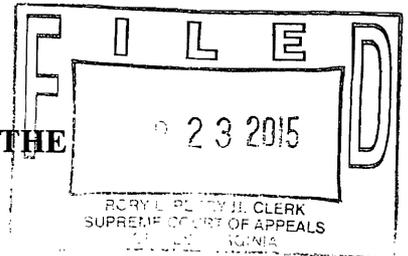


**BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

Nos. 13-0748 & 14-0349

DAVID S. HART,

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 David S. Hart, (hereinafter “Respondent”), arising as the result of two separate Statement of Charges. The first Statement of Charges, case No. 13-0748, was filed with the Supreme Court of Appeals of West Virginia on or about July 30, 2013. The second Statement of Charges, case No. 14-0349, was filed with the Supreme Court of Appeals of West Virginia on April 11, 2014.

1. SUPREME COURT NO. 13-0748

Formal charges were filed against Respondent David S. Hart with the Clerk of the Supreme Court of Appeals on or about July 30, 2013, and served upon Respondent via certified mail by the Clerk on August 1, 2013. Disciplinary Counsel filed her mandatory discovery on or about August 21, 2013.

Because Respondent failed to file an answer to the Statement of Charges, and also failed to provide his mandatory discovery, Disciplinary Counsel filed “Disciplinary Counsel’s Motion to Deem Admitted the Factual Allegations in the Statement of Charges” and “Motion to Exclude Testimony of Witnesses and Documentary Evidence or Testimony of Mitigating Factors” on October 17, 2013. At the November 4, 2013 prehearing, Respondent indicated he wanted to file an answer to the charges. The Hearing Panel Subcommittee (hereinafter “HPS”) gave Respondent until the end of the business day on November 5, 2013, to file an answer and held in abeyance any ruling on Disciplinary Counsel’s motions. The hearing date of November 13, 2013, was confirmed by all parties.

Respondent filed an answer to the Statement of Charges on November 5, 2013. In the afternoon of November 12, 2013, Respondent filed “Respondent’s Motion to Continue Hearing,”

stating he believed his malpractice insurance carrier would pay for representation in the disciplinary matter. On November 12, 2013, Chairperson Yurko advised the parties via telephone that the continuance would be granted. A telephonic status conference was held on November 13, 2013, and Respondent agreed to waive the time requested to hold an evidentiary hearing on the record. The HPS set new prehearing and hearing dates, and denied Disciplinary Counsel's "Motion to Deem Admitted the Factual Allegations in the Statement of Charges" and "Motion to Exclude Testimony of Witnesses and Documentary Evidence or Testimony of Mitigating Factors." Respondent was directed to provide his discovery to Disciplinary Counsel on or before December 13, 2013.

Because Respondent again failed to provide any discovery, Disciplinary Counsel filed "Disciplinary Counsel's Renewed Motion to Exclude Testimony of Witnesses and Documentary Evidence or Testimony of Mitigating Factors" on December 18, 2013. This motion was granted at the telephonic prehearing held on January 2, 2014. The hearing date of January 23, 2014, was confirmed at the prehearing.

At approximately 5:00 p.m. on January 22, 2014, Respondent filed a second motion to continue. The HPS convened the scheduled hearing at 10:00 a.m. on January 23, 2014, and addressed Respondent's motion at the commencement of the hearing. The HPS denied Respondent's motion finding that he had not shown good cause.

The hearing proceeded as scheduled and was held in Charleston, West Virginia, on January 23, 2014. The HPS was comprised of Richard M. Yurko, Esquire, Chairperson; John W. Cooper, Esquire, and Dr. K. Edward Grose, layperson. Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. Respondent appeared *pro se*. The HPS heard testimony from Duane Hammock, Orban Schlatman, Jr., Greta Walker, Edward Banks, Casey M. Johnson, Tony R. Henderson, Jr., and Respondent. In addition, ODC Exhibits 1-67 were admitted into evidence.

The hearing transcript was provided to Disciplinary Counsel on February 11, 2014. On March 24, 2014, Disciplinary Counsel submitted her “Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions” regarding the final disposition of this matter to the HPS of the Lawyer Disciplinary Board. Respondent did not file any proposed findings.

Thereafter, on April 11, 2014, a second Statement of Charges was filed against Respondent. The HPS, with Respondent’s agreement, determined that it would file one recommendation for both proceedings.

2. SUPREME COURT NO. 14-0349

Formal charges were filed against Respondent with the Clerk of the Supreme Court of Appeals on or about April 11, 2014, and served upon Respondent via certified mail by the Clerk on April 15, 2014. The same HPS was assigned to hear this matter. Disciplinary Counsel filed her mandatory discovery on or about April 28, 2014. Respondent filed his Answer to the Statement of Charges on or about May 19, 2014. Because Respondent failed to provide his mandatory discovery, which was due on or before May 28, 2014, Disciplinary Counsel filed a “Motion to Exclude Testimony of Witnesses And/or Documentary Evidence or Testimony of Mitigating Factors” on July 7, 2014. The HPS granted this motion at the telephonic prehearing held on July 18, 2014.

The hearing in this matter was initially scheduled for August 1, 2014, in Charleston, West Virginia. On July 31, 2014, Respondent filed a motion to continue the matter based on illness. The HPS granted the motion and the hearing was subsequently rescheduled for September 18, 2014.

Thereafter, this matter proceeded to hearing in Charleston, West Virginia, on September 18, 2014. The HPS was comprised of Richard M. Yurko, Esquire, Chairperson; John W. Cooper, Esquire, and Dr. K. Edward Grose, Layperson. Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. Respondent appeared *pro se*. The

HPS heard testimony from Martin Durham and Respondent. In addition, ODC Exhibits 1-5 were admitted into evidence.

The hearing transcript was provided to Disciplinary Counsel on September 30, 2014. On November 7, 2014, Disciplinary Counsel submitted her “Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions” regarding the final disposition of this matter to the HPS of the Lawyer Disciplinary Board. Respondent did not file any proposed findings.

3. RECOMMENDATION FOR BOTH PROCEEDINGS

On or about January 20, 2015, the HPS issued its decision for both matters and filed with the Supreme Court of Appeals of West Virginia its “Report of the HPS” (hereinafter “Report”). The HPS found that the evidence established that Respondent committed multiple violations of Rules 1.1, 1.3, 1.4(a), 1.4(b), 1.15(c), 1.16(d), 3.2 and 8.1(b) of the Rules of Professional Conduct¹ for case No. 13-0748; and a violation of Rule 8.1(b) of the Rules of Professional Conduct for case No. 14-0349.² The HPS issued the following sanctions for both cases: (1) That Respondent’s law license be suspended for one year; (2) That prior to petitioning for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, Respondent issue refunds to Casey M. Johnson in the amount of \$2,650.00 and Charles E. Banks in the amount of \$5,200.00, and provide proof thereof to ODC; (3) That Respondent issue an itemized statement of account to Tony R. Henderson, Jr., and provide proof thereof to ODC; and (4) That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.³

¹ All references to the Rules of Professional Conduct are to the version of the Rules of Professional Conduct in effect prior to January 1, 2015.

² The HPS found that Respondent did not violate Rules 1.3, 1.4 and 1.15 of the Rules of Professional Conduct in case No. 14-0349 as alleged in the Statement of Charges.

³ The HPS made no recommendation with respect to reinstatement. *Lawyer Disciplinary Board v. John C. Scotchel, Jr.*, 2014 WL 6734013 (Case No. 11-0728, Slip Op. (WV 11/25/14)).

On or about February 12, 2015, the Office of Disciplinary Counsel filed its formal objection to the HPS's Recommendation pursuant to Rules 3.11 and 3.13 of the Rules of Lawyer Disciplinary Procedure.

B. FINDINGS OF FACT

The Office of Disciplinary Counsel (hereinafter "ODC") objects to the recommended decision because the conclusions of law, in regard to the Durham matter, Case No. 14-0349, and the recommended sanction are insufficient in light of the clear and convincing evidence against Respondent and does not comport with relevant law in West Virginia.

