

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

In Re: Thorn H. Thorn,
a licensed member of
The West Virginia State Bar

Bar No.: 7346
Supreme Court No.: 14-0670
I.D. No.s: 13-06-191, 13-02-230,
13-02-305, 13-05-384,
13-02-414, 13-02-417,
13-02-538, 13-02-542,
13-02-578, 14-02-058,
14-02-183

**AMENDED RECOMMENDED DECISION OF THE HEARING PANEL
SUBCOMMITTEE OF THE WEST VIRGINIA LAWYER DISCIPLINARY BOARD
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA**

INTRODUCTION

The West Virginia State Bar Disciplinary Counsel (ODC) instituted multiple charges against Thorn H. Thorn, Esq., seeking disciplinary action. After carefully considering the evidence of record, the Hearing Panel Subcommittee (HPS) has reached the following findings, conclusions and recommendations for the consideration by the Supreme Court of Appeals of West Virginia.

1. Procedural History:

Formal charges were filed against Respondent Thorn H. Thorn with the Clerk of the Supreme Court of Appeals on or about July 14, 2014, and thereafter formally served the same upon Respondent via certified mail by the Clerk on July 17, 2014. ODC filed its mandatory discovery on or about August 7, 2014. Respondent filed his Answer to the Statement of Charges on or about September 25, 2014, after the deadline for filing was extended by the ODC

pursuant to Rule 2.12 of the Rules of Lawyer Disciplinary Procedure. The hearing in this matter was first scheduled to take place on or about January 14, 2015, at the West Virginia University Law School in Morgantown, West Virginia. However, during a December 19, 2014, telephonic pre-hearing conference, upon a joint motion of the parties, the hearing date was continued to February 17, 2015. The HPS was present in Morgantown for the hearing. However, due to severe overnight snowstorm and icy road conditions in the State, ODC notified the HPS in the early morning hours of February 17, 2015, that ODC counsel, its staff, and several of its witnesses, were unable safely to travel to Morgantown for the hearing. For good cause shown, the HPS again continued the hearing without objection to April 8, 2015.

Respondent submitted his witness list for the April hearing on or about February 24, 2015.

This matter proceeded to hearing in Morgantown, West Virginia, on April 8, 2015, at the West Virginia University College of Law. The Hearing Panel Subcommittee was comprised of Henry W. Morrow, Esquire, Jon Blair Hunter, Lay Member, and John W. Cooper, Esquire, Chairperson. Renée N. Frymyer, Esq., appeared on behalf of ODC. Respondent appeared *pro se*. The Hearing Panel Subcommittee heard testimony from Jessica D. Morris, Daniel N. Britton, Carly A. Wears, Mark D. Benkiel, Russell “Jack” Torsney, Jr., and Respondent. ODC offered Exhibits 1 through 83 to be admitted into evidence.

Six of the ten complainants did not appear to testify at the hearing in this matter. As a procedural matter, the HPS would note that Respondent objected to the admission of any exhibits filed in the case concerning witnesses who did not appear and testify against him.

[Trans. pp. 251-252] ODC responded that even though the Complainants did not appear, all 83

exhibits should be admitted. ODC contended that all of the complaints were verified making them equivalent to affidavits and sworn documents and thus admissible. ODC urged that there are no issues as to their credibility and it also urges that since Respondent failed to respond timely to some complaints the same are deemed admitted. [Trans. pp. 252-253] The HPS recognizes that Respondent answered numerous questions ODC propounded on many of these matters without objecting on the basis of hearsay or otherwise. It also recognizes that Respondent did not timely respond to many of the Complaints. But the record reflects that Respondent did file belated responses to many complaints and he did file an Answer which was verified on September 25, 2014, which admitted some allegations in the Statement of Charges and denied others. Moreover, the HPS also recognizes that under Rule 3.6 of the Rules of Lawyer Disciplinary Procedure, the West Virginia Rules of Evidence are applicable. Consequently, (1) for purposes of considering the veracity of the content in those accusatory exhibits tendered on matters in which the Complainants did not appear and (2) for purposes of considering the credibility of the absent witnesses who generated such exhibits, the HPS sustains the objections under Rule 802 of the West Virginia Rules of Evidence. Moreover, the HPS finds that ODC did not make a record as to whether any exceptions to the hearsay rule for unavailable declarants may apply. Clearly, Respondent was unable to cross-examine such witnesses for impeachment, correction, or otherwise to test the credibility such witnesses. However, the HPS also concludes that to the extent that Respondent was questioned about any such exhibit during his testimony and responded without making a formal objection at the time of the questioning, the objection to its admissibility has been waived. Although the findings of fact may indicate what any such excluded exhibit asserted or alleged, the HPS avoided basing

any of its findings on the veracity or accuracy of the content of any accusatory document.¹ It also did not base its findings on the credibility of any witness who may have generated such exhibit but failed to appear, unless ODC questioned Respondent about such exhibit and Respondent failed to interpose an objection at the time of the questioning.

Based upon the clear and convincing testimony and documentary evidence elicited in the hearing, and based upon the record in this case, the arguments of counsel, and the post-hearing submissions of counsel for ODC, the HPS makes the following Findings of Fact, Conclusions of Law and Recommended Sanctions to this Honorable Court concerning the final disposition of this matter.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Thorn H. Thorn (hereinafter “Respondent”) maintains a solo law practice in Morgantown, which is located in Monongalia County, West Virginia. He was admitted to The West Virginia State Bar on April 23, 1997, after successful passage of the Bar Exam [Hearing Trans. p. 102]. As such, he is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.

Count I Complaint of Debra Miller I. D. No. 13-06-191

2. Ms. Miller did not appear or testify at the hearing. Ms. Miller’s Complaint, which was

¹ Neither the Respondent nor ODC designated the specific documents to which the objections applied, but it was obvious that the complaints filed by non-appearing complainants and the supporting documents offered by such non appearing persons typically constituted hearsay.

sworn to and notarized on or about May 3, 2013, alleged that she hired Respondent in October of 2011 for a probate matter and paid him a retainer of (\$3,695.00) [ODC Ex. 1, bates 3]. She reportedly later terminated him for allegations of poor communication and failure to file a matter and get a hearing.

3. The nature of the Miller complaint was that Respondent failed to advance her case in the proper court and cancelled hearings that had been set [ODC Ex. 1, bates 1-2]. Ms. Miller also claimed in her complaint that Respondent was non-responsive to her telephone messages [ODC Ex. 1, bates 12-13, 20]. Because after one (1) year the case had not progressed, on or about October 11, 2012, Ms. Miller sent Respondent an email in which she terminated Respondent's representation, requested an itemized bill, and asked Respondent to provide her with a refund of the unearned retainer [ODC Ex. 1, bates 10]. Ms. Miller stated in her complaint that Respondent had refused to return her file or provide her with a refund [ODC Ex. 1, bates 1-2].

4. In his response to the complaint, verified on or about July 12, 2013, Respondent denied he had violated the Rules of Professional Conduct and asserted that Ms. Miller's retainer was "mainly exhausted." Respondent asserted that he would send Ms. Miller the balance of her retainer, but Ms. Miller had refused to tell him where to send it [ODC Ex. 5, bates 35-37].

5. Thereafter, the documents in the record allege that Ms. Miller reportedly contacted the Office of Disciplinary Counsel and advised that Respondent had not provided her with her file, despite her requests. By letter dated August 12, 2013, Disciplinary Counsel asked Respondent to provide Ms. Miller with her file on or before August 23, 2013 [ODC Ex. 6, bates 38].

6. By letter dated August 29, 2013, Respondent confirmed that he had forwarded a copy of the file to Ms. Miller at the address he had on file, but that it had been returned to sender.

Respondent stated that he resubmitted the file to Ms. Miller at the Post Office Box address she listed on the ethics complaint [ODC Ex. 7, bates 41-43]. The record also reflects that Ms. Miller reportedly subsequently informed Disciplinary Counsel that she had not yet received her file from Respondent [ODC Ex. 10, bates 46]. The record also reflects that ODC reportedly alerted Respondent of the same and, by letter dated October 1, 2013, Respondent informed Disciplinary Counsel that he had again mailed a copy of Ms. Miller's file to her at her Post Office Box address [ODC Ex. 11, bates 47].

10. At the disciplinary hearing, Respondent testified that he performed work on Ms. Miller's behalf, including filing what he contended was the appropriate pleading, a Petition to Remove Miller's brother as a fiduciary in the Marion County Circuit Court. Respondent acknowledged that Ms. Miller became dissatisfied when he had to continue the hearing in the matter on at least three (3) separate occasions due to scheduling conflicts, due to a felony trial, due to hearings in other proceedings he was handling, and finally due to a personal illness, and at that time, Miller terminated his representation [Trans. pp. 132-135, 143-144].

11. Respondent testified that he could not recall if he had been timely in response to some of Miller's inquiries in emails circa August, 2012, to October, 2012, but that the likelihood was that he probably had not been [Trans. p. 136]. However, Respondent testified that contrary to Miller's complaint to ODC, he did file a petition to remove Miller's brother as fiduciary in the estate of a parent on October 16, 2012. [Trans. pp. 138, 143] Miller had indicated in her filings that Respondent had not filed anything for probate (apparently referring to the county commission). Respondent agreed that he had not filed the matter in the county commission, but indicated that he elected to file in the Circuit Court of Marion because that is the county where

Miller's brother had been appointed and where the property was located [Trans. pp. 138-139]; and because he found the process was faster and he had been successful in going to Circuit Court previously in both Marion and Preston Counties in other similar matters. [Trans. pp. 145, 134]. Respondent also challenged Miller's claim in an email that she was entitled to obtain "actual phone records of our actual transacted calls out to me from you and into you from me" He indicated that he did not know what she meant by that request and he did not know that he had the ability to provide that information because his phone services would not disclose every call in and out. He indicated that some of their calls were by cell phone and others were not. [Trans. pp. 139-141] Notwithstanding the fact that the HPS is unwilling to adopt the sworn complaint of Ms. Miller because of the obvious hearsay problems under WVRE, Rule 802, it nonetheless finds by Respondent's own admissions at the hearing, that he was not diligent and responsive with respect to some of his communications with his client. Respondent also testified that he was having issues with his answering service around the same time period [Trans. p. 141].

