.1(b) of the Rules of Professional Conduct. Case No. 13-0508, ODC Ex. 27. The Panel also directed Respondent to report his depression issues to the Lawyer Assistance Program and verify that he had done so within thirty (30) days of the closing. Id. Respondent did not provide verification that he had complied with the Panel's directive. By letter dated January 31, 2013, Disciplinary Counsel wrote to Respondent asking him to contact the Lawyer Assistance Program and provide proof that he had done so by February 11, 2013. Case No. 13-0508, ODC Ex. 29. Respondent did not respond. By letter dated February 15, 2013, sent via certified and regular mail, Disciplinary Counsel again wrote to Respondent concerning the report to the Lawyer Assistance Program and asking for a response by February 25, 2013. Case No. 13-0508, ODC Ex. 30. Respondent did not respond. Because Respondent failed to follow the directive of the Investigative Panel, of the Lawyer Disciplinary Board, Disciplinary Counsel prepared a Motion to Reopen this matter, which was granted by the Panel on April 27, 2013. Case No. 13-0508, ODC Ex. 31, Ex. 32.

II. The Pike Complaint
I.D. No. 11-09-390[3]

Complainant Jon A. Pike hired Respondent to represent him in a Lemon Law case. Case No. 13-0508, ODC Ex. 34. He said it had taken two (2) years to get a trial date that was still a year away. Id. Mr. Pike filed a complaint on August 22, 2011, alleging that Respondent failed to respond to his emails or telephone calls. Id. He said that Respondent needed to communicate with him concerning the case. Id. By letter dated August 26, 2011, Disciplinary Counsel closed the case with a directive to Respondent to communicate with Mr. Pike within ten (10) days. Case No. 13-0508, ODC Ex. 35.

[3] This complaint comes from the Statement of Charges in 13-0508.

By letter dated September 6, 2011, Respondent advised Disciplinary Counsel that he had complied with her directive. Case No. 13-0508, ODC Ex. 36.

On September 26, 2012, Mr. Pike filed a second complaint alleging that Respondent had not responded to telephone calls, text messages or emails for over two months. Case No. 13-0508, ODC Ex. 37. Mr. Pike asked for a return of his records from Respondent. Id. Disciplinary Counsel presented this matter to the Investigative Panel of the Lawyer Disciplinary Board and it reopened this complaint on December 14, 2012. Case No. 13-0508, ODC Ex. 39. By letter dated December 19, 2012, Disciplinary Counsel advised Respondent that the complaint was reopened and requested a response to the allegations made by Mr. Pike. Case No. 13-0508, ODC Ex. 40. Respondent did not respond. By letter dated December 23, 2013, Mr. Pike advised Disciplinary Counsel that he had retained new counsel and had subsequently settled his Lemon Law case and settled with Respondent and, therefore, asked to withdraw his complaint. Case No. 13-0508, ODC Ex. 41. On January 8, 2013, Disciplinary Counsel wrote to Mr. Pike and advised him that because the complaint had been docketed, Respondent was still required to file a response to the complaint. Case No. 13-0508, ODC Ex. 42. Respondent was provided with a copy of both letters. Id. On January 14, 2013, Disciplinary Counsel again wrote to Respondent asking for a response to the ethics complaint. Case No. 13-0508, ODC Ex. 43. Respondent did not respond. On February 15, 2013, sent via certified and regular mail, Disciplinary Counsel again wrote to Respondent asking for a response to the complaint. Case No. 13-0508, ODC Ex. 44. Again, Respondent did not respond.

III. The Edwards Complaint
I.D. No. 12-05-070[4]

Complainant Steven E. Edwards paid Respondent a One Thousand Five Hundred Dollar ($1,500.00) retainer on April 20, 2011, for representation in a divorce matter. Case No. 13-0508,

[4] This complaint comes from the Statement of Charges in 13-0508.

ODC Ex. 45, bates stamp 109. On December 9, 2011, Mr. Edwards sent Respondent an email stating that Respondent had not provided any services to date, even though the retainer had been paid in April; that he had left numerous telephone messages but Respondent refused to return his calls; and that he had left a telephone message asking for a refund of his retainer so he could hire new counsel, but did not receive any response. Case No. 13-0508, ODC Ex. 45, bates stamp 108. Mr. Edwards did not receive any reply from Respondent and, on February 3, 2012, he filed an ethics complaint. Case No. 13-0508, ODC Ex. 45. By letter dated February 7, 2012, Disciplinary Counsel forwarded the complaint to Respondent asking for a response thereto. Case No. 13-0508, ODC Ex. 46. Respondent did not respond. By letter dated March 15, 2012, sent via certified and regular mail, Disciplinary Counsel again wrote to Respondent asking for a response to the complaint. Case No. 13-0508, ODC Ex. 47. Again, Respondent did not respond.

Disciplinary Counsel then caused an "Investigative Subpoena Duces Tecum" to be issued for Respondent's appearance at the Office of Disciplinary Counsel on May 2, 2012, to give a sworn statement on May 2, 2012 concerning this matter. Case No. 13-0508, ODC Ex. 48. The subpoena was served personally upon Respondent on April 6, 2012. Id. The aforementioned March 15, 2012 letter to Respondent sent via certified mail was returned to sender on April 25, 2012, marked "unclaimed". Case No. 13-0508, ODC Ex. 49. By letter dated May 1, 2012, Respondent provided a response to the complaint. Case No. 13-0508, ODC Ex. 50. Respondent stated that he had performed work on Mr. Edwards' behalf. Id. Respondent said that he had forwarded divorce paperwork to Mr. Edwards, who had misplaced the same, and he forwarded another copy to Mr. Edwards. Id. Respondent said when the paperwork was returned to him, it did not contain the signed divorce petition, only the financial paperwork. Id. Respondent said that although he met with Mr. Edwards on several occasions, drafted the paperwork, and met with Mr. Edwards' wife, he had refunded the full retainer fee. Id. Respondent also sent an email to the Office of Disciplinary Counsel

on May 1, 2012, asking that the sworn statement be rescheduled or avoided if at all possible. Case No. 13-0508, ODC Ex. 17. Disciplinary Counsel agreed to postpone the sworn statement, but reserved the right to reschedule it in the future if Respondent failed to respond to requests for information. Id.