Respondent is a lawyer practicing in Beckley, located in Raleigh County, West Virginia. Respondent was admitted to The West Virginia State Bar on September 29, 1999, by successful completion of the Bar examination. As such, Respondent is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.

1. Walker Complaint, Case No. 13-0748

Complainant Greta Walker filed a complaint against Respondent on or about October 20, 2011. Walker retained Respondent to represent her in a divorce case involving a Qualified Domestic Relations Order (QDRO) regarding a 401(k) account with American Century Investments, an account allegedly held by her ex-husband. [ODC Ex. 1; Bates Nos. 1-2]. A Temporary Order was issued in the divorce case on or about August 27, 2007, prohibiting both parties from making "any withdrawal from any retirement account, 401(k), pension or other such retirement account held by that party and in that party's name as a result of any period of employment during the parties' marriage. . . ." Walker alleged that Respondent failed to forward this order "freeze[ing]" the account. [ODC Ex.1; Bates Nos. 10-13; *See also* ODC Ex. 17; Bates Nos. 493-497; 1/23/14 Hrg. Trans p. 47]. The Final Order stated that Walker was "entitled to an equitable distribution of the [ex-

husband's] 401(k) account, with [Walker] being entitled to receive an amount equal to one-half of the money or assets held in the 401(k) account at the time of the parties' separation on June 2, 2007. Counsel for [Walker] shall be responsible for the preparation of a [QDRO] necessary for the division of the [ex-husband's] 401(k)." Walker alleged that Respondent failed to prepare the QDRO, therefore she did not receive her equitable share from the 401(k). [ODC Ex. 1; Bates Nos. 4-9; *See also* ODC Ex. 17; Bates Nos. 487-492; 1/23/14 Hrg. Trans pp. 51-3].

Walker contacted Respondent on numerous occasions to discuss this situation, but Respondent did not return her telephone calls. She attempted to obtain information about the matter herself, but was repeatedly told to contact her attorney. [ODC Ex. 1; Bates No. 2; 1/23/14 Hrg. Trans pp. 49, 52]. By letter dated October 28, 2011, ODC sent Respondent a copy of the complaint and directed him to file a response to the ethics complaint within twenty (20) days. [ODC Ex. 2; Bates Nos. 14-15]. After receiving no response, on or about December 7, 2011, ODC sent a second letter by certified and first class mail directing Respondent to file a response by December 20, 2011, and advising him that his failure to do so may result in a subpoena *duces tecum* being issued for his appearance at ODC for a sworn statement, or the allegations in the complaint would be deemed admitted and the matter would be referred to the Investigative Panel of the Lawyer Disciplinary Board. This letter was delivered on or about December 8, 2011. [ODC Ex. 3; Bates Nos. 16-18]. On December 22, 2011, Respondent requested an additional ten (10) days to provide his response. This request was granted. [ODC Ex. 4; Bates No. 19].

On or about January 3, 2012, Respondent provided a verified response to the complaint. Respondent stated that Walker was to provide a copy of the Temporary Order to the investment account holder, American Century. [ODC Ex. 5; Bates Nos. 20-27]. After the Final Order was issued, Respondent stated he attempted to prepare the QDRO, but encountered problems. While Respondent was unable to recall any specific problems and had no notes or correspondence with

American Century, he stated he would contact American Century to obtain information regarding the account and would forward that information upon its receipt. [ODC Ex. 5; Bates No. 21]. Respondent maintained he had not heard from Walker for some time, but noted she could have made an appointment with his office to discuss the matter if he was unavailable when she called. [Id.].

On or about March 15, 2012, ODC requested a status update from Respondent regarding his progress in completing the QDRO, as well as copies of any correspondence directed to American Century regarding the same. [ODC Ex. 6; Bates No. 28]. After receiving no response from Respondent, on or about May 22, 2012, ODC again requested that Respondent provide a status update and copies of correspondence with American Century via certified mail. Respondent was advised that the request was a lawful demand for information within the meaning of Rule 8.1(b) of the Rules of Professional Conduct. Respondent received this letter on or about May 24, 2012. Respondent again failed to respond. [ODC Ex. 7; Bates Nos. 29-31]. Disciplinary Counsel caused a subpoena *duces tecum* to be issued for Respondent's appearance at ODC on August 30, 2012, to give a sworn statement concerning this matter. [ODC Ex. 8; Bates Nos. 32-34; ODC Ex. 9; Bates Nos. 35-39; ODC Ex. 10; Bates No. 40].

At his August 30, 2012 sworn statement, Respondent maintained he had informed Walker she needed to provide the Temporary Order to the account administrator because she had the information regarding the account. [ODC Ex. 11; Bates Nos. 49; See also ODC Ex. 5; Bates No. 20]. Respondent said one of his assistants had been working on this matter and he believed the assistant had spoken to American Century. However, the assistant left his employment in March of 2012, and Respondent was unsure if the Temporary Order had actually been sent. Respondent said he believed the assistant had also sent a draft of the QDRO to American Century. When he reviewed the file, Respondent realized that the QDRO had not been entered. [ODC Ex. 11; Bates Nos. 50-53]. Respondent stated that the QDRO would need to be submitted to the Court and to the ex-husband's

attorney, and that he planned to do so, as well as contact Walker. [ODC Ex. 11; Bates Nos. 53-54]. When questioned about his lack of response to ODC, Respondent admitted “there’s no good reason why I didn’t [respond].” [ODC Ex. 11; Bates No. 57; 1/23/14 Hrg. Trans. p. 140].

On or about November 7, 2012, Complainant notified ODC that while Respondent had submitted the QDRO, she had received a letter from American Century indicating there were no investments with their company. Walker contacted American Century and was advised that the account was with JPMorgan Retirement Plan Services. Complainant attempted to contact Respondent to advise him of this information, but she was successful in having Respondent return her calls. [ODC Ex. 13; Bates No. 478; 1/23/14 Hrg. Trans pp. 51-3].

On or about December 17, 2012, a copy of Complainant’s letter was forwarded to Respondent requesting his response within ten (10) days. [ODC Ex. 15; Bates No. 481]. Respondent did not respond. On or about January 17, 2013, ODC again requested Respondent to reply to Walker’s letter via certified mail. Respondent was advised that the request was a lawful demand for information within the meaning of Rule 8.1(b) of the Rules of Professional Conduct. Respondent received this letter or about January 18, 2013. [ODC Ex. 16; Bates No. 482-483]. He did not respond. [1/23/14 Hrg. Trans. pp. 139-140].

2. Schlatman Complaint, Case No. 13-0748

Complainant Orban Schlatman, Jr., and his wife paid Respondent \$7,500.00 in or about May of 2010 to file an appeal of Schlatman’s criminal conviction for second degree sexual assault following a jury trial. Respondent filed an untimely appeal on or about May 26, 2011. By Order entered June 21, 2011, the Supreme Court of Appeals of West Virginia remanded the matter to the Circuit Court of Fayette County to “promptly resentence [Schlatman] for purposes of appointment of counsel and the filing of an appeal . . . [and] dismissed [the matter] from the docket of this Court.” Schlatman was resented on or about October 19, 2011, and on or about November 21, 2011,

Respondent filed a Notice of Intent to Appeal. Schlatman filed his complaint against Respondent on or about February 24, 2012, alleging that Respondent had not perfected the appeal. Both Schlatman and his wife had attempted to contact Respondent numerous times, but with little success. Schlatman also stated that Respondent told them that the appeal had been filed; however, when he or his wife contacted the Supreme Court, they are informed that an Appeal had not been filed. [ODC Ex. 18; Bates Nos. 498-499].

By letter dated February 27, 2012, ODC sent Respondent a copy of the ethics complaint and directed him to file a response within twenty (20) days. [ODC Ex. 19; Bates Nos. 500-501]. After receiving no response, on or about April 13, 2012, ODC sent a second letter by certified and first class mail directing Respondent to file a response by April 25, 2012, and advising him that his failure to do so may result in a subpoena *duces tecum* being issued for his appearance at ODC for a sworn statement, or the allegations in the complaint would be deemed admitted and the matter would be referred to the Investigative Panel of the Lawyer Disciplinary Board. Respondent received this letter on or about April 17, 2012. [ODC Ex. 23; Bates Nos. 504-506].