13. Respondent challenged Miller's reported claim that she was entitled to a full refund because nothing had been filed, when, in fact, a petition had been filed. [Trans. p. 145] Respondent admitted that he owed Miller a partial refund of \$1,100.00 of the \$3,600.00 Miller had paid to him, but said she has repeatedly refused the same, apparently wanting a complete refund of the entire fee. [Trans. p. 147]. ODC inquired of Respondent about the nature of the fee arrangement he had with Miller. He testified that the matter was a flat fee case, and although he did not have a written fee agreement indicating that it was non-refundable fee, although he did explain it to the client as required in a legal ethics opinion in 1999 which ODC had presented to

him for review during his testimony. [Trans. p. 149-150] Again, although the HPS does not give credibility or weight to the formal complaint of Ms. Miller, it does give credit to Respondent's own admission during his testimony that he had not refunded the unearned portion of the fee owing to her.

14. Respondent testified that beginning in 2012 he experienced problems with depression due to problems with his marriage, and the symptoms continued to persist throughout 2013 [Trans. p. 113].

15. Respondent referred to the depression during this time period as "debilitating." He had gone through a divorce, and he testified that he "had kind of just given up for a period of time to the sense that [he] had suicidal ideations and everything else for a period." [Trans. p. 114]

16. Respondent testified that he had been "pretty much solidly back on [his] feet," as of April, 2014, but that in late 2012 and 2013, he "was just a mess," [Trans. p. 114]. Respondent stated that it was not until the first or second quarter of 2014 that he felt like he wanted to continue what he was doing: "I want to continue being an attorney, I want to continue living. I want to continue being a father, I want to continue to, you know, be a person," [Trans. p. 115].

17. Respondent testified that the majority of the complaints contained in the Statement of Charges filed against him concern the time period of 2012 and 2013, and that, without question, he definitely had issues for that period [Trans pp. 118; 186]. "I wasn't communicating with [clients]," [Trans. p. 120].

18. Respondent could not recall if he and Ms. Miller had entered into a written fee agreement [Trans. p. 147]. He conceded that he did not provide an itemization of his fee or an accounting

of his time, but stated that his usual hourly rate was Two Hundred Dollars (\$200.00) [Trans. pp. 147-148].

19. Because Respondent neglected Ms. Miller's case and failed to take appropriate action in the matter, he has violated Rule 1.3 of the Rules of Professional Conduct, which provides as follows:

Rule 1.3. Diligence.²

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

20. Because Respondent failed to keep Ms. Miller informed as to the status of the matter and failed to respond to her requests for information, Respondent has violated Rule 1.4 of the Rules of Professional Conduct which provides as follows:

Rule 1.4. Communication.

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

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

21. ODC urged the HPS to find that Respondent violated Rule 3.2 for failing to expedite litigation, but the HPS declines to so find. That rule provides as follows:

Rule 3.2. Expediting litigation.

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

From the sworn testimony adduced at the hearing, it appeared that Mr. Thorn did file a petition in

² The instant Statement of Charges was issued prior to January 1, 2015. Therefore, the version of the Rules of Professional Conduct in effect prior to the January 1, 2015 amendments is used herein.

Circuit Court to have Ms. Miller's brother removed as a fiduciary.³ The testimony on this issue is somewhat disjointed and given the absence of Ms. Miller at the hearing, the HPS does not find that ODC has proven this violation by clear and convincing evidence.

22. ODC suggests that because Respondent failed promptly to deliver to Ms.

Miller the unearned portion of her retainer or render a full accounting regarding such property pursuant to her request, he has violated Rule 1.15(b) of the Rules of Professional Conduct, which provides as follows:

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.

23. ODC also seeks to have the HPS find that because Mr. Thorn failed promptly return her file and the unearned fee paid to him by Ms. Miller, Respondent has violated Rule 1.16(d) of the Rules of Professional Conduct. That rule provides as follows:

Rule 1.16. Declining or terminating representation.

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

³ The HPS recognizes that the normal procedure for removal of a fiduciary in an estate proceeding has its origin before the county commission rather than in the circuit court. However, Respondent's testimony that he had previously successfully utilized the jurisdiction of the circuit courts to handle such matters is given credit and no finding of a violation of Rule 3.2 seems warranted under the evidence adduced at the hearing.

the client to the extent permitted by other law.

The evidence adduced at the hearing is not entirely clear as to the circumstances surrounding the return of her file, and since Miller failed to appear at the hearing, the HPS finds that violations of Rules 1.15 and 1.16 were not proven by clear and convincing evidence. Indeed, the evidence presented suggests that Ms. Miller was unwilling to accept the partial refund that Respondent felt was due her, and instead wanted a full refund. Further, the record even indicates that Respondent made efforts to return Ms. Millers files even after the Complaint was filed by Ms. Miller, but they were returned because of a problem with the address she had provided.

Count II

Complaint of Bonnie R. Hughes

I. D. No. 13-02-230

24. Complainant, Bonnie R. Hughes, also did not appear at the hearing in this matter. Ms. Hughes alleged in her complaint, which was sworn and notarized on or about May 21, 2013, that she retained Respondent on or about February 28, 2013, for representation in a time-sensitive guardianship matter and paid him a retainer of One Thousand One Hundred Eighty Five Dollars (\$1,185.00) [ODC Ex. 16, bates 63-69].

25. Ms. Hughes' complaint stated that she subsequently called Respondent approximately three (3) times per week to obtain the status of the matter and left messages with Respondent's answering service when she was unable to reach Respondent [ODC Ex. 16, bates 69].

26. By May of 2013, Ms. Hughes claimed that Respondent had failed to take any action in the matter [ODC Ex. 16, bates 69].

27. Thereafter, by email dated May 13, 2013, Ms. Hughes terminated Respondent's

representation and requested that Respondent issue her a refund of the retainer [ODC Ex. 16, bates 64]. Ms. Hughes' new counsel also sought to obtain a refund from Respondent on her behalf [ODC Ex. 20, bates 82-83].

28. In his response to the complaint, verified on or about July 19, 2013, Respondent denied he had violated the Rules of Professional Conduct but asserted that he would provide Ms. Hughes with a full refund [ODC Ex. 21, bates 84-86].

29. Ms. Hughes confirmed that she received a refund from Respondent in late July, 2013 [ODC Ex. 23, bates 88].

30. At the hearing, Respondent testified that it was possible that he failed to respond to Ms. Hughes' phone calls, as it was "in the right time frame." [Trans. p. 156]

31. Respondent also testified at the hearing that nothing happened in Ms. Hughes' case and, as a result, he provided her with a full refund [Trans. p. 156]. Respondent acknowledged that Ms. Hughes had been provided with a refund on or about July 12, 2013, which was after she had lodged an ethics complaint against him [Trans. pp. 157-158].

32. Because Respondent neglected Ms. Hughes' case and failed to take any action in the matter, he has violated Rule 1.3 of the Rules of Professional Conduct, which provides as follows:

Rule 1.3. Diligence.

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

33. Because Respondent failed to respond to the inquiries of Ms. Hughes, Respondent has violated Rule 1.4 of the Rules of Professional Conduct which provides as follows:

Rule 1.4. Communication.

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

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

34. Because Respondent engaged in dilatory practices and failed to make reasonable efforts consistent with the stated and agreed upon objectives of Ms. Hughes, he has violated Rule 3.2 of the Rules of Professional Conduct which provides as follows:

Rule 3.2. Expediting litigation.

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

35. Because Respondent failed to return the unearned fee paid to him by Ms. Hughes until after she filed an ethics complaint against him, Respondent has violated Rule 1.16(d) of the Rules of Professional Conduct, which provides as follows:

Rule 1.16. Declining or terminating representation.

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

Count III

Complaint of Jessica D. Morris

I. D. No. 13-02-305

36. Ms. Morris was present at the hearing in this matter and she offered testimony. Ms. Morris stated in her complaint, which was sworn and notarized on or about July 12, 2013, that she retained

Respondent for representation in her divorce in October of 2011, that Respondent subsequently filed the appropriate paperwork but otherwise failed to advance the case [ODC Ex. 26, bates 113-115].

37. Ms. Morris' complaint further alleged that many of her subsequent calls and emails to Respondent were not returned, that Respondent failed to provide Ms. Morris with a copy of the response that had been filed by the opposing party in the matter, and that Respondent failed to provide certain documents to opposing counsel and the Court [ODC Ex. 28, bates 124-126].

38. Thereafter, Ms. Morris sought legal representation from another lawyer and, by letter dated February 20, 2013, terminated Respondent's representation and requested that Respondent issue her a refund of the retainer and provide her with an itemization of accounting of all legal services that had been rendered [ODC Ex. 28, bates 124].

39. In his response to the complaint, verified on or about October 2, 2013, Respondent attributed the delays in the underlying matter to cancellations made by the Family Court and stated that he was in the midst of negotiations when he was informed by Ms. Morris that his services were terminated [ODC Ex. 30, bates 138-140].

40. At the hearing, Ms. Morris testified that multiple phone calls that were not returned by Respondent and emails to him went unanswered. Ms. Morris stated that Respondent "was not doing anything to help proceed [the case]." [Trans. pp. 8-9]

41. Ms. Morris testified that she began keeping a log of her attempts to communicate with Respondent due to her frustrations. She stated that the log reflected that from December 27, 2012, to February 6, 2013, she made multiple unsuccessful attempts to communicate with Respondent [ODC Ex. 28, bates 125; Trans. pp. 12-13].