In a previous response to a different complaint, Respondent advised Disciplinary Counsel that he suffered from depression. Case No. 13-0508, ODC Ex. 5. Because other complaints had been filed against Respondent alleging that he accepted a retainer fee but did not perform the work, by letter dated July 27, 2012, Disciplinary Counsel wrote to Respondent asking what steps he had taken to deal with his depression issues and to alleviate the issues that caused the ethics complaints to be filed. Case No. 13-0508, ODC Ex. 53. Respondent did not respond. By letter dated September 24, 2012, sent via certified and regular mail, Disciplinary Counsel again wrote to Respondent asking what steps he had taken to deal with his depression issues and to alleviate the issues that caused the ethics complaints to be filed. Case No. 13-0508, ODC Ex. 56. By letter dated September 30, 2012, Respondent wrote to Disciplinary Counsel advising that he treated briefly with Dr. Kradel in Martinsburg, but was unable to continue treatment because he did not have health insurance. Case No. 13-0508, ODC Ex. 57.

On December 14, 2012, the Investigative Panel of the Lawyer Disciplinary Board issued an "Investigative Panel Closing" for the Edwards complaint with an admonishment for his violation of Rule 8.1(b) of the Rules of Professional Conduct. Case No. 13-0508, ODC Ex. 59. The Panel also directed Respondent to report his depression issues to the Lawyer Assistance Program and verify that he had done so within thirty (30) days of the closing. Id. Respondent did not provide verification that he had complied with the Panel's directive. By letter dated January 31, 2013, Disciplinary Counsel wrote to Respondent asking him to contact the Lawyer Assistance Program and provide proof that he had done so by February 11, 2013. Case No. 13-0508, ODC Ex. 61. Respondent did not respond.

By letter dated February 15, 2013, sent via certified and regular mail, Disciplinary Counsel again wrote to Respondent concerning the report to the Lawyer Assistance Program and asking for a response by February 25, 2013. Case No. 13-0508, ODC Ex. 62. Respondent did not respond. Because Respondent failed to follow the directive of the Investigative Panel, of the Lawyer Disciplinary Board, Disciplinary Counsel prepared a Motion to Reopen this matter, which was granted on April 27, 2013. Case No. 13-0508, ODC Ex. 63, 64.

IV. The Ashby Complaint
I.D. No. 12-02-330[5]

Complainant Jeannette Renee Ashby retained Respondent in November of 2011 to represent her son on charges of DUI 2nd offense, possession with intent to distribute, and malicious battery and assault. Case No. 13-0508, ODC Ex. 66. She stated that Respondent quoted her a retainer fee of Two Thousand Five Hundred Dollars ($2,500.00), and they reached an agreement whereby she was to pay One Thousand Five Hundred Dollars ($1,500.00) up-front and make payments on the balance. Id. Ms. Ashby said she never received any agreement or contract to officially state that Respondent had accepted her money for the representation. Id. She said she had requested an itemized billing, but did not receive one. Id. Ms. Ashby said she advised Respondent that she would not make any additional payments until she had a contract. Id.

Ms. Ashby said that Respondent did not show up for the hearing on the DUI 2nd offense charge, and her son, Cody Ashby, had to represent himself. Id. She said he managed to get the charge reduced to DUI 1st offense and his jail time was time served. Id. Ms. Ashby said her son waived his right to a preliminary hearing on the malicious assault case to obtain early discovery. Id. She said the discovery was not presented to her or her son until he was indicted, and that was also the only time Respondent visited her son at the Eastern Regional Jail. Id. Ms. Ashby said they were to receive

[5] This complaint comes from the Statement of Charges in 13-0508.

a copy of the surveillance video, but never did. Id. Ms. Ashby said Respondent did represent her son on the intent to distribute charge, which was dropped to simple possession with four (4) months jail time. Id. Ms. Ashby said her son was sitting in jail awaiting a trial date, and she attempted to contact Respondent on several occasions without success. Id. She went to what she believed was his office address, only to find that he had moved his office, and she could not find any information as to where he had moved to. Id. She said she searched the Internet, but it still listed the old address. Id. Ms. Ashby then retained Sherman Lambert to represent her son on the malicious assault and battery charge. Id. She said Mr. Lambert obtained the client file from Respondent, and told her that the file was very disorganized and contained other clients' information in her son's file. Id.

On June 7, 2012, Ms. Ashby filed an ethics complaint against Respondent making the allegations set forth above, and also requesting a refund of the fee she paid to Respondent. Id. By letter dated June 12, 2012, Disciplinary Counsel forwarded the complaint to Respondent for a response. Case No. 13-0508, ODC Ex. 67. Respondent filed a response and stated he had agreed to represent Ms. Ashby's son at the Magistrate Court level for a flat fee of Two Thousand Five Hundred Dollars ($2,500.00). Case No. 13-0508, ODC Ex. 68. He said he did receive One Thousand Five Hundred Dollars ($1,500.00) from Ms. Ashby, but said he never pressed her for the remaining One Thousand Dollars ($1,000.00). Id. Respondent denied having any conversation with Ms. Ashby wherein she advised him that no additional monies would be forthcoming, nor did they ever discuss the issue of providing an itemized billing. Id.