On or about May 3, 2012, Respondent provided a verified response. Respondent acknowledged that he missed the first deadline for filing an appeal but had filed a motion with the Supreme Court to extend the time frame to file the petition. The matter was remanded to the Circuit Court and Respondent prepared an Order re-sentencing Schlatman. Respondent then filed a second Notice of Appeal with the Circuit Court. Respondent said he later realized that the Notice should have been filed with the Supreme Court. Respondent stated that he then filed the Notice with the Supreme Court along with a Motion to Extend Time. At the time he filed his response, Respondent indicated that he had not yet received any response from the Supreme Court regarding this matter. Finally, Respondent stated he provided Complainant with copies of the filings. [ODC Ex. 23; Bates Nos. 508-510]. Respondent maintained he had spoken with Complainant and Complainant's wife

on several occasions. [ODC Ex. 23; Bates No. 508-509]. Respondent also offered to keep the Office of Disciplinary Counsel updated on the status of the matter. [ODC Ex. 23; Bates No. 509].

On or about June 25, 2012, Schlatman sent a letter to ODC confirming that he had received the copies of the filings from Respondent. However, Schlatman alleged that Respondent misrepresented about the status of the Appeal, and pointed out that it had been two years, and Respondent had yet to file a properly filed Appeal. [ODC Ex. 24; Bates Nos. 511-513].

On or about June 25, 2012, a copy of Schlatman's letter was sent to Respondent, requesting a response within ten (10) days. Respondent was also advised that the request was a lawful demand for information within the meaning of Rule 8.1(b) of the Rules of Professional Conduct. Respondent failed to respond. [ODC Ex. 26; Bates No. 515]. On or about August 13, 2012, via certified mail, ODC again requested that Respondent reply to Complainant's letter by August 24, 2012. The Return Receipt was received on or about August 16, 2012. Respondent was again advised that the request was a lawful demand for information within the meaning of Rule 8.1(b) of the Rules of Professional Conduct and that failure to respond could result in disciplinary action. [ODC Ex. 28; Bates Nos. 517-519]. By letter received on or about September 11, 2012, Respondent stated that he was awaiting entry of a second Order re-sentencing Schlatman.⁴ Once it was entered, Respondent stated he would re-file the previously prepared Notice of Appeal on Schlatman's behalf. Respondent stated that he has informed Schlatman of these developments. [ODC Ex. 30; Bates Nos. 521-523].

On or about December 17, 2012, ODC requested a status update from Respondent, requesting a reply within ten (10) days. [ODC Ex. 31; Bates No. 524]. Respondent did not respond. On or about January 17, 2013, ODC again requested a status update from Respondent via certified mail.

⁴ Respondent failed to include the fact that this Court had refused his motion for extension of time to file the notice of appeal. [ODC Ex. 37; Bates No. 559].

Respondent received this letter on or about January 18, 2013. [ODC Ex. 32; Bates No. 525]. Respondent did not respond.

On or about February 14, 2013, Schlatman notified ODC that Respondent had blocked Schlatman's calls. Schlatman stated that Mrs. Schlatman contacted the Supreme Court and was informed that no appeal had been filed. [ODC Ex. 33; Bates No. 527]. On or about February 20, 2013, ODC contacted the Supreme Court of Appeals of West Virginia to inquire about the status of Schlatman's appeal. ODC was informed that nothing had been filed on Schlatman's behalf. [ODC Ex. 37; Bates No. 630].

A copy of Complainant's letter was sent to Respondent on or about February 20, 2013, via certified mail. Respondent received this letter on or about February 21, 2013. [ODC Ex. 34; Bates Nos. 528-529]. On or about March 6, 2013, Respondent informed ODC that Schlatman's appeal was perfected on or about February 25, 2013, and he "provided Schlatman a copy of the Brief of the Petitioner and various volumes of the Appendix of Exhibits. . . ." [ODC Ex. 35; Bates No. 530].⁵

3. Henderson Complaint, Case No. 13-0748

Complainant Tony Henderson Jr., filed a complaint with ODC on or about July 24, 2012. Complainant retained Respondent to represent him in a child support case in or about March 2011. Complainant alleged that Respondent neglected the matter and failed to respond to requests for information about the case. On or about June 27, 2012, Complainant terminated Respondent's representation and he requested a refund of his retainer fee. While Complainant stated he received a \$1,000.00 refund from Respondent from the \$3,500.00 retainer he had paid, Complainant also requested an accounting of the retainer fee but had not received one from Respondent. Finally,

⁵ Again, Respondent failed to advise that a Notice of Sanction had been filed against him by the Supreme Court of Appeals of West Virginia because he had failed to comply with the Supreme Court's scheduling order. The Notice of Sanction directed him to perfect the appeal within ten days of receipt of the order, and to show good cause why the appeal had not been timely perfected. [ODC Ex. 37; Bates No. 594].

Complainant was concerned that time limitations in his case may have expired. [ODC Ex. 39; Bates Nos. 685-686].

By letter dated July 30, 2012, ODC sent Respondent a copy of the complaint and directed him to file a response to the ethics complaint within twenty (20) days. [ODC Ex. 40; Bates Nos. 687-688].

On or about August 30, 2012, Complainant faxed additional correspondence to ODC. Complainant stated that he also paid \$4,000.00 to Respondent on or about February 22, 2011, and made another payment of \$3,750.00 on or about March 22, 2012. Complainant requested an accounting of these payments, as well. Complainant also stated that Respondent ignored numerous phone messages and e-mail messages, and canceled scheduled meetings. [ODC Ex. 41; Bates Nos. 689-690].

After receiving no response, on or about September 28, 2012, ODC sent a second letter, along with a copy of Complainant's additional correspondence, by certified and first class mail directing Respondent to file a response by October 8, 2012, and advising him that his failure to do so may result in a subpoena *duces tecum* being issued for his appearance at the Office of Disciplinary Counsel for a sworn statement, or the allegations in the complaint would be deemed admitted and the matter would be referred to the Investigative Panel of the Lawyer Disciplinary Board. Respondent received this letter, although the date stamp on the return receipt was illegible. [ODC Ex. 691-693].

On or about December 17, 2012, ODC again sent a letter to Respondent via certified mail notifying him of the complaint. The Return Receipt indicates that this letter was received on or about December 19, 2012. [ODC Ex. 43; Bates Nos. 694-696]. Respondent did not file any response in the Henderson matter.

4. Johnson Complaint, Case No. 13-0748

Respondent had represented Complainant Casey Johnson in a divorce case and she hired Respondent again to represent her on a custody modification. Johnson met with Respondent on or about January 4, 2011. Johnson stated Respondent asked her to pay half of a \$2,500.00 retainer fee, as well as the filing fees, within forty-five (45) days and he would initiate proceedings. Complainant said she paid the filing fees, half of the retainer and then made a final payment on or about June 6, 2011. [ODC Ex. 44; Bates Nos. 697-704].

Johnson alleged she did not hear from Respondent again until approximately August 2011, when he called and advised that the modification had not yet been filed. Respondent told her that it “fell through the cracks” but he assured her the modification would be filed within a week. [ODC Ex. 44; Bates No. 698]. Johnson stated she had not heard from Respondent since that telephone conversation, despite calling his office numerous times and leaving voice mails, as well as messages with his staff. [Id.] Johnson stated she had faxed a letter to Respondent in or about April 2012 “informing him his services would no longer be needed.” Johnson also requested a refund of her retainer fee and the filing fees she paid, and provided Respondent with her address and telephone number so he could make arrangements to reimburse her. A copy of this letter and copies of checks paid to Respondent were provided with the complaint, which was filed on or about August 28, 2012. [ODC Ex. 44; Bates Nos. 698, 701-702].