42. Ms. Morris also testified that she was entitled to a refund from Respondent because she did

not believe Respondent had earned the full retainer [Trans. pp. 15-16]. She could not, however, recall how much she paid Respondent [Trans. p. 23].

43. At the hearing, Respondent testified that he failed to communicate well with Ms. Morris [Trans. pp. 162; 186].

44. Respondent also testified that he probably did not respond to the letter of February 20, 2013, wherein Ms. Morris requested an itemized accounting of his services and a refund [Trans. pp. 186-187]. Respondent had previously contended that he charged Ms. Morris a “flat fee,” that was a “non-refundable, one-time payment.” [Trans. p. 17]

45. Respondent testified that he believed that he earned the full fee Ms. Morris paid him, which he estimated was Two Thousand Five Hundred Dollars (\$2,500.00) [Trans. p. 187]. Respondent did not, however, provide an accounting of his time or an itemization of his fee.

46. Respondent testified that the reason the case was pending from late 2011 to early 2013 was due to cancellations of hearings on the part of the Family Court of Marion County [Trans. pp. 162-163; 188].

47. Because Respondent neglected Ms. Morris’ case and failed to take appropriate action in the matter, he has violated Rule 1.3 of the Rules of Professional Conduct, which provides as follows:

Rule 1.3. Diligence.

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

48. Because Respondent failed to keep Ms. Morris informed as to the status of the matter and failed to respond to her requests for information, Respondent has violated Rule 1.4 of the

Rules of Professional Conduct which provides as follows:

Rule 1.4. Communication.

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

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

49. Because Respondent engaged in dilatory practices and failed to make reasonable efforts consistent with the stated and agreed upon objectives of Ms. Morris, he has violated Rule 3.2 of the Rules of Professional Conduct which provides as follows:

Rule 3.2. Expediting litigation.

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

50. Because Respondent failed to promptly deliver to Ms. Morris the unearned portion of her retainer or render a full accounting regarding such property pursuant to her request, he has violated Rule 1.15(b) of the Rules of Professional Conduct, which provides as follows:

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.

51. Because the burden of proof is always upon the attorney to show the reasonableness of the

fees charged,⁴ and Respondent failed to present any records or evidence that he earned the full fee paid to him by Ms. Morris, Respondent has violated Rule 1.16(d) of the Rules of Professional Conduct, which provides as follows:

Rule 1.16. Declining or terminating representation.

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

**Count IV
Complaint of Todd H. Goodnight
I. D. No. 13-05-384**

52. Mr. Goodnight did not appear or testify at the hearing in this matter. Mr. Goodnight alleged in his complaint, which was sworn and notarized on or about August 19, 2013, that Respondent was appointed to represent Mr. Goodnight in criminal matters and in an abuse and neglect proceeding in the Circuit Court of Marion County [ODC Ex. 33, bates 148-150].

53. Mr. Goodnight's complaint alleged that Respondent failed to appear for Court hearings that were scheduled in the abuse and neglect proceeding on February 4, 2013, March 8, 2013, and June 11, 2013, respectively [ODC Ex. 33, bates 150].

54. It was further alleged that on June 13, 2013, the Circuit Court entered an Order which relieved Respondent of his representation of Mr. Goodnight and appointed Mr. Goodnight a new attorney in the abuse and neglect cases. The Order also noted that the State had advised the Court

⁴ See, Syllabus Point 2, *Committee on Legal Ethics of West Virginia State Bar v. Tatterson*, 177 W.Va. 356, 352 S.E.2d 107 (1986).

that Respondent had failed to appear for Multi-Disciplinary Team (“MDT”) meetings in the preceding six (6) months and had not been responsive to telephone calls made to him to determine the status of Mr. Goodnight [ODC Ex. 33, bates 152-153].

55. Mr. Goodnight’s complaint also alleged that Respondent was unresponsive to his inquiries [ODC Ex. 33, bates 149].

56. In his response to the complaint, verified on or about October 2, 2013, Respondent denied that the allegations raised in Mr. Goodnight’s complaint affected the final disposition of either Mr. Goodnight’s criminal cases or the abuse and neglect cases [ODC Ex. 36, bates 166-169].

57. At the hearing, Respondent did not dispute that he failed to attend some MDT meetings on behalf of Mr. Goodnight, who was incarcerated at the time and may not have responded to all calls. [Trans. p. 190- 195]. However, he indicated that the fact that he missed some MDT meetings was because he was not notified, on others he appeared by telephone, on others he could not attend the MDT meetings because he had appearances in court which took precedence over MDT meetings. Moreover, he testified that Mr. Goodnight had committed domestic battery on his current girlfriend and a former girl friend and was incarcerated for the batteries and other offenses and could not participate in a parenting plan anyway, nor could he participate in an improvement period either because he continually got in trouble and was incarcerated.

58. Goodnight was not at the hearing and could not be located by ODC. However, from Respondent’s testimony it became clear that he represented Goodnight in multiple criminal offenses as well as the abuse and neglect case. The evidence is unrefuted that Respondent was able to secure an excellent result in the criminal case and that Goodnight’s less favorable result in the abuse and neglect case resulted from his bad behavior and repeated arrests and nothing that Respondent did

with respect to communication or appearance at MDT's had anything to do with the bad result. The HPS finds the testimony of Respondent on this Complaint to be credible and further finds that ODC has not proven the alleged violations of Rules 1.1, 1.3, and 1.4 of the Rules of Professional Conduct on this complaint by clear and convincing evidence. [Trans. Pp. 191-195]

Count V
Complaint of Mark D. Benkiel
I. D. No. 13-02-414

59. Mr. Benkiel did not physically appear at the site of the hearing but he did appear by telephone and was duly sworn. Mr. Benkiel stated in his complaint, which was sworn and notarized on or about September 4, 2013, that he retained Respondent for representation relating to an automobile accident that occurred in the state of Pennsylvania on or about April 23, 2010, in which Mr. Benkiel suffered injury. Mr. Benkiel said that he and Respondent entered into signed a contingent-fee agreement with respect to the matter [ODC Ex. 43, bates 181-183].

60. Mr. Benkiel alleged that despite his phone calls and texts, Respondent failed to take any action in the case for three (3) years [ODC Ex. 43, bates 181-183].

61. Mr. Benkiel further alleged that Respondent failed to file the complaint on Mr. Benkiel's behalf before the statute of limitations expired on April 23, 2012. In fact, Mr. Benkiel stated that Respondent, who is not licensed in Pennsylvania, had advised him that Pennsylvania had a three (3) year statute of limitations period, and had provided Mr. Benkiel with a one (1) page complaint for him to file *pro se* in Allegheny County, Pennsylvania, on April 24, 2013. The Clerk did not accept Mr. Benkiel's complaint at that time due to it being barred by the statute of limitations [ODC Ex. 43, bates 181-183; Trans. pp. 87-88].

62. By letter dated September 11, 2013, the Office of Disciplinary Counsel sent Respondent a

copy of the complaint and directed him to file a verified response within twenty (20) days [ODC Ex. 44, bates 190-191].

63. After not receiving any response from Respondent, by letter dated November 15, 2013, sent via certified mail, return receipt requested, Disciplinary Counsel requested that Respondent provide the requested response by Tuesday, November [26], 2013,⁵ or Respondent would be subpoenaed to appear at the Office of Disciplinary Counsel to give 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 [ODC Ex. 45, bates 192-194].

64. Respondent failed to provide a verified response to the complaint by the above-referenced deadline and, as a result, Respondent was issued a subpoena to appear at the Office of Disciplinary to give a sworn statement [ODC Ex. 46, bates 196]. However, on or about February 10, 2014, Disciplinary Counsel agreed to cancel the statement if Respondent provided a verified written response to Mr. Benkiel's complaint by February 28, 2014 [ODC Ex. 47, bates 200-201].

65. In his response to the complaint, verified on or about March 13, 2014, Respondent stated that the underlying matter involved pending litigation and he requested that he be permitted to respond to this complaint once the litigation had been resolved [ODC Ex. 48, bates 202-203].

66. At the hearing, Mr. Benkiel testified that, because he had grown up with Respondent, he called him for legal advice after he was involved in an automobile accident in Pennsylvania where another driver had been at fault and Mr. Benkiel sustained injury [Trans. pp. 82-83]. He also testified on cross-examination that he was the advertising representative for Respondent in his law

⁵ The letter contained a typographical error for the date as follows, "Tuesday, November 26 21, 2013 . . ."

practice in the metropolitan area of Morgantown, which included West Virginia and Pennsylvania.
[Trans. pp. 95-96]

67. Mr. Benkiel also confirmed that he and Respondent entered into a written contingency-fee agreement shortly thereafter [Trans. pp. 83-84].

68. Mr. Benkiel stated that he was not aware that Respondent was not licensed to practice law in Pennsylvania and that the case would have to be filed in that jurisdiction [Trans. p. 84].

69. Mr. Benkiel testified that he sought medical treatment, provided medical records and other information to Respondent, and he believed that Respondent “sent out various letters,” on Mr. Benkiel’s behalf [Trans. p. 85].

70. Mr. Benkiel said he was under the impression that the case would be filed in court at some point, and that he “. . . kept bugging [Respondent] and saying, hey, we’ve got to get this done.” [Trans. p. 86]

71. Mr. Benkiel testified that he ultimately learned that the statute of limitations had expired in the case and that there was nothing more he could do to pursue the matter [Trans. p. 88].

72. Mr. Benkiel was never able to pursue damages against the driver that caused that April 2010 accident [Trans. p. 89]. Mr. Benkiel testified that he still experiences some neck pain from the accident [Trans. p. 90].