Respondent stated that he never received notice for the DUI hearing despite the fact that he had filed a Notice of Appearance. Id. Respondent said the matter was resolved at a later hearing, at which he was present. Id. Respondent stated that he did advise Ms. Ashby and her son that he had moved his office to Charles Town. Id. Respondent stated that he had previously represented Ms. Ashby's son on a felony malicious wounding charge in the Circuit Court of Berkeley County, West

Virginia. Id. While that matter was pending, the son was arrested on a charge of brandishing a knife in Martinsburg and for stabbing someone in Maryland. Id. Respondent said that when the son was arrested on the charges for which Ms. Ashby retained his services, the son was denied bail because he violated his bond on the pending matters. Id. Respondent said the Court denied his motion to reinstate bail, and that the son's incarceration was not due to any lack of action on Respondent's part. Id.

In a previous response to a different complaint, Respondent advised Disciplinary Counsel that he suffered from depression. Case No. 13-0508, ODC Ex. 5. Because other complaints had been filed against Respondent alleging that he accepted a retainer fee but did not perform the work, by letter dated July 27, 2012, Disciplinary Counsel wrote to Respondent asking what steps he had taken to deal with his depression issues and to alleviate the issues that caused the ethics complaints to be filed. Case No. 13-0508, ODC Ex. 69. Disciplinary Counsel also asked if Respondent could provide an itemization or accounting of the work he had performed in the instant case, as well as the fees associated with the work. Id. Respondent did not respond.

By letter dated September 24, 2012, sent via certified and regular mail, Disciplinary Counsel again wrote to Respondent asking what steps he had taken to deal with his depression issues, what had he done to alleviate the issues that caused the ethics complaints to be filed, and for an accounting of the work performed on Mr. Ashby's behalf. Case No. 13-0508, ODC Ex. 72. By letter dated September 30, 2012, Respondent wrote to Disciplinary Counsel advising that he treated briefly with Dr. Kradel in Martinsburg, but was unable to continue treatment because he did not have health insurance. Respondent stated he was also actively seeking employment. Respondent also provided an extensive list of work performed on the son's behalf. Case No. 13-0508, ODC Ex. 73.

By letter dated October 1, 2012, Disciplinary Counsel wrote to Respondent asking for an estimate of the time spent for each entry, the total time spent and the hourly rate. Case No. 13-0508,

ODC Ex. 74. Respondent did not respond. By letter dated November 1, 2012, Disciplinary Counsel again wrote to Respondent asking for an estimate of the time spent for each entry, the total time spent and the hourly rate. Case No. 13-0508, ODC Ex. 76. By letter dated November 20, 2012, Respondent provided an estimate for twenty and a half (20.5) hours expended on the son's case. Case No. 13-0508, ODC Ex. 78. He stated that this was a conservative estimate and, based upon the retainer amount paid, the "effective" hourly rate was Seventy-Three Dollars ($73.00) per hour. Id. Respondent said his typical hourly rate ranged from One Hundred Fifty Dollars ($150.00) to Two Hundred Dollars ($200.00) per hour. Id.

By letter dated December 19, 2012, Ms. Ashby filed a reply and reiterated her original allegations. Case No. 13-0508, ODC Ex. 80. She also stated that she had received services for fee dispute mediation and Respondent had agreed to refund Three Hundred Dollars ($300.00) to her. Id. By letter dated January 4, 2013, Disciplinary Counsel wrote to Respondent asking if he agreed to refund the Three Hundred Dollars ($300.00) and, if so, the basis for the refund. Case No. 13-0508, ODC Ex. 81. Respondent did not respond. By letter dated February 15, 2013, sent via certified and regular mail, Disciplinary Counsel again wrote to Respondent asking if he agreed to refund Three Hundred Dollars ($300.00) to Ms. Ashby and, if so, the basis for doing so. Case No. 13-0508, ODC Ex. 82. Again, Respondent did not respond.

V. The Vogtman Complaint
I.D. No. 12-05-443[6]

On August 8, 2012, Complainant Roxanne Coburn Vogtman filed a complaint on behalf of her father, Jennings B. Coburn, Sr., alleging that Respondent had neglected her father's case. Case No. 13-0508, ODC Ex. 85. Ms. Vogtman said her father had fallen and sustained a brain injury and retained Respondent to represent him on June 29, 2010. Id. Ms. Vogtman stated that her parents were

[6] This complaint comes from the Statement of Charges in 13-0508.

having problems contacting Respondent and, on June 29, 2012, she called Respondent's office under the guise of being a new client. Id. She said that Respondent called her back within four (4) minutes. Id. Ms. Vogtman said she told Respondent that he had been on the case for two years and asked if he had filed the case yet and he said no. Id. Ms. Vogtman said she asked Respondent why he did not respond to her parents' calls, and he told her he had been busy and on vacation. Id. Ms. Vogtman said she prepared a letter for her father's signature discharging Respondent from the case. Id.