By letter dated August 29, 2012, ODC sent Respondent a copy of the complaint and directed him to file a response thereto within twenty (20) days. [ODC Ex. 45; Bates Nos. 705-706]. After receiving no response, on or about December 17, 2012, ODC sent a second letter by certified and first class mail directing Respondent to file a response by January 2, 2013, and advising him that his failure to do so may result in a subpoena *duces tecum* being issued for his appearance at ODC for a sworn statement, or the allegations in the complaint would be deemed admitted and the matter

would be referred to the Investigative Panel of the Lawyer Disciplinary Board. Respondent received this letter on or about December 19, 2012. [ODC Ex. 46; Bates Nos. 707-709]. Respondent did not file any response in this matter.

5. Hammock Complaint, Case No. 13-0748

Respondent, as a court appointed attorney, represented Complainant Duane L. Hammock in a criminal matter that proceeded to a jury trial. Respondent was to file an appeal of Hammock's criminal conviction. Complainant requested copies of the evidence used against him, specifically a surveillance CD, audio CD, and a transcript, but he alleged he never received any response from Respondent. Enclosed with his complaint were copies of letters Hammock had written to Respondent, and to the Honorable H. L. Kirkpatrick, III, requesting these items and requesting that a new attorney to be appointed in his case. [ODC Ex. 47; Bates Nos. 710-717; ODC Ex. 49; Bates No. 720; Hrg. Trans. at pp. 11-12]. Hammock filed his complaint on August 31, 2012.

On or about September 6, 2012, ODC sent Respondent a copy of the complaint. [ODC Ex. 48; Bates Nos. 718-719].

On or about September 12, 2012, ODC received Respondent's verified response. Respondent stated that another attorney within his law firm was initially appointed to represent Hammock, however, that attorney left the law firm and Respondent took over. Respondent stated that against his advice, Hammock chose to go to trial. Hammock was found guilty and sentenced to a ten-year determinate sentence. As this was Hammock's second felony, Respondent said the Court was required to add an additional five (5) years to the sentence. Respondent stated he convinced the Court to find that a firearm was not used during the crime because the weapon Hammock used was a BB gun. As a result, Hammock was eligible for parole in three and three quarter (3 3/4) years instead of five (5) years. Respondent stated that he strongly recommended that Hammock take the State's plea offer, which would have resulted in a shorter sentence based on the strength of the

evidence against him. [ODC Ex. 49; Bates Nos. 720-722]. Respondent stated that Hammock's request for new counsel was denied. [ODC Ex. 49; Bates No. 721]. Following Hammock's conviction, Respondent filed motions requesting a new trial which were denied. Respondent also filed a Notice of Appeal, and provided a copy to Hammock. Respondent maintained he had previously provided Hammock a complete copy of his file, including the items Hammock had listed in the complaint. Respondent stated he would keep Hammock updated on the status of the case. [ODC Ex. 49; Bates Nos. 720-721].

On or about September 26, 2012, ODC received Hammock's response to Respondent's letter. Hammock acknowledged that Respondent encouraged him to take the plea offered by the State. Hammock requested that Respondent still send him the items he had requested. [ODC Ex. 50; Bates No. 723].

On or about December 19, 2012, ODC requested an update on the status of the appeal from Respondent. Respondent did not respond. [ODC Ex. 51; Bates No. 724]. On or about January 7, 2013, ODC again requested an update on the status of Hammock's appeal from Respondent via certified mail. Respondent received this letter on or about January 8, 2013. [ODC Ex. 52; Bates Nos. 725-727]. Respondent did not respond.

On or about January 29, 2013, ODC received a letter from Hammock informing ODC of his new address and stating that he never received the items he had requested from Respondent. Hammock stated that Respondent's response had indicated that these items had been provided to him, but Hammock denied he had received the items. [ODC Ex. 53; Bates No. 728].

By letter dated February 4, 2013, ODC forwarded a copy of Complainant's letter to Respondent via certified mail and requested a response. Respondent received this letter on or about February 5, 2013. [ODC Ex. 55; Bates Nos. 730-731].

On or about February 5, 2013, ODC received a certified docket sheet regarding Hammock's case indicating that a Notice of Appeal was filed on or about September 16, 2011. The docket sheet indicated that transcripts of the arraignment and motions hearing, jury trial transcripts volumes 1, 2, 3, and the sentencing hearing transcript were filed on November 8, 2011. The last entry on the docket sheet indicated that Hammock had been re-sentenced on September 10, 2012. [ODC Ex. 56; Bates Nos. 732-734].

On or about February 26, 2013, Respondent responded to ODC advising that the appellate brief and appendix record for Hammock's case was filed.⁶ [ODC Ex. 57; Bates Nos. 735-736; See also ODC Ex. 61; Bates Nos. 742-824 [Appellate Record]. On or about March 6, 2013, ODC received a letter from Hammock, again informing ODC that he had not received the items he requested from Respondent. [ODC Ex. 58; Bates No. 737].

6. Banks Complaint, Case No. 13-0748

On or about September 5, 2012, Complainant Charles Banks filed a complaint with ODC. Banks hired Respondent on or about December 23, 2008, to contest the administration of his father's estate. Banks paid Respondent a flat fee of \$5,000.00, plus filing fees. [ODC Ex. 64; Bates Nos. 825-836]. Banks also provided a copy of the December 23, 2009 contract he entered into with Respondent, as well as copies of the cashier's check paid to Respondent in the amount of \$5,000.00. [ODC Ex. 64; Bates Nos. 829-833]. Banks also provided a copy of a letter dated January 25, 2010, he received from Respondent, stating that the petition was prepared and that he was requesting payment of the \$145.00 filing fee, and a \$75.00 payment for the service of process. Respondent's letter stated he planned to have the petition ready to file in the Circuit Court of Fayette County, West

⁶ However, Respondent failed to advise that a Notice of Sanctions had been filed against him for failing to comply with the Supreme Court of Appeals of West Virginia's scheduling order. [ODC Ex. 61; Bates No. 742].

Virginia, by the first week of February, 2010. [ODC Ex. 64; Bates Nos. 828, 834]. Banks alleged that since that time, Respondent has failed to communicate with him regarding the case. [ODC Ex. 64; Bates No. 826].

By letter dated September 7, 2012, ODC sent Respondent a copy of the complaint and directed him to file a response thereto within twenty (20) days. [ODC Ex. 65; Bates Nos. 837-838]. After receiving no response, on or about December 17, 2012, ODC sent a second letter by certified and first class mail directing Respondent to file a response by January 2, 2013, and advising him that his failure to do so may result in a subpoena *duces tecum* being issued for his appearance at ODC for a sworn statement, or the allegations in the complaint would be deemed admitted and the matter would be referred to the Investigative Panel of the Lawyer Disciplinary Board. Respondent received this letter on or about December 19, 2012. [ODC Ex. 66; Bates Nos. 839-841]. Respondent did not file any response in this matter.

7. Durham Complaint, Case No. 14-0349

Complainant Martin Durham filed a complaint against Respondent on or about January 23, 2014. Durham stated he spoke with Respondent on or about September 27, 2013, regarding a lawsuit he wanted to file against Bobby Shifflett and Briar Patch Gold Links, PLLC, allegedly resulting from a November 11, 2009 assault on Durham by Mr. Shifflett, an employee of Briar Patch Golf Links. Durham stated Respondent agreed to contact him again, but as of January 5, 2014, Respondent had not done so. Durham alleged he does not know if Respondent ever filed anything on his behalf in this matter. [ODC Ex. 1; Bates Nos. 1-4; 9/18/14 Hrg. Trans. at pp. 8-14].

Durham also alleged that Respondent had represented him in another matter, a civil case against Nationwide Insurance following an motor vehicle accident (Raleigh County Circuit Court Case number 09-C-1169-H). Durham stated the case settled for \$18,000.00. Respondent received \$6,000.00 and Durham received \$5,955.00. The remaining money (\$4,154.04 according to Durham)

was to be paid to Advantra Freedom. Durham contacted Advantra Freedom to confirm that they had received the money from Respondent, but was informed that Advantra was no longer in business. Durham then contacted the Social Security Administration and was told he owed nothing. Thereafter, Durham contacted Respondent about releasing the remaining money Respondent had been holding because Advantra Freedom was no longer in business and there were no other liens. When Respondent failed to respond to his inquiries, Durham filed a civil suit (Raleigh County Magistrate Court Case number 13-C-292) against Respondent on or about April 8, 2013, “to acquire the monies that [Respondent] retained for Advantra Freedom.... On September 27, 2013, and [sic] order of dismissal was reached and [Respondent] presented a check to [Durham] for the amount of \$4,154.04.” [ODC Ex. 1; Bates Nos. 1-4, 5-20; ODC Ex. 4; 9/18/14 Hrg. Trans. at pp. 15-24].