73. Mr. Benkiel said he attempted to pursue damages from Respondent through counsel but abandoned his claim after learning from new counsel that that Respondent advised that he was filing for bankruptcy [Trans. pp. 90-91; ODC Ex. 43, bates 184-189].

74. In the course of negotiations regarding the professional negligence claim, Benkiel testified that Respondent offered an arrangement whereby he would “hire” Mr. Benkiel as a consultant for

a fee of One Thousand Dollars (\$1,000.00) per month for a period of Twenty Four (24) months, and Mr. Benkiel's sole job during that period would be "to keep his accusations confidential," [ODC Ex. 43, bates 186]. Mr. Benkiel testified that he declined said offer from Respondent [Trans. pp. 92-93]. Respondent admitted in his testimony that he had made an offer to Mr. Benkiel, via Mr. Benkiel's counsel, to pay him Twenty Four Thousand Dollars (\$24,000.00) in One Thousand Dollar (\$1,000.00) a month monthly payments [ODC Ex. 40, bates 186; Trans p. 200]. (The HPS finds this evidence troubling. The HPS is concerned that such a proposal might have been construed in the bankruptcy proceeding as creating favorable treatment of one creditor over another by concealing one creditor with a legitimate claim in a malpractice case against, and then satisfying that creditor without listing him as a creditor in the bankruptcy proceeding and designating the payments to satisfy the debt as "compensation" for work that did not exist and was never to be performed.)

75. Respondent testified at hearing that Mr. Benkiel was aware that he was not licensed to practice law in Pennsylvania and that they would need to get counsel in Pennsylvania if the case proceeded to litigation [Trans. p. 197]. Respondent denied that he provided Mr. Benkiel with advice concerning the laws in Pennsylvania [Trans. p. 198].

76. Respondent acknowledged that he did not act with reasonable diligence and promptness during his representation of Mr. Benkiel because he missed the statute of limitations in the case [Trans. pp. 198-199].

77. Respondent testified that his recollection was that he was not able to quickly find a Pennsylvania lawyer to assist with the case, so the case "probably fell along the wayside," [Trans. p. 200].

78. Respondent acknowledged that Mr. Benkiel had never filed a lawsuit against him alleging malpractice [Trans. pp. 200-201]. Respondent had testified earlier in the disciplinary hearing that he did not maintain malpractice insurance [Trans. p. 106].

79. Respondent stated that he filed for personal bankruptcy in late 2014 [Trans. p. 201].

80. Respondent said that he would be willing to make restitution to Mr. Benkiel and that he believed Twenty Four Thousand Dollars (\$24,000.00) to be a fair amount considering the facts of the case [Trans. p. 205].

81. Because Respondent incorrectly advised Mr. Benkiel as to the law in another jurisdiction and failed to take any action on Mr. Benkiel's case before the statute of limitations expired, Respondent has violated Rules 1.1 and 1.3 of the Rules of Professional Conduct which provide as follows:

Rule 1.1. Competence.

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

Rule 1.3. Diligence.

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

82. Because Respondent failed to keep Mr. Benkiel informed as to the status of the matter and failed to respond to his requests for information, Respondent has violated Rule 1.4 of the Rules of Professional Conduct which provides as follows:

Rule 1.4. Communication.

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

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

83. Because Respondent engaged in dilatory practices that brought the administration of justice into disrepute and failed to make reasonable efforts consistent with the stated and agreed upon objectives of Mr. Benkiel, he has violated Rule 3.2 of the Rules of Professional Conduct which provides as follows:

Rule 3.2. Expediting litigation.

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

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

Rule 8.1. Bar admission and disciplinary matters.

[A] lawyer in connection with . . . a disciplinary matter, shall not:
(b) . . . knowingly fail to respond to a lawful demand for information from . . . disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Count VI
Complaint of Daniel N. Britton
I. D. No. 13-02-417

85. Daniel Britton appeared and testified at the hearing in this matter. Mr. Britton stated in his complaint, which was sworn and notarized on or about August 30, 2013, that he retained Respondent on or about June 14, 2013, for representation in a Family Court matter and paid him a retainer of One Thousand Seven Hundred Dollars (\$1,700.00). The complaint further stated that the matter involved a request to modify a parenting plan in order to permit Mr. Britton's children to attend a different school [ODC Ex. 49, bates 204-208].

86. Mr. Britton alleged that despite his representation that the matter was time-sensitive, it took Respondent approximately five (5) weeks to file the necessary documents [ODC Ex. 49, bates 204-

208; Trans. pp. 28-29].

87. Mr. Britton further alleged that Respondent was not responsive to Mr. Britton's calls of inquiry [Trans. pp. 29-30; 43].

88. Mr. Britton stated that Respondent finally obtained a court date of August 23, 2013, purportedly after Mr. Britton had contacted the Family Court of Preston County to ascertain the status of the matter and the Court's assistant notified Respondent of Mr. Britton's call to the Court [Trans. pp. 29-30; 43]. The hearing was later continued to the following week due to the vacation of opposing counsel [Trans. p. 38].

89. Mr. Britton testified at the hearing that he believed that the Court ultimately denied his request to modify the parenting plan because the hearing took place after the new school year began [Trans. p. 30].

90. Mr. Britton further testified that he believed that had Respondent filed the paperwork sooner, they could have obtained an earlier hearing date [Trans. p. 38].

91. Mr. Britton testified that he did not believe that Respondent had earned the full One Thousand Seven Hundred Dollars (\$1,700.00) he had been paid [Trans. p. 32].

92. By letter dated September 16, 2013, the Office of Disciplinary Counsel sent Respondent a copy of Mr. Britton's complaint and directed him to file a verified response within twenty (20) days [ODC Ex. 50, bates 209-210].

93. After not receiving any response from Respondent, by letter dated November 15, 2013, sent via certified mail, return receipt requested, Disciplinary Counsel requested that Respondent provide

the requested response by Tuesday, November [26], 2013,⁶ or Respondent would be subpoenaed to appear at the Office of Disciplinary Counsel to give 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 [ODC Ex. 51, bates 211-212].

94. Respondent failed to provide a verified response to the complaint by the above-referenced deadline and, as a result, Respondent was issued a subpoena to appear at the Office of Disciplinary to give a sworn statement [ODC Ex. 52, bates 214]. However, on or about February 10, 2014, Disciplinary Counsel agreed to cancel the statement if Respondent provided a verified written response to Mr. Britton's complaint by February 28, 2014 [ODC Ex. 47, bates 200-201].

95. In his response to the complaint, verified on or about March 13, 2014, Respondent denied that the late-August hearing date was a factor in the Court's decision in the underlying case, citing to the fact that the children had been attending the same school for the previous two (2) years based upon an agreed parenting plan that was previously in place. Respondent also denied that he owed Mr. Britton any refund, citing to the work he performed on the matter [ODC Ex. 54, bates 220-222].

96. At the hearing, Respondent contended that Mr. Britton was charged a "flat fee," which was "non-refundable" [Trans. p. 36].

97. Respondent admitted in the hearing that he had communication and diligence issues with regard to his representation of Mr. Britton, but denied that those issues contributed to the result of Mr. Britton's case [Trans. p. 215].

98. Respondent further testified that he believed that he had earned his full fee from Mr. Britton

⁶ The letter contained a typographical error for the date as follows, "Tuesday, November 26 21, 2013, . . ."

[Trans. p. 216].

99. Respondent testified that the reason he had failed to timely file a response to Mr. Britton's complaint was that he "had pretty much given up for a period of time," and "wasn't interested in responding," [Trans. p. 219]. Respondent denied that the failure to respond to ethics complaints or other requests from the Office of Disciplinary Counsel was detrimental to the practice of law [Trans. p. 220].

100. Because Respondent failed to take prompt action with regard to Mr. Britton's case after being retained, he has violated Rule 1.3 of the Rules of Professional Conduct, which provides as follows:

Rule 1.3. Diligence.

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

101. Because Respondent failed to keep Mr. Britton informed as to the status of the matter and failed to respond to his requests for information, Respondent has violated Rule 1.4 of the Rules of Professional Conduct which provides as follows:

Rule 1.4. Communication.

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

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

102. Because Respondent engaged in dilatory practices and failed to make reasonable efforts consistent with the stated and agreed upon objectives of Mr. Britton, he has violated Rule 3.2 of the Rules of Professional Conduct which provides as follows:

Rule 3.2. Expediting litigation.

A lawyer shall make reasonable efforts to expedite litigation

consistent with the interest of the client.

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

Rule 8.1. Bar admission and disciplinary matters.

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

(b) . . . knowingly fail to respond to a lawful demand for information from . . . disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Count VII
Complaint of Martin H. Donovan
I. D. No. 13-02-538

104. Mr. Donovan did not appear or testify at the hearing in this matter. Mr. Donovan alleged in his complaint, which was sworn and notarized on or about October 25, 2013, that he retained Respondent on or about November 17, 2011, seeking an expungement for a matter and paid Respondent a retainer of Six Hundred Dollars (\$600.00) [ODC Ex. 55, bates 223-229].

105. Mr. Donovan's complaint stated that Respondent subsequently provided him with no updates in the matter [ODC Ex. 55, bates 227].

106. Mr. Donovan further alleged that on or about October 22, 2013, he contacted the Court to determine the status of the matter and learned that no expungement pleading had ever been filed on his behalf [ODC Ex. 55, bates 227; ODC Ex. 58, bates 234].

107. By letter dated November 21, 2013, the Office of Disciplinary Counsel sent Respondent a copy of the complaint and directed him to file a verified response within twenty (20) days [ODC Ex. 56, bates 230-231].

108. After not receiving any response from Respondent, by letter dated February 12, 2014,

Disciplinary Counsel advised Respondent that if a response was not received by February 28, 2014, his failure to respond would be regarded as an admission of the allegations and subject Respondent to disciplinary action [ODC Ex. 57, bates 232-233].