By letter dated August 10, 2012, Disciplinary Counsel forwarded the complaint to Respondent asking for a response thereto. Case No. 13-0508, ODC Ex. 86. Respondent did not respond. By letter dated September 24, 2012, sent via certified and regular mail, Disciplinary Counsel again requested a response to the complaint by October 1, 2012. Case No. 13-0508, ODC Ex. 89. On September 30, 2012, Respondent filed his response to the complaint. Case No. 13-0508, ODC Ex. 92. He stated that he had spoken with Ms. Vogtman's parents on several occasions. Id. Respondent said, in his most recent conversation, he advised Ms. Vogtman's mother that he was at an impasse with the insurance companies in question because they contended that Mr. Coburn had contributed to the accident through his own negligence. Id. He said he also reminded Mrs. Coburn that if he filed suit, he would need to engage the services of a Maryland attorney because the accident occurred in Maryland. Id. He said he advised Ms. Vogtman that the statute of limitations on the case would run in February of 2013. Id. Respondent said he received the letter discharging him from the case and closed the file. Id.

By letter dated October 1, 2012, Disciplinary Counsel inquired if Respondent had provided the client file to Jennings B. Coburn, Sr. Case No. 13-0508, ODC Ex. 90. Respondent did not respond. By letter dated November 1, 2012, sent via certified mail, Disciplinary Counsel again asked Respondent if the client file had been provided to Mr. Coburn. Case No. 13-0508, ODC Ex. 93. By letter dated November 20, 2012, Respondent stated that he had overnighted Mr. Coburn's file to his

attention via UPS. Case No. 13-0508, ODC Ex. 95. By letter dated December 13, 2012, Disciplinary Counsel wrote to Ms. Vogtman asking for confirmation that her father had received his file. Case No. 13-0508, ODC Ex. 96.

In a telephone conversation on December 27, 2012, Ms. Vogtman confirmed that her father had received the file, but stated that no other attorney was willing to accept the case. Case No. 13-0508, ODC Ex. 97. By letter dated January 4, 2013, Disciplinary Counsel wrote to Respondent asking him to explain what actions he had taken on Mr. Coburn's behalf over the course of the two years he had the case. Case No. 13-0508, ODC Ex. 98. Respondent did not respond. By letter dated February 15, 2013, sent via certified and regular mail, Disciplinary Counsel against asked Respondent what actions he had taken on Mr. Coburn's behalf over the two years. Case No. 13-0508, ODC Ex. 99. Again, Respondent did not respond.

VI. The Davis Complaint
I.D. No. 13-05-342[7]

Complainant Glenn R. Davis is the Chief Executive Officer for Comverge, a telecommunications firm located in Virginia Beach, Virginia. Case No. 13-1148, ODC Ex. 1, bates stamp 2. Comverge was named as a co-defendant in a lawsuit entitled *CSC Leasing Company v. 201 North George Street, LLC v. Comverge*, in the Jefferson County, West Virginia Circuit Court Civil Action No. 10-C-451. Case No. 13-1148, ODC Ex. 4, bates stamp 33-38. On or about November 29, 2011, 201 North George Street, LLC filed an Amended Counterclaim and Third Party Complaint against Comverge. Id. On or about December 7, 2011, Comverge was served with the Amended Counterclaim and Third Party Complaint by filing with the West Virginia Secretary of State's office. Case No. 13-1148, ODC Ex. 4, bates stamp 72-76. Complainant believed there was no legal basis for Comverge to be named as a party. Case No. 13-1148, ODC Ex. 1, bates stamp 2.

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[7] This complaint comes from the Statement of Charges in 13-1148.

On or about February 22, 2012, Comverge retained Respondent and paid Respondent a One Thousand Five Hundred Dollar ($1,500.00) retainer on or about the same date. Case No. 13-1148, ODC Ex. 1, bates stamp 2, 16. After retaining Respondent, Complainant had numerous phone calls and correspondence between him and Respondent about the matter and what action would be taken on behalf of Comverge. Case No. 13-1148, ODC Ex. 1, bates stamp 2, 7-8, 14-15. Complainant was told by Respondent that Respondent would file a Motion to Dismiss. Case No. 13-1148, ODC Ex. 1, bates stamp 2. Complainant personally called Respondent for updates on the matter multiple times a week, and Respondent would provide a brief summary. Id.

On or about April 24, 2012, a Motion for Default Judgment was filed by 201 N. George Street against Comverge. Case No. 13-1148, ODC Ex. 4, bates stamp 66-78. On or about April 25, 2012, a Judgment Order was entered by the Jefferson County Circuit Court. Case No. 13-1148, ODC Ex. 4, bates stamp 80-81. The Order stated "Comverge, Inc. has not appeared, or filed a Responsive Pleading or filed an Answer or in any other manner appeared to defend this matter and accordingly it is hereby ADJUDGED and ORDERED that all matters alleged in the Amended Counterclaim and Third Party Complaint asserted by 201 N. George Street, LLC against Comverge, Inc. are hereby considered fully proven and taken to be true for purposes of this Civil Action and it is hereby ORDERED that 201 N. George Street, LLC is hereby granted Judgment against Comverge, Inc. in the amount of Thirty Thousand Dollars ($30,000.00) plus pre and post judgment interest from the date of service of process and all expenses, attorney's fees and costs expended herein or in the amount recovered, if any by CSC Leasing Company against 201 N. George Street, LLC, whichever is greater." Id.

Complainant attempted to contact Respondent after April 25, 2012, and was only able to reach Respondent on one occasion during the week of May 7, 2012. Case No. 13-1148, ODC Ex.

1, bates stamp 2. Respondent informed Complainant's assistant that Respondent had been traveling but, Respondent was going to look into the summary judgment and would call them back the next day. Id. Respondent failed to contact Complainant and there was no response from Respondent in the many attempts to contact him after that. Id. Complainant contacted the Jefferson County Circuit Clerk's office and was informed that there had not been any motions filed by Respondent on behalf of Comverge. Id. Respondent also had made no appearance of counsel in the matter. Id. On or about May 12, 2012, Complainant sent a letter to the Jefferson County Circuit Court about the April 25, 2012 Judgment Order. Case No. 13-1148, ODC Ex. 1, bates stamp 4-5. The letter outlined the information in paragraphs 2 through 10 herein. Id.