By letter dated January 27, 2014, ODC sent Respondent a copy of the complaint and directed him to file a response to the ethics complaint within twenty (20) days. [ODC Ex. 2]. After receiving no response, on or about March 7, 2014, ODC sent a second letter by certified and first class mail directing Respondent to file a response by March 21, 2014, and advising him that his failure to do so may result in a subpoena *duces tecum* being issued for his appearance at ODC for a sworn statement, or the allegations in the complaint would be deemed admitted and the matter would be referred to the Investigative Panel of the Lawyer Disciplinary Board. Respondent received this letter on or about March 10, 2014. [ODC Ex. 3]. Respondent did not respond to this complaint filed against him. [9/18/14 Hrg. Trans. at pp. 67-68].

C. CONCLUSIONS OF LAW

The HPS found that Respondent failed to work diligently on Walker’s matter and failed to communicate with her in violation of Rules 1.3, 1.4(a) and (b) of the Rules of Professional Conduct.⁷

⁷ **Rule 1.3. Diligence.**

A lawyer shall act with reasonable diligence and promptness in

The HPS also found that Respondent failed to respond to Disciplinary Counsel in violation of Rule 8.1(b) of the Rules of Professional Conduct.⁸ In the Schlatman matter, the HPS found that Respondent did not diligently work on Schlatman's appeal and failed to respond to Schlatman's requests for information in violation of Rules 1.3 and 1.4(a) of the Rules of Professional Conduct. Respondent was also found to have violated Rule 1.1 of the Rules of Professional Conduct in the Schlatman complaint because he failed to properly file at least two appeals of Schlatman's criminal conviction.⁹ Finally, the HPS found that Respondent engaged in dilatory practices which brought the administration of justice into disrepute, and failed to make reasonable efforts consistent Schlatman's objective in violation of Rule 3.2 of the Rules of Professional Conduct.¹⁰ In the Henderson matter, Respondent was found to have violated Rules 1.3, 1.4(a) and (b). The HPS also found that because Respondent failed to provide an accounting to Henderson when one was requested, he violated Rules

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 informed decisions regarding the representation.

⁸ **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.

⁹ **Rule 1.1. Competence.**

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

¹⁰ **Rule 3.2. Expediting litigation.**

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

1.15(c) and 1.16(d) of the Rules of Professional Conduct.¹¹ Respondent also violated Rule 8.1(b) because he failed to respond to requests for information from ODC. In the Johnson matter, Respondent's lack of diligence and failure to communicate with Johnson violated Rules 1.3 and 1.4(a) and (b) of the Rules of Professional Conduct. Respondent also violated Rule 1.16(d) by failing to issue a refund to Johnson after his discharge from the representation. Finally, Respondent violated Rule 8.1(b) because he failed to respond to requests for information from ODC. In the Hammock matter, the HPS found that Respondent failed to work diligently on Hammock's appeal and failed to respond to Hammock's requests for information in violation of Rules 1.3 and 1.4(a) of the Rules of Professional Conduct. Respondent was also found to have violated Rule 1.1 in the Hammock matter. Again, the HPS found that Respondent's dilatory practices brought the administration of justice into disrepute, and he failed to make reasonable efforts consistent with Hammock's objective in violation of Rule 3.2 of the Rules of Professional Conduct. Respondent was found to be in violation of the Rules 1.3, 1.4(a) and (b), 1.16(d) and 8.1(b) in the Banks matter for failing to perform work in a diligent matter, for failing to communicate with Banks, for failing to return an unearned retainer fee, and for failing to respond to ODC's requests for information.

¹¹ **Rule 1.15. Safekeeping property.**

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion that is in dispute shall be kept separate by the lawyer until dispute is resolved.

Rule 1.16 Declining or terminating representation

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

In the Durham matter, the HPS only found that Respondent violated Rule 8.1(b) for failing to respond to ODC's requests for information. The HPS was satisfied with Respondent's explanation of the circumstances relating to the allegations in the Durham complaint. [9/18/14 Hrg. Trans. pp. 72-85]. However, ODC asserts the evidence demonstrates that Respondent failed to comply with his obligations to communicate with Durham about the motor vehicle accident matter and neglected the motor vehicle accident matter to the point that Durham filed suit against Respondent in Magistrate Court in April of 2013 in order to obtain some sort of finalization of his case. [ODC Ex. 4]. Respondent had been holding the remainder of Durham's settlement funds for more than fourteen (14) months when Durham filed the magistrate court case against Respondent. Respondent also acknowledged at the hearing that his last communication with Durham was in January of 2012. [9/18/14 Hrg. Trans. p. 74]. When questioned about his attempts to contact Durham and about any inquires he had made about the alleged outstanding liens, Respondent acknowledged that "[w]hat work had I done? I don't know that I specifically picked up the file and done anything with it." [9/18/14 Hrg. Trans. p. 73]. The evidence clearly supports a finding that Respondent violated his duties owed to Durham with regard to Rules 1.3, 1.4(a) and (b), and 1.15(b) of the Rules of Professional Conduct.¹²

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

¹² **Rule 1.15. Safekeeping property.**

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

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).

The HPS of the Lawyer Disciplinary Board found that Respondent committed multiple violations of Rules 1.1; 1.3; 1.4(a) and (b); 1.15(c); 1.16(d); 3.2 and 8.1(b) of the Rules of Professional Conduct and recommended that Respondent be suspended for one year; that he issue refunds to Johnson and Banks and provide proof thereof to ODC; issue an accounting to Henderson and provide proof thereof to ODC; and pay the costs of two disciplinary proceedings. Respectfully, ODC asserts that there was error by the HPS in also not finding that the clear and convincing evidence demonstrated that Respondent violated Rules 1.3, 1.4(a) and (b) and 1.15(b) in the Durham matter. ODC further asserts that the HPS's recommendation as to sanction is insufficient as applied to these facts and is inconsistent with relevant law.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 19 of the Revised Rules of Appellate Procedure, this Honorable Court's March 3, 2015 Order set this matter for oral argument on Tuesday, May 12, 2015.

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.

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

It is without question that Respondent engaged in conduct in violation of the Rules of Professional Conduct and violated duties to his clients, the public, the legal system and legal profession. The evidence clearly demonstrates that Respondent repeatedly failed to respond to his clients' reasonable requests for information, neglected their cases and continually failed to comply with the ODC's lawful demands for information.

The HPS found that Respondent violated his duties owed to his clients in all of these complaints, except for the Durham matter. Notwithstanding the HPS's inclination to disregard Durham's testimony regarding the golf club incident, Respondent's own testimony about Durham's motor vehicle accident matter provides clear and convincing evidence that he neglected his duties owed to his client. The evidence demonstrates that Respondent failed to respond to Durham's reasonable requests for information, neglected his case to the point that Durham filed suit against Respondent in Magistrate Court in order to have Respondent complete his case and respond to his inquiries about the status of settlement funds which Respondent had withheld. [ODC Ex. 4; *See also* 9/18/14 Hrg Trans. at pp. 73-4].