109. In his response to the complaint, verified on or about March 13, 2014, Respondent acknowledged that he failed to complete the work he was paid to do by Mr. Donovan and that he would issue Mr. Donovan a full refund [ODC Ex. 59, bates 235-237].

110. At the hearing, Respondent admitted that he never filed anything on behalf of Mr. Donovan and that he currently still owed him a refund [Trans. p. 223].

111. Respondent also testified that Mr. Donovan's funds were probably in his operating account, despite those funds being unearned [Trans. p. 226].

112. Because Respondent failed to take any action with regard to Mr. Donovan's case after being retained, he has violated Rule 1.3 of the Rules of Professional Conduct, which provides as follows:

Rule 1.3. Diligence.

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

113. Because Respondent failed to keep Mr. Donovan informed as to the status of the matter and failed to respond to his requests for information, Respondent has violated Rule 1.4 of the Rules of Professional Conduct which provides as follows:

Rule 1.4. Communication.

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

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

114. Because Respondent engaged in dilatory and failed to make reasonable efforts consistent

with the stated and agreed upon objectives of Mr. Donovan, he has violated Rule 3.2 of the Rules of Professional Conduct which provides as follows:

Rule 3.2. Expediting litigation.

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

115. Because Respondent failed to promptly return unearned fee paid to him by Mr. Donovan, Respondent has violated Rule 1.16(d) of the Rules of Professional Conduct, which provides as follows:

Rule 1.16. Declining or terminating representation.

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

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

Rule 8.1. Bar admission and disciplinary matters.

[A] lawyer in connection with . . . a disciplinary matter, shall not:
(b) . . . knowingly fail to respond to a lawful demand for information from . . . disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

117. Because Respondent placed Donovan's funds in his operating account which potentially he could utilize rather than in an IOLTA account from which he could only draw funds when they were earned, he has violated, the misrepresentation aspect of Rule 8.4(c) of the Rules of Professional Conduct, which provide as follows:

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:
(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Count VIII
Complaint of Tony Bethea
I. D. No. 13-02-542

118. Mr. Bethea did not appear or testify at the hearing. He alleged in his complaint, which was sworn and notarized on or about November 18, 2013, that Respondent had been appointed by the Circuit Court of Monongalia County to file a writ of *habeas corpus* on his behalf [ODC Ex. 60, bates 238-243]. Court records indicated that Respondent was appointed on or about December 10, 2004 [ODC Ex. 64, bates 259].

119. Respondent was relieved as counsel by Order entered January 8, 2013, and Attorney Christopher Miller, Esquire, was appointed to represent Mr. Bethea in the matter [ODC Ex. 64, bates 260].

120. Mr. Bethea alleged in his complaint that despite several requests, Respondent had not turned over the files in his possession relating to Mr. Bethea's case to Mr. Miller [ODC Ex. 60, bates 238].

121. In his response to the complaint, verified on or about March 13, 2014, Respondent stated that Mr. Miller should have had access to the file at the Courthouse. Respondent further stated that he delivered everything in his possession relating to Mr. Bethea's case to Mr. Miller on March 13, 2014 [ODC Ex. 63, bates 248-250].

122. At the hearing, Respondent testified that he could recall specifics of when Mr. Bethea's counsel was provided with the files in Respondent's possession, but that his depression could have affected his ability to copy and turn over files during that time period [Trans. pp. 230-231].

123. Because Respondent neglected Mr. Bethea's case and failed to take any action in the matter,

he has violated Rule 1.3 of the Rules of Professional Conduct, which provides as follows:

Rule 1.3. Diligence.

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

124. Because of his dilatory practices and his failure to make reasonable efforts consistent with the stated and agreed upon objectives of Mr. Bethea, and because such action brings the administration of justice in disrepute ultimately requiring that the Circuit Court remove him as counsel, he has violated Rule 3.2 of the Rules of Professional Conduct which provides as follows:

Rule 3.2. Expediting litigation.

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

125. Because Respondent failed to promptly surrender papers and property to which the Mr. Bethea and his new counsel were entitled, Respondent has violated Rule 1.16(d) of the Rules of Professional Conduct, which provides as follows:

Rule 1.16. Declining or terminating representation.

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

Count IX

Complaint of Lisa A. Long

I. D. No. 13-02-578

126. Ms. Long did not appear or testify at the hearing. She alleged in her complaint, which was sworn and notarized on or about November 24, 2013, that in mid-2012, she and her husband paid Respondent to file a bankruptcy action on their behalf [ODC Ex. 65, bates 261-263].

127. Ms. Long's complaint stated that despite complying with all of Respondent's requests, Respondent had taken no action in the matter [ODC Ex. 65, bates 262].

128. Ms. Long also alleged that Respondent had not returned her phone calls [ODC Ex. 65, bates 262].

129. In his response to the complaint, verified on or about March 13, 2014, Respondent attributed the delay in the case to scheduling issues [ODC Ex. 68, bates 268-270].

130. At the hearing, Respondent disputed that he had been unresponsive to Ms. Long's calls. He stated that the reason for delays in this case was that Ms. Long had failed to bring him the documentation he needed to proceed with the case [Trans. pp. 232-234]. The HPS gives credit to Respondent's testimony on this issue because documentation is a necessary component to any bankruptcy proceeding, and with the absence of Ms. Long at the hearing, the HPS does not find that the ODC has proven this aspect of the case by clear and convincing evidence.

131. Respondent acknowledged that Ms. Long was entitled to a refund, although he was not certain of how much she had paid him. Respondent contended that the retainer remained in his operating account [Trans. pp. 233-234].

132. Because Respondent engaged in dilatory practices and failed to make reasonable efforts consistent with the stated and agreed upon objectives of Ms. Long, he has violated Rule 3.2 of the Rules of Professional Conduct which provides as follows:

Rule 3.2. Expediting litigation.

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

133. Because Respondent intentionally placed his client's funds in his operating account which he could utilize rather than in an IOLTA account from which he could only draw funds when they

were earned, he has violated the misrepresentation ground of Rule 8.4(c) of the Rules of Professional Conduct which provides as follows:

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

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

**Count X
Complaint of Carly A. Wears
I. D. No. 14-02-058**

134. Ms. Wears did appear and testify at the hearing. She stated in her complaint, which was sworn and notarized on or about January 27, 2014, that she retained Respondent in August of 2013 to represent her in a child custody matter and paid him a retainer of Two Thousand Five Hundred Dollars (\$2,500.00) [ODC Ex. 70, bates 274].

135. Ms. Wears' complaint alleged that from late August to October, 2013, Respondent was routinely non-responsive to Ms. Wears' calls of inquiry and rarely provided her with updates in the matter [ODC Ex. 70, bates 272-276].

136. Ms. Wears stated that she visited Respondent's office on or about October 10, 2013, and noticed a copy of discovery responses Respondent had prepared for her case. Ms. Wears observed that the Certificate of Service for the documents was for that same day, which was two (2) months past the deadline given in the Temporary Order entered by the Court in the matter for such [ODC Ex. 70, bates 275; Trans. pp. 53-55].

137. By letter dated October 23, 2013, Ms. Wears terminated Respondent's representation and requested that he return the remainder of her retainer in a timely manner [ODC Ex. 73, bates 287; Trans. pp. 59-60].

138. By letter dated November 27, 2013, Ms. Wears again requested a refund of her retainer from Respondent, along with a final bill and a copy of her file [ODC Ex. 73, bates 291; 293; Trans. p. 61].

139. Ms. Wears was provided with her file on or about December 10, 2013 [ODC Ex. 71, bates 278; Trans. p. 62].

140. By letter dated January 31, 2014, the Office of Disciplinary Counsel sent Respondent a copy of the complaint and directed him to file a verified response within twenty (20) days. This letter also notified Respondent that failed to respond may be regarded as an admission of the allegations and may form the basis for a Statement of Charges [ODC Ex. 76, bates 324-325].

141. Respondent failed to respond to Ms. Wears' complaint [Trans. p. 239].

142. At the hearing, Ms. Wears testified that communication with Respondent when she first hired

him was, "really really awesome," but then it "slowed down to nonexistent," [Trans. p. 46]. Ms. Wears testified that communication was the biggest issue she had with Respondent [Trans. pp. 52; 62; 71; 77; ODC Ex. 74, bates 294].

143. Ms. Wears also testified that she never received a refund from Respondent or an itemization of his fee [Trans. pp. 56-57; 60].

144. Respondent admitted on the record at the hearing that he would stipulate to communication issues during his representation of Ms. Wears and further admitted that at times he had been non-responsive to her calls [Trans. p. 237].

145. Respondent denied that he missed discovery deadlines in the case which resulted in her terminating him and testified that he had an agreement with opposing counsel to extend discovery. Hence, no harm to Ms. Wears had occurred. [Trans. p. 237]. The HPS gives credit to Respondent's

explanation of this issue and finds that no disciplinary action is warranted with respect to this part of ODC's evidence.

146. Respondent contended that he earned the full fee paid to him by Ms. Wears, but did not provide any documentation concerning the time he expended in the matter [Trans. pp. 238-239].

147. Because Respondent failed to keep Ms. Wears informed as to the status of the matter, failed to respond to her requests for information, and failed to be available to explain to her important legal issues, Respondent has violated Rules 1.4 of the Rules of Professional Conduct which provides as follows:

Rule 1.4. Communication.

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

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

148. Because the burden of proof is always upon the attorney to show the reasonableness of the fees charged,⁷ and Respondent failed to present any records or evidence that he earned the full fee paid to him by Ms. Wears, Respondent has violated Rule 1.16(d) of the Rules of Professional Conduct, which provides as follows:

Rule 1.16. Declining or terminating representation.