On or about August 5, 2013, Complainant filed an ethics complaint against Respondent. Case No. 13-1148, ODC Ex. 1. By letter dated August 13, 2013, Disciplinary Counsel forwarded the complaint to Respondent asking for a response thereto. Case No. 13-1148, ODC Ex. 2. Respondent did not respond. By letter dated September 20, 2013, sent via certified and regular mail, Disciplinary Counsel again wrote to Respondent asking for a response to the complaint. Case No. 13-1148, ODC Ex. 3. The return receipt was signed for by Judy Ropp on or about September 23, 2013. Id. Again, Respondent did not respond.

C. CONCLUSIONS OF LAW

The Hearing Panel found Respondent failed to work on Mr. Williams' case and failed to communicate with Mr. Williams in violation of Rules 1.3, 1.4(a), and 1.4(b) of the Rules of Professional Conduct.[8] Respondent was found by the Hearing Panel to have failed to timely return

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[8] **Rule 1.3. Diligence.**

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

Rule 1.4. Communication.

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

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make

Mr. Williams' retainer and client file after Respondent was discharged in violation of 1.16(d) of the Rules of Professional Conduct.[9] The Hearing Panel also found that Respondent failed to follow the directive of the Investigative Panel, and also failed to respond to Disciplinary Counsel, he violated Rule 8.1(b) of the Rules of Professional Conduct.[10]

The Hearing Panel found that Respondent failed to work on Mr. Pike's Lemon Law case, and failed to respond to Mr. Pike's requests for information in violation of Rules 1.3 and 1.4(a) of the Rules of Professional Conduct.[11] Respondent was also found to have violated Rule 8.1(b) of the Rules of Professional Conduct[12] in the Pike complaint because he failed to respond to Disciplinary Counsel's letters requesting a response to the ethics complaint.

Respondent's failure to work on Mr. Coburn's case, and failure to communicate with Mr. Coburn, was found by the Hearing Panel to be in violation of Rules 1.3, 1.4(a) and 1.4(b) of the Rules of Professional Conduct[13] in the Vogtman complaint. The Hearing Panel found that Respondent's failure to timely return Mr. Coburn's client file after Respondent was discharged was

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informed decisions regarding the representation.

[9] **Rule 1.16(d). 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.

[10] **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.

[11] The provisions of Rule 1.3 and Rule 1.4(a) are set forth in n. 8 *supra*.

[12] The provisions of Rule 8.1(b) are set forth in n. 10 *supra*.

[13] The provisions of Rule 1.3, Rule 1.4(a), and Rule 1.4(b) are set forth in n. 8 *supra*.

in violation of Rule 1.16(d) of the Rules of Professional Conduct.[14] Respondent was also found in the Vogtman complaint to be in violation of Rule 8.1(b) of the Rules of Professional Conduct because of his failure to respond to requests for information from Disciplinary Counsel, he violated Rule 8.1(b) of the Rules of Professional Conduct.[15]

The Hearing Panel found that Respondent again failed to follow the directive of the Investigative Panel, and failed to respond to Disciplinary Counsel in violation of Rule 8.1(b) of the Rules of Professional Conduct in the Edwards complaint.[16] The Ashby complaint also resulted in another finding by the Hearing Panel that Respondent failed to respond to requests for information from Disciplinary Counsel in violation of Rule 8.1(b) of the Rules of Professional Conduct.[17]

There was a finding by the Hearing Panel of violations of Rules 1.3, 1.4(a), and 1.4(b) of the Rules of Professional Conduct based upon Respondent's failure to work on Mr. Davis' case and failure to communicate with Mr. Davis in the Davis complaint.[18] The Hearing Panel also found Respondent engaged in dilatory practices and failed to make reasonable efforts consistent with Mr. Davis' objective in violation of Rule 3.2 of the Rules of Professional Conduct.[19] Respondent was again found by the Hearing Panel to be in violation of Rule 8.1(b) of the Rules of Professional

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[14] **Rule 1.16(d). 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 ofother 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.

[15] The provisions of Rule 8.1(b) are set forth in n. 10 *supra*.

[16] The provisions of Rule 8.1(b) are set forth in n. 10 *supra*.

[17] The provisions of Rule 8.1(b) are set forth in n. 10 *supra*.

[18] The provisions of Rule 1.3, Rule 1.4(a) and Rule 1.4(b) are set forth in n. 8 *supra*.

[19] **Rule 3.2. Expediting litigation.**

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

Conduct[20] based upon his failure to respond to Disciplinary Counsel. And finally, the Hearing Panel found that Respondent falsely informed Mr. Davis on his work and intent in the case, which did lead to a default judgment, in violation of Rule 8.4(c) and 8.4(d) of the Rules of Professional Conduct.[21]

II. SUMMARY OF ARGUMENT

The Supreme Court has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but also to protect the public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard its interests in the administration of justice. Lawyer Disciplinary Board v. Taylor, 192 W.Va. 139, 451 S.E.2d 440 (1994). In order to effectuate the goals of the disciplinary process, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board recommended that Respondent be suspended for one (1) year; shall petition for reinstatement after serving his suspension; undergo probation for one (1) year after reinstatement; undergo supervised practice for one (1) year after reinstatement; Respondent shall complete additional nine (9) hours of CLE hours before reinstatement; and that Respondent pay the costs of the disciplinary proceeding.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

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[20] The provisions of Rule 8.1(b) are set forth in n. 10 *supra*.