The HPS found that Respondent violated his duties owed to the legal system and to the legal profession in all of these complaints. Moreover, Respondent's transgressions are serious and amount to an inescapable and severe pattern of misconduct not befitting of an attorney and a severe sanction should be imposed. After being provided notice of the these complaints filed against him, Respondent only provided responses to the Walker, Schlatman, and Hammock complaints. Moreover, even when he initially responded to the Walker complaint, Respondent then failed to provide the requested additional information and filed untimely additional responses in the Schlatman and Hammock complaints. Respondent failed to respond or file any written response whatsoever to the Johnson, Henderson, Banks and Durham complaints. In all of these matters, ODC made multiple attempts to contact Respondent without success. Additionally, as the HPS noted, once

formal charges were filed against Respondent, Respondent failed to timely file answers; failed to file discovery; failed to file responses to ODC's motions; failed to submit witness and exhibit lists; and failed to file proposed findings of fact and conclusions of law after each hearing. A lawyer's duties include maintaining the integrity of the profession. 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. In these seven (7) matters, the record reflects that Respondent failed to respond to twenty-one letters sent by ODC asking for him to respond with information about the complaints. Respondent's repeated failures to respond to the requests of the ODC clearly violates his duties to the legal system and to the profession.

Complaint of Greta J. Walker

Respondent admitted that he failed in his duty to communicate with Walker and that he neglected her matter. [1/23/14 Hrg. Trans. p. 138; 140]. Walker stated that it was her belief that after the entry of the Temporary Order, Respondent was to "freeze" her now ex-husband's 401(k) account in order to preserve the remaining funds after her ex-husband made a sizable withdrawal, and that after the entry of the Final Order in May of 2009, Respondent was to prepare a QDRO regarding her portion of her ex-husband's 401(k) funds. [1/23/14 Hrg. Trans. pp. 50, 54-55]. Walker testified that she tried on numerous occasions after the Final Hearing to contact Respondent to find out the status of the QDRO, but she was unsuccessful in her attempts, except for one time when Respondent returned one of her voicemails. [1/23/14 Hrg. Trans. p. 49]. When Respondent failed to communicate with her after that, she filed the complaint. [Id.] Respondent testified that the QDRO was not filed until 2012, which was more than one year after the filing of the complaint against him, and three years after the entry of the Final Order in Walker's divorce. [1/23/14 Hrg. Trans. p. 138].

Complaint of Orban H. Schlatman, Jr.

Schlatman and his wife paid Respondent \$7,500.00 to represent Schlatman on the appeal of his criminal conviction for second degree sexual assault after a jury trial. [1/23/14 Hrg. Trans. pp. 33-35]. Schlatman was initially sentenced on June 28, 2010, to a term of incarceration for an indeterminate period of not less than ten years and not more than twenty-five years. The evidence clearly establishes that Respondent neglected Complainant's matter and that Respondent failed to perfect Mr. Schlatman's appeal during a time period stretching nearly three years, and through at least two failed attempts to properly file a Notice of Appeal. Respondent first attempted to file Schlatman's appeal on May 26, 2011. This appeal was not timely filed and by Order entered June 21, 2011, the Supreme Court of Appeals of West Virginia remanded the matter to the Circuit Court of Fayette County to "promptly resentence [Schlatman] for purposes of appointment of counsel and the filing of an appeal . . . [and] dismissed [the matter] from the docket of this Court." [ODC Ex. 37; Bates No. 532]. In his Motion for Extension of Time to File Petition for Appeal, Respondent admitted that "[t]he failure to file the appeal on a timely basis was due to the neglect of the petitioner's counsel, and was through no fault of the petitioner." [ODC Ex. 37; Bates No. 533].

After Schlatman was re-sentenced on or about October 19, 2011, Respondent again attempted to file Schlatman's appeal. However, for the second time, Respondent again filed the Notice of Intent petition for appeal untimely on or about May 2, 2012. [ODC Ex. 37; Bates No. 559]. Moreover, Respondent admitted in his Motion for Extension of Time to File Notice of Appeal, that he filed the Notice of Appeal on the incorrect form and in the wrong court. [ODC Ex. 37; Bates No. 561]. By Order entered May 15, 2012, the Supreme Court of Appeals "refuse[ed] said motion for extension to file notice of appeal as the appeal period of four months from the October 19, 2011 re-sentencing order has expired." [ODC Ex. 37; Bates No. 559]. The matter was remanded for a second time for

re-sentencing and Respondent was “directed to properly complete and file a notice of appeal within thirty days of entry of the order of resentencing.” [Id.]

Thereafter, Schlatman was re-sentenced on September 12, 2012. [ODC Ex. 37; Bates Nos. 627-629]. Respondent’s third attempt at filing Schlatman’s Notice of Appeal was timely filed on or about October 5, 2012. [ODC Ex. 37; Bates Nos. 601-629]. Thereafter, the Supreme Court entered a Scheduling Order on October 23, 2013, and directed Respondent to perfect the appeal on or about January 14, 2013. [ODC Ex. 37; Bates Nos. 597-596]. However, Respondent failed to comply with the Supreme Court’s directive to perfect the appeal by January 14, 2013, and on January 28, 2013, the Supreme Court of Appeals entered a Notice of Sanction against Respondent directing him to perfect the appeal within ten days of receipt of the order, and show good cause as to why the appeal was not perfected timely. [ODC Ex. 37; Bates No. 594]. On February 26, 2013, the State of West Virginia filed a Motion to Dismiss due to Respondent’s failure to Respondent’s apparent failure to perfect the appeal in accordance with the Supreme Court’s directive. [ODC Ex. 37; Bates Nos. 597-600]. Respondent finally filed his brief on Schlatman’s behalf on or about February 28, 2013, and the State of West Virginia moved to withdraw its Motion to Dismiss. On March 12, 2013, the Supreme Court of Appeals granted the State’s Motion to Withdraw the Motion to Dismiss and entered an Amended Scheduling Order. [ODC Ex. 37; Bates No. 589]. Respondent’s conduct in this matter clearly fell below that which is expected of a competent member of the West Virginia State Bar. Moreover, the evidence demonstrates that Respondent neglected Schlatman’s matter.

Complaint of Tony R. Henderson, Jr.

Respondent’s conduct in this matter violated his duties owed to his client because Respondent failed to provide an itemized statement of services upon Henderson’s request after Henderson terminated Respondent’s representation. [1/23/14 Hrg. Trans. p. 106]. Henderson also testified to his difficulties in communicating with Respondent and the fact that Respondent failed

to return telephone messages and emails. [1/23/14 Hrg. Trans. p. 104]. Respondent admitted at the hearing that he did not prepare any type of accounting or itemized statement reflecting his services for Henderson. [1/23/14 Hrg. Trans. p. 157].

Complaint of Casey M. Johnson

The evidence in this matter clearly demonstrates that Respondent completely neglected Johnson's matter and failed in his duty to communicate with her. On or about January 4, 2011, Johnson retained Respondent to represent her in a custody modification, and she paid him a total of \$2,650.00, which included both a retainer fee and filing fees. [1/23/14 Hrg. Trans. pp. 87-88]. She did not hear again from Respondent until August of 2011, when Respondent admitted to her that her matter had "fallen through the cracks." [1/23/14 Hrg. Trans. pp. 89-90; ODC Ex. 44; Bates No. 697]. Johnson testified that she never heard from Respondent again after that August 2011 telephone call, despite her own attempts to contact him to find out information about her case. [1/23/14 Hrg. Trans. p. 90]. In April of 2012, Johnson faxed Respondent a letter terminating the representation and asked Respondent for a refund. Again, Respondent failed to acknowledge her letter or respond in any way. [1/23/14 Hrg. Trans. p. 91]. Johnson testified that she eventually had to hire another attorney and she paid the attorney \$3,000.00 to complete the matter for which she had hired Respondent in 2011. [1/23/14 Hrg. Trans. pp. 91-92]. She also testified that the matter was not concluded until a hearing in December of 2013. [1/23/14 Hrg. Trans. p. 92]. At the hearing, Respondent admitted that Johnson is owed a refund. [1/23/14 Hrg. Trans. p. 152]. Respondent clearly violated his duties of diligence and communication.

Complaint of Duane L. Hammock

The evidence in this matter demonstrates that Respondent neglected Hammock's case. Respondent was appointed to represent Complainant in a criminal matter that went to a jury trial in May of 2011. [1/23/14 Hrg. Trans. at pp. 11-12]. Hammock was found guilty of first degree robbery.