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

⁷ See, Syllabus Point 2, *Committee on Legal Ethics of West Virginia State Bar v. Tatterson*, 177 W.Va. 356, 352 S.E.2d 107 (1986).

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

Rule 8.1. Bar admission and disciplinary matters.

[A] lawyer in connection with . . . a disciplinary matter, shall not:
(b) . . . knowingly fail to respond to a lawful demand for information from . . . disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

150. Because Respondent intentionally placed his client's funds in his operating account which he could utilize rather than in an IOLTA account from which he could only draw funds when they were earned, he has violated the misrepresentation aspect of Rule 8.4(c) of the Rules of Professional Conduct, which provide as follows:

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:
(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

**Count XI
Complaint of the Office of Disciplinary Counsel
I. D. No. 14-02-183**

151. By letter dated February 28, 2014, Attorney Delby B. Pool advised Disciplinary Counsel of a Family Court matter involving her client, Amy Dovola, and Ms. Dovola's former husband, who was represented by Respondent [ODC Ex. 77, bates 326-335]. Neither Ms. Poole nor her client appeared to give testimony at the hearing.

152. Ms. Pool stated in her letter that the underlying matter reached a settlement on October 30, 2013, which required Respondent's client to pay Six Thousand Five Hundred Dollars (\$6,500.00) to Ms. Dovola within sixty (60) days. Respondent also was to prepare the agreed order [ODC Ex.

77, bates 326].

153. Despite Mr. Dovola's representation to Ms. Pool and her client that the Six Thousand Five Hundred Dollars (\$6,500.00) had been timely sent to Respondent, Ms. Pool represented that Respondent had not forwarded any such funds to Ms. Pool's client [ODC Ex. 77, bates 326].

154. Bank records indicated that a check in the amount of Six Thousand Five Hundred Dollars (\$6,500.00), made out to Respondent by Michael Dovola, was deposited into Respondent's Client Trust Account on or about December 12, 2013 [ODC Ex. 80, bates 371].

155. Ms. Pool maintained that she sent Respondent several reminders to forward the funds to her client [ODC Ex. 77, bates 326].

156. On or about January 17, 2014, Ms. Pool filed a Motion for Sanctions in the matter, in which she alleged that Respondent had not tendered the funds to Ms. Dovola, nor had he tendered the agreed order to the Court [ODC Ex. 77, bates 326; 330-335].

157. On or about February 12, 2014, Respondent provided Ms. Pool with a check from his Client Trust Account made payable to Ms. Pool in the amount of Six Thousand Five Hundred Dollars (\$6,500.00) [ODC Ex. 77, bates 326; ODC Ex. 80, bates 364].

158. On or about February 18, 2014, Ms. Pool deposited the same in her IOLTA account and then disbursed the funds to her client the next day [ODC Ex. 77, bates 326].

159. On or about February 27, 2014, a copy of the check from Respondent was received in the mail by Ms. Pool from her bank marked, "NOT SUFFICIENT FUNDS" [ODC Ex. 77, bates 327; 333].

160. Ms. Pool notified Respondent of the bad check and advised Respondent to provide the funds to her immediately [ODC Ex. 77, bates 327].

161. By letter dated March 31, 2014, the Office of Disciplinary Counsel sent Respondent a copy of the complaint and directed him to file a verified response within twenty (20) days. This letter also notified Respondent that failed to respond may be regarded as an admission of the allegations and may form the basis for a Statement of Charges [ODC Ex. 78, bates 336-337].

162. Respondent failed to respond to the complaint [Trans. p. 248].

163. At the hearing, Respondent testified that during the end of 2013 he was not doing a good job of keeping track of his accounting or with putting money in the right accounts. He believed that the check he provided to Ms. Pool was returned due to the fact he provided a refund to another client before putting the money to cover such into the correct account [Trans. pp. 240; 244-246].

164. Respondent denied that he had misappropriated or commingled any client funds and acknowledged the seriousness of client trust account violations [Trans. pp. 245-247]. The HPS gives credit to this testimony of Respondent and finds that he did not intentionally and knowingly convert funds to his own use. Nonetheless, the length of the delay in transferring the funds to Ms. Pool was unreasonable.

165. Respondent testified that he ultimately made a cash payment to Ms. Pool and she withdrew her request for sanctions [Trans. p. 240].

166. Because Respondent failed to promptly tender the agreed order to the Family Court and failed to promptly forward funds from his client to Ms. Dovola, Respondent has violated Rule 1.3 of the Rules of Professional Conduct which provides as follows:

Rule 1.3. Diligence.

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

167. Because Respondent engaged in dilatory practices that brought the administration of justice

into disrepute and failed to make reasonable efforts consistent with the stated and agreed upon objectives of his client, he has violated Rule 3.2 of the Rules of Professional Conduct which provides as follows:

Rule 3.2. Expediting litigation.

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

168. Because Respondent failed to promptly deliver to Ms. Dovola funds to which she was entitled, he has violated Rule 1.15(b) of the Rules of Professional Conduct, which provides as follows:

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.

169. Because Respondent failed to file a verified response to this complaint and failed to comply with the Office of Disciplinary Counsel's lawful request for information, he has violated Rule 8.1(b) of the Rules of Professional Conduct, which provides as follows:

Rule 8.1. Bar admission and disciplinary matters.

[A] lawyer in connection with . . . a disciplinary matter, shall not:
(b) . . . knowingly fail to respond to a lawful demand for information from . . . disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Expert witnesses

170. Russell "Jack" Torsney, Jr., a professional counselor and therapist, with a masters degree in guidance and counseling, testified at the hearing as an expert psychologist retained by

Respondent. He has thirty (30) years experience as a counselor and psychologist. [Trans. p. 165]

⁸ His private practice is located in Morgantown, West Virginia, and he also works as a counselor with the Federal Probation Office and with Community Corrections. [Trans. p. 165] He has testified as an expert on multiple occasions in state and federal courts in northern West Virginia. He provides counseling for depression and similar matters on a daily basis, although his emphasis in serving as an expert witness has been in matters of addiction and substance abuse and sexual offenses. [Trans. p. 166-167] He has known Respondent for more than ten years having encountered him professionally in cases where Respondent represented a party involved in litigation.

171. Although Torsney did not provide counseling to Respondent during the period of time encompassed in the several disciplinary complaints which are the subject of this proceeding, he was asked to review the history of Respondent's mental status during that time frame in an effort to evaluate Respondent's emotional condition in that time frame. [Trans. p. 167-168]. Mr. Torsey actually had a recollection before he evaluated Respondent, that he had observed Respondent during that time frame and observed a significant weight loss, which is one criteria for major depressive disorders, and Respondent advised that he had not been on a diet. [Trans. p. 168] Torsey met with Respondent on one (1) occasion, on January 15, 2015, in a session lasting approximately two (2) hours. Respondent disclosed that he had suffered from feelings of hopelessness, worthlessness, and lack of the ability to enjoy anything for a period exceeding one year. Also, the history disclosed that Respondent stayed at home much of the time and avoided interaction with others.

⁸ Mr. Torsney is not a licensed psychologist, but he is nationally certified as a professional counselor, and is a licensed counselor, and a licensed social worker.

172. The expert indicated that these were symptoms that are consistent with a significant situational depression. [Trans. p. 168-169] Mr. Torsney noted that these symptoms often manifest themselves in persons who are depressed over the loss of a loved one whether through death or through a divorce. One characteristic is that the person may not be able to function in normal capacities. Another is suicidal ideation. [Trans. p. 169] He noted that Respondent disclosed that he had held suicidal thoughts during his depression and that he had both a plan and the means to carry out suicide. He also opined that the isolationism was a primary symptom in Respondent's depression. [Trans. p. 170] Mr. Torsney opined that Respondent had experienced significant depression during the time periods discussed herein. Mr. further opined that despite his opinion that Respondent currently maintained some symptoms of depression, that he had made progress and was currently fit to practice law. Mr. Torsney testified that Respondent's depression appeared more situational as opposed to clinical, that Respondent appeared to take responsibility for neglecting client matters, and that Respondent's goal moving forward was for these kinds of things not to happen. Mr. Torsney believed that it would be in Respondent's best interest to go forward with periodic counseling [Trans. pp. 165-185].

173. Respondent testified that with regard to overcoming his depression which resulted largely from the break-up of his fifteen year marriage. He indicated that he "just got out of it" [Trans. p. 120], and he currently did not believe he was depressed [Trans. p. 129]. Respondent also testified that he did not abuse alcohol or other drugs [Trans. p. 122], and he has since remarried [Trans. p. 130]. He also testified that during the period of his depression he was not good at holding his clients hands [Trans. p. 120-121], but that he was able to represent his clients effectively. He just was not good at communicating with them as he normally would have been. [Trans. p. 121, 250-

251]. He indicated that he has now recovered from the loss of his marriage, and from the divorce.