[21] **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.

IV. ARGUMENT

A. STANDARD OF PROOF

In lawyer disciplinary matters, a *de novo* standard of review applies to questions of law, questions of application of the law to the facts, and questions of appropriate sanction to be imposed. Roark v. Lawyer Disciplinary Board, 207 W. Va. 181, 495 S.E.2d 552 (1997); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994). The Supreme Court of Appeals gives respectful consideration to the Lawyer Disciplinary Board's recommendations as to questions of law and the appropriate sanction, while ultimately exercising its own independent judgment. McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381.

Substantial deference is to be given to the Lawyer Disciplinary Board's findings of fact unless the findings are not supported by reliable, probative, and substantial evidence on the whole record. McCorkle, Id.; Lawyer Disciplinary Board v. Cunningham, 195 W. Va. 27, 464 S.E.2d 181 (1995). At the Supreme Court level, "'[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board." Cunningham, 464 S.E.2d at 189; McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381. The charges against an attorney must be proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. *See*, Syl. Pt. 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995).

The Supreme Court of Appeals is the final arbiter of formal legal ethic charges and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law. Syl. Pt. 3, Committee on Legal Ethics v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984); Syl. Pt. 7, Committee on Legal Ethics v. Karl, 192 W.Va. 23, 449 S.E.2d 277 (1994).

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

Syl. Point 4 of Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998) holds: Rule 3.16 of the Rules of Lawyer Disciplinary Procedure provides that when imposing a sanction after a finding of lawyer misconduct, the Court shall consider: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. A review of the extensive record in this matter indicates that Respondent has transgressed all four factors set forth in Jordan.

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

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

Respondent was hired by the Williamses to handle a property dispute in late July of 2010 for Two Thousand Dollars ($2,000.00). The Williams attempted to communicate with Respondent over the next several months through various methods such as fax, email, telephone, and even showing up at Respondent's office without success. After ten (10) months, the Williams checked to see if their lawsuit had been filed by Respondent and discovered nothing had been filed. At that point, the Williamses fired Respondent and hired a new attorney at an additional cost. The new attorney was able to settle the matter within two (2) months. The Williamses suffered because they did not receive any rent which ranged from Four Thousand Dollars ($4,000.00) to Seven Thousand Dollars ($7,000.00) during the ten (10) months that Respondent had their case. Hrg. Trans. 17-18, 59. Further, Respondent never refunded his retainer or provided the client file until after the filing of the disciplinary complaint and after the new attorney had settled the matter. Respondent also had communication issues in the Pike case in violation of his duties which resulted in Mr. Pike hiring another attorney to contact Respondent. Mr. Pike had concern that he would be responsible for the issues with his "lemon" of a car if the matter was not timely dealt with. Hrg. Trans. p. 144. Respondent was able to settle the matter for Mr. Pike, but it took the filing of the disciplinary complaint on two (2) occasions to settle the matter.

The communication problems that Respondent was having with clients include the Edwards complaint. Mr. Edwards paid Respondent One Thousand Five Hundred Dollars ($1,500.00) to

represent him in divorce proceedings. Respondent failed to communicate or file anything for Mr. Edwards. Hrg. Trans. p. 151-152. Mr. Edwards ended up handling his own divorce on his own after waiting nine (9) months for Respondent to do anything in the case. Hrg. Trans. p. 156-157. The retainer was not refunded by Respondent until after Mr. Edwards filed the complaint against Respondent.

The Coburns had hired Respondent for a contingency case involving Mr. Coburn's slip and fall at a local grocery store in Maryland. The Coburns were concerned about the incident occurring in Maryland when Respondent was not licensed there, but Respondent assured them that he had contact with a Maryland attorney to help with the case. And again, communication issues began to occur for the Coburns when they tried to contact Respondent. Respondent did not respond to the Coburns' telephone calls and Respondent had moved his office without notifying the Coburns. The Coburns' daughter was able to make contact with Respondent by using a different telephone number that was not familiar to Respondent. Further, the client file was not returned to the Coburns until months after the disciplinary complaint had been filed against Respondent. The Coburns case was left without resolution and their daughter believed that important evidence was lost because Respondent did not secure the evidence after he was hired by the Coburns. Hrg. Trans. p. 187-190.

Respondent also had communication and dilatory performance in the Davis complaint affecting his clients and the legal system. Mr. Davis had retained Respondent in February of 2012 for One Thousand Five Hundred Dollars ($1,500.00) to file a response in a civil lawsuit against a company within Mr. Davis was the Chief Executive Officer. While the communication in the case was good at first, the communication became an issue after Mr. Davis paid the retainer. Hrg. Trans. p. 71-72. Respondent never filed the response and a default judgment was entered against the company. Mr. Davis indicated that the default judgment cost about Thirty Thousand Dollars

($30,000.00) and the cost to remove the default judgment would be about the same amount so the default judgment is still pending against the company. Hrg. Trans. p. 69, 78. A client file was never returned to Mr. Davis. Hrg. Trans. p. 75. Further, Mr. Davis was able to get a refund of the retainer by filing a dispute of the money through his credit card company. Hrg. Trans. p. 75-76.

In all of the complaints, Respondent failed to properly respond to Disciplinary Counsel in violation of the duties to the legal profession. In particular, the Williams and Edwards complaints were closed by the Investigative Panel with an admonishment along with an order that Respondent contact the Lawyers Assistant Program to determine if he needed any additional help regarding his depression issues. Respondent failed to follow the directives of the Investigative Panel in both of those cases even after Disciplinary Counsel sent several letters about the matter. Respondent failed to respond to twenty-three (23) letters from Disciplinary Counsel regarding the Williams complaint, the Pike complaint, the Edwards complaint, the Ashby complaint, the Coburn complaint, and the Davis complaint. This is a clear indication that Respondent has an issue in following his duties under the Rules of Professional Conduct to respond to Disciplinary Counsel. Also, the failure to respond to the Davis complaint occurred after the Statement of Charges was served in case No. 13-0508, so Respondent was well-aware that such misconduct can result in charges being filed.