[ODC Ex. 49, Bates No. 720]. On or about September 13, 2011, Hammock was sentenced to a ten year determinate sentence and, due to the fact that Hammock was a second time felon, an additional five years was added to the sentence. [Id., *See also*, ODC Ex. 56; Bates No. 724]. A Notice of Appeal was filed on or about September 16, 2011, but the appeal was not perfected. [ODC Ex. 56; Bates No. 724].

On or about August 31, 2012, Hammock filed a complaint alleging that Respondent “will not file my appeal,” and included copies of letters he had sent to Respondent to which Respondent had not replied. [ODC Ex. 47; Bates Nos. 710- 717]. ODC notified Respondent of the complaint by letter dated September 6, 2012. [ODC Ex. 48; Bates No. 718]. On or about September 10, 2012, Hammock was re-sentenced by the Circuit Court of Raleigh County. [ODC Ex. 56, Bates No. 734]. Thereafter, Respondent filed a Notice of Appeal on or about September 12, 2012. [ODC Ex. 61, Bates No. 749- 763]. By letter dated September 11, 2012, Respondent filed a response to Hammock’s complaint and advised “I have filed a Notice of Appeal of the conviction, which has been provided to Mr. Hammock.” [ODC Ex. 50; Bates No. 721]. Thereafter, the Supreme Court entered a Scheduling Order on September 24, 2012, and directed Respondent to perfect the appeal on or about January 11, 2013. [ODC Ex. 61; Bates Nos. 747-748]. However, Respondent again failed to comply with the Supreme Court’s directive to perfect the appeal by January 11, 2013, and on January 24, 2013, the State of West Virginia filed a Motion to Dismiss due to Respondent’s failure to file his brief on Hammock’s behalf. [ODC Ex. 743-746]. On January 28, 2013, the Supreme Court of Appeals entered a Notice of Sanction against Respondent directing him to perfect the appeal within ten days of receipt of the order, and show good cause as to why the appeal was not perfected timely. [ODC Ex. 61; Bates No. 742]. Respondent finally filed his brief on Hammock’s behalf on or about

February 26, 2013. [ODC Ex. 61, Bates Nos. 780-807].¹³ It is clear from this evidence that Respondent's conduct in this matter fell below that which is expected of a competent member of the West Virginia State Bar, and that Respondent neglected Hammock's matter, failed to keep him informed as to the status after the filing of the first Notice of Appeal in September of 2011, and failed to make reasonable efforts to expedite Hammock's case consistent with his duty owed to his client.

Complaint of Charles E. Banks

Banks paid a flat fee of \$5,000.00 to Respondent for representation in a will contest. [ODC Ex. 64; Bates Nos. 825-836; Hrg Trans. at pp. 69-70]. On or about January 2010, Banks received a letter from Respondent advising that Respondent had completed the petition and requesting \$200.00 in filing fees. [ODC Ex. 64; Bates No. 828; 1/23/14 Hrg. Trans. p. 70]. In or about July of 2012, Banks wrote a letter to Respondent asking for a refund of the \$5,200.00 he had paid to Respondent because he had been unable to speak to Respondent about his case and Respondent never filed the petition. [ODC Ex. 64; Bates No. 834]. The evidence clearly establishes that Respondent violated the duties of diligence and communication he owed to Banks and owes Banks a refund of the retainer fee and filing fee Banks had paid to him.

Complaint of Martin E. Durham

The evidence demonstrates that Respondent failed to respond to keep Durham informed about the status of his case, neglected his case to the point that Durham filed suit against Respondent in Magistrate Court in order to have Respondent finalize his case and respond to his inquiries about the status of settlement funds which Respondent had holding for more than a year. [ODC Ex. 4]. Moreover, the evidence clearly establishes that Respondent once again failed to comply with ODC's

¹³ The Supreme Court of Appeals affirmed Mr. Hammock's conviction by Memorandum Decision filed on October 18, 2013. [ODC Ex. 63, Bates Nos. 843-846].

lawful demands for information about the complaint that was filed against him by his client. All of these transgressions are serious and amount to an inescapable and severe pattern of misconduct not befitting of an attorney and for which sanction should be imposed.

The HPS found Complainant's testimony not credible and Respondent's explanation of the circumstances to be satisfactory. However, the clear and convincing evidence is that Respondent held the remainder of Durham's settlement funds for more than fourteen (14) months before Durham filed the magistrate case against Respondent in April of 2013. Furthermore, Respondent acknowledged at the hearing that his last communication with Durham was in January of 2012. [9/18/14 Hrg. Trans. p. 74]. When questioned about his attempts to contact Durham and about any inquiries he had made about the alleged outstanding liens, Respondent acknowledged that "What work had I done? I don't know that I specifically picked up the file and done anything with it." [9/18/14 Hrg. Trans. p. 73]. This clear and convincing evidence supports a finding that Respondent violated his duties owed to his client.

2. Respondent acted intentionally and knowingly.

Respondent acted intentionally and knowingly. Respondent acknowledged that he was aware of his clients attempts to contact him and that he had received multiple correspondence from ODC asking him to respond to requests for information. In fact, Respondent could offer no explanation at all. [1/23/14 Hrg. Trans. pp. 140, 180; 9/18/14 Hrg. Trans. p. 68; ODC Ex. 11; Bates No. 57]].

3. The amount of real injury is great.

At hearing, witnesses expressed how they were harmed by Respondent's misconduct. In addition to describing intangible emotional injuries, each of the witnesses testified that as a result of Respondent's misconduct, their trust and confidence in lawyers and the legal system had been seriously affected. Walker stated that "I feel that [the legal system and her dealing with Respondent] really lets people down. When they're counting on something and something is owed to you and

you've went through a hard, stressful time in your life, your attorney is supposed to be there and kind of guide you through it." [1/23/14 Hrg. Trans. p. 54]. Johnson testified that "[i]t makes you leery of who you hire and give your money to." [1/23/14 Hrg. Trans. p. 93]. Respondent's actions clearly negatively impacted his former clients' faith in other lawyers and the legal system. Moreover, Respondent's failure to communicate and his delays in the underlying matters also created potential injury for all of these Complainants. Respondent's noncompliance with the Rules of Professional Conduct is clearly detrimental to the legal system and profession and has brought the legal system and legal profession into disrepute.

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). The following aggravating factors exist in this case: (1) prior disciplinary offenses; (2) substantial experience in the practice of law; (3) pattern and practice of failing to adequately communicate with clients and neglect of their cases; (4) pattern and practice of failing to respond to requests from ODC which constitutes bad faith obstruction of the disciplinary process; (5) multiple offenses; (6) lack of remorse; and (7) indifference to making restitution. 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 expedite cases consistent with the interests of his clients; and failing to respond to the Office of Disciplinary Counsel. Respondent has committed multiple violations of numerous Rules of Professional Conduct during his representation of these Complainants. Respondent has been

a licenced attorney for nearly fifteen years. The Supreme Court has held that “lawyers who engage in the practice of law in West Virginia have a duty to know the Rules of Professional Conduct and to act in conformity therewith.” Lawyer Disciplinary Board v. Ball, 219 W.Va. 296, 633 S.E.2d 241 (2006).

Rule 9.22(a) of the ABA Model Standards for Imposing Lawyer Sanctions also recognizes that prior disciplinary action is an aggravating factor. Respondent was issued a reprimand by the Supreme Court of Appeals of West Virginia on September 13, 2007. On or about March 6, 2007, a Statement of Charges was filed against Respondent alleging violations of Rules 1.3, 1.4(a), 1.4(b) and 8.1(b) of the Rules of Professional Conduct. The underlying charges involved Respondent’s failure, as a court appointed attorney, to timely perfect an appeal of the denial of a Petition for Writ of Habeas Corpus, failure to respond to his client’s inquiries about the status of the appeal, and then Respondent’s failure to respond to ODC after the complaint was filed against him in 2005. By Order of the Supreme Court of Appeals of West Virginia entered on September 13, 2007, Respondent was reprimanded, required to complete six additional hours of continuing legal education during the 2006-2008 reporting year, and directed to pay the costs of the disciplinary proceeding. Respondent was also ordered to file a Motion to Withdraw.¹⁴ [ODC Ex. 67, Lawyer Disciplinary Board v. David S. Hart, Supreme Court No. 33328 (WV 9/13/04) (unreported).