174. Respondent testified that his disciplinary issues occurred over a two year period while he was

depressed [Trans. p. 118] He admitted that during that time period he lacked the energy for “high maintenance” clients, but that he has recovered and has changed his practice to avoid the pitfalls that existed during the time he was depressed. [Trans. pp. 120 -121]. He indicated that his conduct was an anomaly. He pointed out that over his 17 year period of practicing law that it was only during this time frame that he had problems with ethics matters. He said it devastated him, his practice, and his whole life. However, he further indicated that he has made changes and is in the process of getting everything back together. He testified that he is emotionally and mentally now capable of strong representation of his clients. He thinks he has fixed things which caused problems with his lack of communication. [Trans. p. 250- 251]

Testimony of Complainant Wears related to Respondent’s mental status

175. The HPS notes that Complainant Wears inferred that the Respondent’s conduct was an anomaly and that Respondent was a very competent lawyer. The inference is raised from several excerpts in her testimony: She noted when she retained him in August, 2013, Respondent was the most promising and understanding of the several attorneys with whom she consulted when selecting counsel. [Trans. p. 45] She indicated that in the beginning of the attorney client relationship, the communication “was really really awesome and then it kind of slowed down to nonexistent.” [Trans. pp. 46, 63]. Her biggest problem with him was communication and when she asked him about the problem he indicated that he said he had just lost a secretary. [Trans. pp. 52-53] When she decided to terminate him, “. . . I just pretty much realized that he is either swamped with something going

on in his own life or he just, you know, doesn't really care or I don't know what's going on” [Trans. p. 56] When asked whether Mr. Thorn diligently handled her case, she responded, “I think he could have if he wasn't busy. I don't know. He just seemed super busy. I feel like when I hired him he was on top of his game and very confident and that's the reason I hired him, but something happened in that time that -- I don't know if he just had stuff going on in his own life or what was going on, but I mean something clearly changed from the time I hired him to the time that our proceedings started. [Trans. p. 59] She also commented on his competence: “And I felt like when I hired him that it was the perfect person to hire, but -- I have no doubt in his competence at all as a lawyer, I just -- like I said several times, I feel like something happened along the line where maybe he had too much of a caseload, I don't know” [Trans. p. 64] Interestingly, she also testified that this incident did *not* affect her trust in the legal system. [Trans. p. 65] Although she was frustrated with his lack of communication, Ms. Wears indicated that “if we had to go to court, he's very thorough and very informative, but the majority of the time, I felt like I was kind of in the dark, which is -- that's why, I mean I truly believe he's very competent in what he does. I have no doubts that he's a great lawyer. I just felt like, I don't know, there wasn't enough time.” [Trans. p.73-74]

176. The HPS finds from the clear and convincing evidence that Mr. Thorn's problems in the various matters giving rise to these disciplinary complaints were, indeed, an anomaly and an aberration from the manner in which he conducted his law practice during the remaining seventeen years of his practice. Although it has previously found above that multiple violations of his ethical obligations occurred during this time period, it also finds that this aberrant behavior was the result of a situational depression and that the depression created a legitimate and substantial mitigating

factor. It further finds that his violations were largely precipitated by the breakup of his marriage and the related depression, rather than by a lack of commitment to and concern for his clients. The HPS finds that his violations were not the result of some intentional or malevolent behavior or personality disorder.

177. Rule 3.7 of the Rules of Lawyer Disciplinary Procedure provides that, in order to recommend

the imposition of discipline of a lawyer, “the allegations of the formal charge must be proved by clear and convincing evidence.” *See also* Syllabus Point 2, Lawyer Disciplinary Board v. Cunningham, 195 W.Va. 27, 464 S.E.2d 181 (1995).

178. The factual findings and rule violations as set forth *supra* are fully supported by the record.

III. DISCUSSION

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

A. Respondent violated duties to his clients, to the public, to the legal system and to the legal profession.

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 demonstrates that Respondent committed multiple violations of the Rules of Professional Conduct, including: (1) failing to act with reasonable diligence and promptness in representing his clients; (2) failing to communicate with his clients; (3) failing to return client files or refund unearned fees in a timely fashion; (4) failing to respond to the requests of information from the Office of Disciplinary Counsel; and (5) to a lesser degree, engaging in conduct that was prejudicial to the administration of justice. However, the HPS finds that the violations involving his clients were resulted more from negligence and from a mental disability rather than from intentional and knowing behavior.

Lawyers owe their clients duties of loyalty, communication, and diligence. The comment to Rule 1.4⁹ states that the client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued. The comment goes on to say, “The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interest, and the client’s overall requirements as to the character of representation.”

The Statement of Charges filed against Respondent consists of complaints from ten (10) different clients and one (1) complaint opened by the Office of Disciplinary Counsel. In regard to the complaints filed by Respondent’s former clients, all contained allegations that Respondent had fallen short of his duties to effectively communicate with them in their respective matters. Moreover,

⁹ Because the alleged conduct in the instant matters occurred prior to January 1, 2015, the version of the Rules of Professional Conduct in effect prior to the January 1, 2015 amendments will be used to analyze Respondent’s conduct.

the record clearly reflects that Respondent failed his clients' expectations in the underlying matters by failing to communicate with them and by failing to diligently work on their cases.

Ms. Wears testified that it was "stressful" when she could not reach Respondent or have her questions answered [Trans. p. 48], yet she concurrently observed that he was caring, competent, and very responsive at the inception. The HPS found her testimony about the nature of Mr. Thorn's conduct to be more telling than that of the other complainants, as discussed in paragraph 176 above.

Ms. Morris testified regarding her repeated attempts at contacting Respondent, stating that it was "really frustrating," and resulted in "stress," and "annoyance" [Trans. pp. 12-14]. Respondent also failed to perform work for which he already had received a fee. Ms. Wears, Ms. Morris, Ms. Miller and Ms. Hughes were forced to obtain new counsel after they concluded that no progress was being made in their respective cases, and all demanded refunds of their retainer fees. Respondent neglected to provide accountings for his work when asked and only complied with Ms. Hughes' request for a refund belatedly. In Mr. Donovan and Mr. Benkiel's cases, Respondent failed to perform any work for a significant period of time.

Respondent also violated his duties to the legal system and the legal profession. Some of Respondent's actions clearly negatively impacted his former clients' faith in other lawyers and the legal system. Mr. Britton testified that the experience, "puts a bad taste in his mouth towards, you know, lawyers" [Trans. p. 34]. Mr. Benkiel testified regarding a "distrust of the process," and that he had "less of a trust" among the legal profession [Trans. p. 93]. However, as indicated previously, Ms. Wears concluded that his conduct did not adversely affect her trust in the legal profession and attributed his actions to the fact that something must have been going on in his life.

Finally, Respondent violated a duty to the legal system by failing to respond to the Office of Disciplinary Counsel and failing promptly to address the *habeas corpus* directives of the Circuit

Court of Monongalia County in the Bethea matter. Respondent failed to file timely responses to the complaints of Mr. Britton, Mr. Donovan, and Ms. Long. Regarding the complaints of Ms. Wears and the Office of Disciplinary Counsel, Respondent failed to file any responses at all. Respondent's noncompliance with the Rules of Professional Conduct is clearly detrimental to the legal system and profession, and to some degree his conduct has brought the legal system and legal profession into disrepute.

B. Respondent acted negligently, but not intentionally and knowingly.

The evidence related to the ethical complaints involving his clients strongly suggests to the HPS that Respondent actions and inactions resulted primarily from the effects of his mental disability and some negligence rather than from wilful neglect or some intentional or knowing plan. Respondent acknowledged, for the most part, that he was aware of his clients attempts to contact him but his failure to respond resulted from his state of mind, not lack of concern or from an intentional and knowing disregard for his clients. The matter involving Mr. Benkiel, his childhood friend and office publicity manager, evidenced negligence in handling an out-of-state personal injury case.¹⁰ With regard to the communications with Disciplinary Counsel, however, the failures to respond were not warranted once he received the correspondence from the Office of Disciplinary Counsel asking him to respond to requests for information. Respondent also failed to perform legal work for his clients and has belatedly retained unearned fees long after being discharged.

C. The amount of real injury.

Respondent created intangible, but real injuries by failing to communicate with his clients and some real harm by failing to perform work in their cases. At the hearing, witnesses expressed

¹⁰ The HPS cannot recommend a reprimand in this case in large part because of the monetary harm suffered by Mr. Benkiel and because of the bankruptcy proceeding which deprived him recovery from Mr. Thorn. Moreover, the proposal to satisfy Benkiel's claim certainly had an intentional and knowing component on the part of Respondent.

how they were harmed by Respondent's conduct. In addition to describing intangible emotional injuries, witnesses that testified believed that as a result of Respondent's misconduct, their trust and confidence in lawyers and the legal system had been affected. (As pointed out above, Ms. Wears did not think his actions affected her trust in the legal system. Moreover, the delays Respondent created in the underlying matters also created some potential injury for all of the Complainants.)

There is no question that Mr. Benkiel suffered real harm from Respondent's representation. Respondent valued Mr. Benkiel's lost claim at a minimum of Twenty Five Thousand Dollars (\$25,000.00) [Trans. p. 205]. To date, Mr. Benkiel had not received any compensation for the injuries from his accident or from the damages resulting from Respondent's legal negligence in missing a statute of limitations and failing to associate with counsel licensed in Pennsylvania. Furthermore, some Complainants are still owed refunds for fees that they paid to Respondent where Respondent failed to perform work or did not complete it. Respondent estimated that Ms. Miller is entitled to a refund of One Thousand One Hundred Dollars (\$1,100.00) [Trans. p. 147]. Respondent owes Mr. Donovan a refund of Six Hundred Dollars (\$600.00) due to his failure to take any action in the matter after receiving payment.

In addition, Respondent did not provide any documentation that he earned the full fees paid to him by Ms. Morris, Mr. Britton, Ms. Long, or Ms. Wears and, as a result, they also may be entitled to refunds. It is concerning that Respondent claimed he did not have knowledge of Legal Ethics Opinion 99-03 entitled "Non-Refundable Retainers," in which the Lawyer Disciplinary Board advised that non-refundable agreements must be written, explained to the client, and meet the reasonableness test of Rule 1.5 of the Rules of Professional Conduct [ODC Ex. 83]. Respondent indicated that he was also not aware that even with regard to so-called non-refundable retainers and "flat fees," the burden of proof was always upon the attorney to show the reasonableness of the fees

charged; and, regardless of the fee structure, upon termination of representation that Rule 1.16(d) requires that the lawyer promptly refund any advance payment that has not been earned [Trans. pp. 148-149]. In some of the cases discussed herein, Respondent could not recall if he had communicated his fee to his clients in writing and provided no copies of fee agreements at the hearing.