2. Respondent acted intentionally and knowingly.

There is no evidence to suggest that Respondent did not act intentionally or knowingly. Respondent intentionally took retainer fees and failed to perform work in matters. Respondent also failed to diligently handle his clients' cases and failed to have reasonable communication with his clients. Further, Respondent failed to respond to multiple requests from Disciplinary Counsel in these cases.

3. The amount of real injury is great.

The amount of real injury was great in these cases. The Williamses lost rent in the amount of anywhere from Four Thousand Dollars ($4,000.00) to Seven Thousand Dollars ($7,000.00). The Williamses also had to pay an additional retainer fee without a refund of the Two Thousand Dollars ($2,000.00) paid to Respondent because Respondent did not refund the retainer until after the filing of the disciplinary complaint. Mr. Pike worried for several years that he would be responsible for car he had bought with lemon law issues because Respondent would not communicate. Eventually, Mr. Pike had to hire another attorney to contact Respondent about the case. In the Edwards complaint, Mr. Edwards waited for months for Respondent to handle his divorce case after paying Respondent One Thousand Five Hundred Dollars ($1,500.00). The divorce was ultimately handled by Mr. Edwards himself and it took months for Mr. Edwards to receive a refund of the retainer. The Coburns suffered from lost evidence and the loss to bring their case to court to determine the fault of any of the parties. Their ability have other counsel look into the case was hindered by Respondent's failure to release their client file for months. The default judgment entered against the company in the Davis complaint was for Thirty Thousand Dollars ($30,000.00), and the cost to remove that default judgment would cost almost the same amount of money.

4. There are several aggravating factors present.

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

Rule 9.22(c) of the *ABA Model Standards for Imposing Lawyer Sanctions* indicates that a pattern of misconduct constitutes an aggravating factor. Respondent has exhibited a pattern and practice of accepting retainer fees but then failing to carry out services; failing to communicate with his clients; failing to diligently handle matters; failing to timely return retainer fees and client files; and failing to respond to requests for information from the Office of Disciplinary Counsel during the investigation of multiple disciplinary complaints.

Additionally, the Scott Court noted that the ABA Model Standards for Imposing Lawyer Sanctions has also recognized "multiple offenses" as an aggravating factor in a lawyer disciplinary proceeding. Scott, 213 W.Va. at 217, 579 S.E.2d at 558. Respondent has committed multiple violations of the Rules. In fact, there are twenty-two (22) separate violations of the Rules of Professional Conduct with many being for the same violations. The multiple infractions committed by Respondent go to his integrity and fitness to practice law. Respondent also has been practicing law for over fifteen (15) years which gives him substantial experience in the practice of law.

5. There are mitigating factors present.

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. 209, 214, 579 S.E.2d 550, 555 (2003).

The following mitigating factors are present: absence of a selfish or dishonest motive and remorse. Respondent has been licensed to practice law in West Virginia since October 15, 1997, and has no prior discipline from the West Virginia Supreme Court of Appeals. The evidence does not suggest that Respondent had selfish or dishonest motive in these matters. Respondent has also expressed remorse for his misconduct.

A mitigating factor that cannot be used in this case is any claim of depression by Respondent. Respondent testified during the hearing that he suffered from depression but offered no medical testimony or evidence or witnesses to support that assertion. The Hearing Panel found that the undiagnosed depression alleged by Respondent was not sufficient to mitigate any sanction in this matter. The Hearing Panel pointed out that this Court has stated that "[i]n a lawyer disciplinary proceeding, a mental disability is considered mitigating when: (1) there is evidence that the attorney is affected by a mental disability; (2) the mental disability caused the misconduct; (3) the attorney's recovery from the mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely." Lawyer Disciplinary Board v. Dues, 218 W.Va. 104, 624 S.E.2d 125 (2005). The Hearing Panel found that there was no clear and convincing evidence to establish that Respondent suffered any mental disability or that the alleged disability caused the misconduct because it appeared that Respondent never sought treatment. Likewise, Respondent could not show that any recovery was demonstrated by a meaningful and sustained period of successful rehabilitation and no evidence was presented that the recovery arrested the misconduct and that recurrence of similar misconduct is unlikely. Further, Respondent was given an opportunity to obtain a determination as to whether he needed any additional treatment for his depression through the Lawyers Assistance Program by the Investigative Panel in two of the cases but he failed to do so.

C. SANCTION

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syllabus Pt. 3, *in part*, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), *cited in* Committee on Legal Ethics v. Morton, 186 W.Va. 43, 45, 410 S.E.2d 279, 281 (1991). In addition, discipline must serve

as both instruction on the standards for ethical conduct and as a deterrent against similar misconduct to other attorneys. In Syllabus Point 3 of Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987), 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).