5. There are no mitigating factors present.

In addition to adopting aggravating factors in Scott, the Scott court also adopted mitigating factors in a lawyer disciplinary proceedings 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) *quoting ABA Model*

¹⁴ The Supreme Court’s Order also included specific instructions to Respondent in the event his Motion to Withdraw was denied by the Circuit Court of Raleigh County.

Standards for Imposing Lawyer Sanctions, 9.31 (1992).¹⁵ There are no mitigating factors present in this matter. While Respondent claimed at the hearing that he was suffering from undiagnosed depression during the time frame of these complaints due to his on going divorce, he did not present any medical testimony or evidence or call any witnesses on his behalf. [1/23/14 Hrg. Trans. pp. 133, 179-180]. Moreover, Respondent's divorce is now final and he acknowledged that he is "two years away now away from the situation that's causing [him] to be overwhelmed. . . ." and thus, his current and continuing failures to comply with his obligations under the Rules of Professional Conduct cannot be explained by any assertions of "undiagnosed depression" for which absolutely no medical evidence was submitted. [1/23/14 Hrg. Trans. p. 180].

Respondent's alleged undiagnosed depression is clearly not sufficient to mitigate any sanction in this matter. In Lawyer Disciplinary Board v. Dues, 218 W.Va. 104, 624 S.E.2d 125 (2005), the Supreme Court of Appeals of West Virginia 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." In this case, there is no clear and convincing evidence to establish that Respondent suffered any mental disability or that the alleged disability caused the misconduct because it appears that Respondent never sought treatment. Likewise, Respondent's cannot show that

¹⁵ The Scott Court held that mitigating factors which may be considered in determining the appropriate sanction to be imposed against a lawyer for violating the Rules of Professional Conduct include: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses.

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.¹⁶

C. SANCTION

The principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Syl. pt. 3, Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); and Syl. pt. 2, Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999). "A sanction is to not only punish the attorney, but should also be designed to reassure the public confidence in the integrity of the legal profession and deter other lawyers from similar conduct." Syl. pt 2, Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993); Syl. pt 3, Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Syl. pt. 5, Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Syl pt. 3, Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); and Syl pt. 3, Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000). The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syl.pt. 3, in part, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), cited in Committee on Legal Ethics v. Morton, 186 W.Va. 43, 45, 410 S.E.2d 279, 281 (1991). Respondent, a lawyer with considerable experience, has demonstrated conduct which has fallen far below the minimum standard to which attorneys are held to under the Rules of Professional Conduct.

¹⁶ At the conclusion of the first hearing in this matter, the HPS gave Respondent permission to file a motion to reopen the record, presumably to give Respondent an opportunity to present additional evidence. [1/23/14 Hrg. Trans. P. 184]. However, Respondent filed no motion and did not submit any additional evidence.

A review of the whole record suggests that insufficient weight was given to the overwhelming evidence in these seven complaints of Respondent's near complete failure to comply with his obligations under the Rules of Professional Conduct to respond to requests for information from ODC and the impact his repeated failures of his duties owed to clients had on his clients and their cases. Furthermore, the recommended sanction does not account for Respondent's continued failure to respond to ODC even while his first disciplinary proceeding was still pending. It is clear, given Respondent's pattern and practice of misconduct, his multiple offenses and his prior history of discipline, that the sanction should be more severe than the one year suspension recommended by the HPS.

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).¹⁷

¹⁷ It is acknowledged that there are instances of sanctions issued of shorter lengths of suspension. *See*, Committee on Legal Ethics v. Karl, 192 W.Va. 23, 449 S.E.2d 277 (1994) (3 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. Simmons, 219 W.Va. 223, 632 S.E.2d. 909 (2006) (while expressing concern about the effectiveness of short suspensions, attorney suspended 20 days for failure to act with reasonable diligence, failure to appear for

However, this case is more like Lawyer Disciplinary Board v. Phalen, No. 11-1746 (WV 11/14/12) (unreported) wherein this Court issued 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 and than an additional six month suspension against the same lawyer in Lawyer Disciplinary Board v. Phalen, (Phalen II) No. 12-1265 (WV 10/16/13) (unreported) for additional multiple violations of lack of diligence, lack of communication, failure to provide refunds and failure to respond to ODC. The additional six month suspension was ordered to run consecutive to the previously imposed one-year suspension giving the lawyer an effective eighteen (18) month suspension.

Most recently, this Court sanctioned a lawyer with a three-year suspension in Lawyer Disciplinary Board v. Rossi, Cases No. 13-0508 & 13-1148, Slip Op. (WV 2/5/15), in which the facts and conclusions of law are substantially similar to the instant case. Like Phalen and Rossi, this case has multiple complaints and multiple violations of the Rules of Professional Conduct. Like Phalen and Rossi, a second Statement of Charges was issued against the lawyer alleging failure to respond to ODC, in additional to violations of misconduct involving client representation, while the initial Statement of Charges was pending. Furthermore, in this case, Respondent was previously reprimanded by this Court for the exact same dilatory practices. *See also*, Lawyer Disciplinary Board v. Aleshire, 230 W.Va. 70, 79-80, 736 S.E.2d 70, 79-80 (2012) (wherein after the Lawyer Disciplinary Board recommended a one-year suspension, this Court disagreed and issued a three-year suspension finding that Aleshire was “completely unresponsive to his client tin these two matters

court hearings on numerous occasions, and failure to communicate effectively with his clients); Lawyer Disciplinary Board v. Sullivan, No. 12-0005 (WV 1/17/13) (unreported case) (Respondent’s license to practice law was suspended for a period of thirty (30) days for conduct involving lack of diligence, lack of communication and failure to respond to ODC); Lawyer Disciplinary Board v. Hollandsworth, No. 14-0022 (WV 9/18/14) (unreported case) (lawyer suspended for 90 days for violations of lack of diligence, lack of communication and failure to respond to ODC).

and caused both of them actual monetary damage. Additional, [Alshire] has shown a consistent unwillingness to respond to opposing counsel, court orders, and the ODC.”)

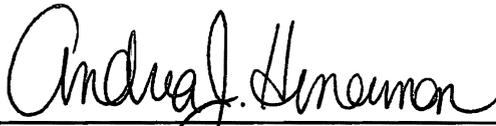
Standard 4.42 of the *ABA Model Standards for Imposing Lawyer Sanctions* provides that suspension is generally appropriate when a lawyer “(a) knowingly fails to perform services for a client and causes injury or potential injury to a client; or (b) a lawyer engages in a pattern of neglect causes injury 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 complete lack of concern for some of the fundamental aspects of the practice of law outlined in the Rules of Professional Conduct. Consideration must also be given to Respondent’s apparent disregard of his duty to respond to lawful demands for information from disciplinary authority. 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

Accordingly, for the reasons set forth above, the Office of Disciplinary Counsel requests that this Honorable Court adopt the following sanctions: (1) That Respondent’s law license be suspended for at least eighteen (18) months; (2) That prior to petitioning for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, Respondent issue refunds to Casey M. Johnson in the amount of \$2,650.00 and Charles E. Banks in the amount of \$5,200.00, and provide proof thereof

to the Office of Disciplinary Counsel; (3) That prior to reinstatement, Respondent issue an itemized statement of account to Tony R. Henderson, Jr., and provide proof thereof to the Office of Disciplinary Counsel; and (4) That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Respectfully submitted,
The Office of Disciplinary Counsel
By Counsel



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CERTIFICATE OF SERVICE

This is to certify that I, Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 23rd day of March, 2015, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" upon Respondent David S. Hart by mailing the same via United States Mail, with sufficient postage, to the following address:

David S. Hart, Esquire
102 McCreery Street
Beckley, West Virginia 25801

And upon the Hearing Panel Subcommittee at the following addresses:

Richard M. Yurko, Esquire
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