The potential harm to the public, the legal system and the legal profession caused by Respondent was significant. Because the legal profession is largely self-governing, it is vital that lawyers abide by the rules of substance and procedure which shape the legal system. Respondent's noncompliance with these rules as exhibited in the record is clearly detrimental to the legal system and profession, and his conduct undermines the integrity and public confidence in the administration of justice.

D. There are 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 misconduct on multiple occasions by failing to communicate with his clients; failing to diligently pursue claims on behalf of clients; and failing to respond to requests for information from the Office of Disciplinary Counsel. However, as indicated above this pattern and practice was an

anomaly in the seventeen years of his practice which coincided with a mental disability which appears to be resolved at present.

E. There are potential mitigating factors present.

In addition to adopting aggravating factors, the *Scott* Court also adopted mitigating factors in a lawyer disciplinary proceedings concluding 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 Standards for Imposing Lawyer Sanctions*, 9.31 (1992).¹¹ The following mitigating factors are present: absence of a prior disciplinary record; absence of a dishonest or selfish motive; full and free disclosure to disciplinary board and cooperative attitude toward proceedings; mental disability; and obvious and repeated expressions of contrition and remorse during his testimony. Respondent has been licensed to practice law in West Virginia since April 23, 1997, and has no prior discipline from the Lawyer Disciplinary Board or the West Virginia Supreme Court of Appeals. Respondent also expressed remorse for his misconduct [Trans. pp. 189, 254-255].

Respondent has established by clear and convincing evidence that he was suffering from significant situational depression during the time frame of these complaints.¹² In Syllabus Point 3 of *Lawyer Disciplinary Board v. Dues*, 218 W.Va. 104, 624 S.E.2d 125 (2005), the Court stated that “[i]n a lawyer disciplinary proceeding, a mental disability is considered mitigating when: (1)

¹¹The *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.

¹² The HPS would have preferred that Respondent seek counseling during the pendency of his emotional illness, but the fact that he worked his way through the condition on his own does not abate or minimize the nature of or extent of this mitigating factor.

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 clear and convincing evidence to establish each of these factors. Respondent suffered a significant mental disability and this mental disability caused and substantially contributed to the misconduct. Although Respondent attempted to deal with his depression independently before these proceedings were filed, he ultimately has consulted with a professional. The Respondent has demonstrated through his testimony and that of Mr. Torsney that a meaningful and sustained period of successful rehabilitation has occurred. Fortunately, he was able to achieve that rehabilitation without prior counseling, but the HPS agrees with Mr. Torsney that Respondent should submit to counseling for some period of time in the future and document that his emotional condition and mental status are strong for a period of time in the future. The HPS also finds that Respondent is genuinely remorseful for his ethical violations and was contrite throughout the proceedings before the HPS. ODC has not indicated that any new complaints of misconduct have been filed subsequent to those listed herein. The HPS finds that Respondent's recovery appears to have arrested the misconduct and believes that recurrence of similar misconduct is unlikely. However, as a precautionary measure to protect the public from a recurrence it will include a recommendation in the proposed sanctions that he should receive psychological counseling from a licensed psychologist or psychiatrist.

IV. RECOMMENDED SANCTIONS

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syllabus Pt. 3, *in part, Committee on*

Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), cited in *Committee on Legal Ethics v. Morton*, 186 W.Va. 43, 410 S.E.2d 279, 281 (1991). In addition, discipline must serve as both instruction on the standards for ethical conduct and as a deterrent against similar misconduct to other attorneys. In Syllabus Point 3 of *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987), the Court stated:

In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.

Indeed, attorney disciplinary proceedings are primarily designed to protect the public, to reassure it as to the reliability and integrity of attorneys and to safeguard its interest in the administration of justice. See, Syllabus Point 6, *Committee on Legal Ethics v. Tatterson*, 177 W.Va. 356, 352 S.E.2d 107 (1986); Syllabus Point 3, *Daily Gazette v. Committee on Legal Ethics*, 174 W.Va. 359, 326 S.E.2d 705 (1984); Syllabus Point 2, *In re Daniel*, 153 W.Va. 839, 173 S.E.2d 153 (1970).

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

ODC recommends that Respondent's license be suspended for two years. Respondent urges that he receive only a reprimand. The HPS believes that neither of their recommendations is appropriate to address Respondent's conduct, to protect the public, to deter violations by other lawyers or to fairly punish Respondent. Based upon the conduct discussed herein it is the position of the Hearing Panel that Respondent's license should be suspended for 90 days. Although the

conduct was an aberration of the normal behavior by Respondent in his law practice, it did adversely affect a number of persons whom he represented.

With respect to most of his clients, the lack of communication and failure to prosecute the matters diligently and expeditiously was a frustration with some harm. His failure to respond to requests for information and responses to the complaints against him clearly has a negative impact upon the administration of justice and the practice of law. Moreover, the harm done to Mr. Benkiel was real and substantial for which some period of suspension is necessary to satisfy the need for punishment, the need to protect the public, and the need to deter other lawyers from similar violations. The fact that the violations occurred on multiple occasions is an aggravating factor which makes a mere reprimand inappropriate. However, the HPS finds that balancing the nature of the violations and the aggravating factors against the mitigating factors is necessary and appropriate in this case. The nature, extent and impact that his situational depression caused to him, his practice, and his clients, was very real and substantial for the period of time around his divorce and its sequela. When that mental disability is coupled with the fact that Respondent has had no other disciplinary action taken against him in the seventeen years of his practice, a two year suspension seems excessive and inappropriate.

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.” In *Committee on Legal Ethics v. Mullins*, the Supreme Court of Appeals of West Virginia 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. Rossi*, 234 W.Va. 675, 769 S.E.2d 464 (2015) (three year suspension was warranted for attorney who failed to perform work and failed to cooperate with disciplinary investigation); *Lawyer Disciplinary Board v. Aleshire*, 230 W.Va. 70, 736 S.E.2d 70 (2012) (three year suspension for unresponsiveness to clients coupled with monetary damage); *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); *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)).

The HPS finds that the facts of the present case are clearly distinguishable from each of these cases where more serious sanctions were imposed than what is recommended in the present case.

For example, in *Rossi* and *Aleshire*, and the three-year suspensions ordered by the court in each of them, the misconduct involved dishonest and selfish motives and wilful misconduct committed by each attorney which is not present here. Furthermore each of the attorneys in these two cases demonstrated a consistent unwillingness to respond to disciplinary counsel and court orders. Additionally, it should be noted, that in each of these cases, the attorney was overwhelmed by the actual practice of law and the requirements to operate a successful, ethical practice and each

admitted his inability to competently manage a law practice. Here there is no question that Mr. Thorn knows how to manage a practice and his lack of disciplinary infractions and even the testimony by his own clients, except in the narrow time frame of the complaints in this case, demonstrates he has the ability to conduct an ethical and successful practice but for the situational depression he experienced.

In both *Keenan* and *Mullins*, indefinite suspensions were ordered because the attorneys had not submitted expert testimony establishing their claimed mental and emotional disabilities. The court held that, in absence of such testimony, and because of the misconduct committed by each, the attorneys continued to represent a danger to the public and the profession. The Court reasoned that in order to protect the public, an indefinite suspension was required until the attorney could make a satisfactory showing, and the Court was satisfied, that the personal and emotional problems which gave rise to the misconduct had been satisfactorily resolved and that the attorney was once again competent to return to practice without fear of repeat violations. In this case, we have expert testimony that Mr. Thorn suffered from situational depression and that Mr. Thorn's present circumstances indicate that the situations leading to his misconduct have passed.

Respondent's actions in these matters clearly rise to such a level to justify a suspension. This is not a case of simple negligence in communication and neglect of legal representation. Ten (10) separate clients asserted that Respondent was unresponsive to them, failed to take appropriate action on their cases, and caused them real injuries. Some of those assertions were proven at the hearing, but others were not. The most serious violations apart from the Benkiel complaint were the failure to respond and communicate clients, the failure to prosecute matters with the diligence, and the failure to respond to requests from ODC. The latter infractions clearly exhibit 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. Respondent has represented that he is now removed from the period of depression that resulted in these complaints, and Mr. Torsney's opinion supports the Respondent. However, unless some serious sanction is imposed, public confidence in the legal system may be eroded. A license to practice law is a revokable privilege and when such privilege is abused, the privilege should be revoked or suspended.

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. 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.

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

- A. That Respondent's law license be suspended for a period of 90 days;
- B. That prior to reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, Respondent shall issue refunds to Debra Miller in the amount of One Thousand One Hundred Dollars (\$1,100.00), Martin Donovan in the amount of Six Hundred Dollars (\$600.00); that within eighteen months of the date of his reinstatement, Respondent shall make restitution to Mark Benkiel in the amount of Twenty Four Thousand Dollars (\$24,000.00), and provide proof thereof to the Office of Disciplinary Counsel;
- C. That prior to reinstatement, Respondent must issue an itemized statement of account to Jessica Morris, Daniel Britton, Lisa Long, and Carly Wears, in addition

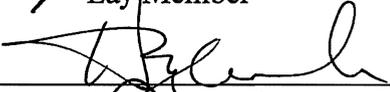
to providing them with refunds where appropriate, and provide proof thereof to the Office of Disciplinary Counsel;

- D. That upon reinstatement, Respondent's practice shall be supervised for a period of one (1) 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 submit to counseling with a licensed psychologist or psychiatrist beginning immediately and that such counseling continue for at least eighteen (18) months after that date of the Court's mandate in this case. During such period, the Respondent shall cause his counselor to file a report with the Office of Disciplinary Counsel at least semi-annually describing the nature of the counseling, the nature of the therapy, the progress of Respondent during that period, and verifying that his mental status is such that he is capable of performing his profession as a lawyer.
- F. That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rule of Lawyer Disciplinary Procedure.

Respectfully submitted.



Lay Member



Lawyer Member



Chairperson