In Committee on Legal Ethics v. Mullins, this Court stated that "[m]isconduct or malpractice consisting of negligence or inattention, in order to justify a suspension or annulment, must be such as to show the attorney to be unworthy of public confidence and an unfit or unsafe person to be entrusted with the duties of a member of the legal profession or to exercise its privileges." Mullins, 159 W.Va. 647, 652, 226 S.E.2d 427, 430 (1976) (indefinite suspension for failure to act with reasonable diligence, failure to communicate effectively with clients, and failure to respond to the disciplinary authorities repeated requests for information, including failure to appear at the disciplinary hearing), *quoting* Syllabus No. 1, In Re Damron, 131 W.Va. 66, 45 S.E.2d 741 (1947). *See also*, Lawyer Disciplinary Board v. Keenan, 189 W.Va. 37, 427 S.E.2d 471 (1993) (indefinite suspension for failure to provide competent representation, failure to act with reasonable diligence, failure to communicate effectively with his clients, and failure to return unearned fees); Committee on Legal Ethics v. Karl, 192 W.Va. 23, 449 S.E.2d 277 (1994) (three month suspension for failure to act with reasonable diligence, failure to communicate effectively with clients, and failure to

respond to the disciplinary authorities repeated requests for information); Lawyer Disciplinary Board v. Burgess, No. 23030 (WV 4/25/96) (unreported) (two year suspension with one year suspension deferred while respondent undergoes a one-year period of supervision following reinstatement for violations of Rules of Professional Conduct 1.1, 1.3, 1.4 (a) and (b), 1.16(a)(3), 1.16(d); 8.1(b); and 8.4 (c) and (d)); Lawyer Disciplinary Board v. Holmstrand, No. 22523 (WV 5/30/96) (unreported) (one year suspension and psychiatric evaluation ordered for multiple violations of Rules of Professional Conduct 1.3, 1.4(a), 3.3(a)(1)(4) and 8.4(c) and (d)); Lawyer Disciplinary Board v. Farber, No. 32598 (WV ½6/06) (unreported) (indefinite suspension and a psychological counseling ordered to determine fitness to practice law for violating Rules of Professional Conduct 1.1, 1.3, 1.4, and 8.1(b), including failure to appear at the disciplinary hearing); Lawyer Disciplinary Board v. Morgan, 228 W.Va. 114, 717 S.E.2d 898 (2011) (one year suspension for pattern of failing to communicate with clients and failing to respond to Office of Disciplinary Counsel along with failure to handle client matters with diligence in multiple matters); and Lawyer Disciplinary Board v. Phalen, No. 11-1746 (WV 11/14/12) (unreported) (one year suspension for multiple offenses of diligence, communication, failure to provide refunds, failure to respond to Office of Disciplinary Counsel, and failure to provide itemizations).

In addition, Standard 4.42 of the *ABA Model Standards for Imposing Lawyer Sanctions* states that suspension is generally appropriate when a lawyer "(a) knowingly fails to perform services for a client and causes injury or potential injury to a client; or (b) a lawyer engages in a pattern of neglect causes injury or potential injury to a client." Respondent's actions in these cases clearly rise to such a level to establish that Respondent is unworthy of public confidence and unfit to be entrusted with the duties or privileges of a licensed member of the legal profession. This is not a case of simple negligence in communication and neglect of legal representation. Respondent clearly exhibits a pattern and practice of a lack of concern for some of the fundamental aspects of the

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

It is clear from the evidentiary record in this case that Respondent failed his clients in a variety of ways. Respondent failed to communicate with his clients, failed to diligently handle client matters, failed to promptly return unused retainers and client files, failed to expedite litigation, falsely told clients about working on cases, and failed to respond to Disciplinary Counsel on multiple occasions. There were a total of twenty-two (22) different violations of the Rules of Professional Conduct. This was not one (1) case falling through the cracks with Respondent. It was Respondent's pattern of practice in handling client matters and responding to Disciplinary Counsel. Clients who paid retainers to Respondent to handle their legal matters were left without any progress on their legal matters and without any contact by Respondent. Clients went to Respondent's office only to discover that he had moved his office without any notification to them. Months went by without any contact by Respondent. It took the filing of complaints for several clients to receive a refund of their retainer and their client files, which further hindered their legal matters. The first complaint, the Williams complaint, was opened against Respondent in July of 2011 and, for two (2) years following that complaint up through the 2013 Davis complaint, Respondent continued the same misconduct. Respondent even continued in his failure to respond to Disciplinary Counsel. In fact, the evidence shows that Respondent failed to respond to twenty-three (23) letters from Disciplinary Counsel.

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

in similar conduct and to restore the faith of the victims in this case and of the general public in the integrity of the legal profession.

V. CONCLUSION

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

A. That Respondent's law license be suspended for one year for case No. 13-0508 and case No. 13-1148, and each suspension would run concurrent with the other;

B. That Respondent shall be required to petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure;

C. That upon reinstatement, Respondent will remain on probation for a period of one year;

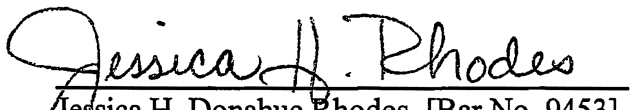
D. That Respondent's practice shall be supervised for a period of one year by an attorney agreed upon between the Office of Disciplinary Counsel and Respondent. The goal of the supervised practice will be to improve the quality and effectiveness of Respondent's law practice to the extent that Respondent's sanctioned behavior is unlikely to recur;

E. That Respondent shall complete nine hours of CLE during the next reporting period, 2014-2016, in addition to what he is otherwise required to complete to maintain his active license to practice in the area of ethics and law office management; and

F. That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

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, Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 4th day of September, 2014, served a true copy of the foregoing **"Brief of the Lawyer Disciplinary Board"** upon Respondent Ronald S. Rossi by mailing the same via United States Mail with sufficient postage, to the following address:

Ronald S. Rossi, Esquire
Post Office Box 698
Charles Town, West Virginia 25414

Jessica H. Rhodes

Jessica H. Donahue Rhodes

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