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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BEFORE THE LAWYER DISCIPLINARY BOARD
STATE OF WEST VIRGINIA

In Re: KEVIN E. McCLOSKEY, a member of The Pennsylvania State Bar

Bar No.: out-of-state
Supreme Court No.: 14-1119
I.D. No.: 14-03-152

DISCIPLINARY COUNSEL'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED SANCTIONS

I. PROCEDURAL HISTORY

Formal charges were filed against Respondent Kevin E. McCloskey (hereinafter "Respondent") with the Clerk of the Supreme Court of Appeals on or about October 30, 2014, and served upon Respondent via certified mail by the Clerk on November 10, 2014. A scheduling conference was held on November 24, 2014, and the matter was set for hearing on March 2 and 3, 2015. Disciplinary Counsel provided its mandatory discovery on December 3, 2014. By letter dated December 4, 2014, and received by Disciplinary Counsel on December 15, 2014, Respondent filed his "Response to Statement of Charges and New Matter," which did not contain any signature by Respondent. Respondent failed to provide his mandatory discovery, which was due on or before January 5, 2015.

Because Respondent had provided an unsigned Response and failed to provide any discovery, Disciplinary Counsel filed its "Motion to Deem Admitted the Factual Allegations in the Statement of Charges" and "Motion to Exclude Testimony of Witnesses and Documentary Evidence or Testimony of Mitigating Factors" on February 9, 2015. That same

date, Disciplinary Counsel also filed its "Motion for Leave to Conduct Additional Discovery and to Disclose Additional Witnesses," "Notice of Intent to Introduce Evidence Pursuant to Rule 404(b) of the West Virginia Rules of Evidence," "Notice of Potential Conflict of Interest" and "Motion to Continue March 3, 2015 Hearing." Based on new evidence received on February 10, 2015, Disciplinary Counsel filed its "Supplemental Notice to Introduce Evidence Pursuant to Rule 404(b) of the West Virginia Rules of Evidence" and "Supplemental Motion for Leave to Conduct Additional Discovery and to Disclose Additional Witnesses." The motions were to be heard at the prehearing set for February 19, 2015. Because Hearing Panel Subcommittee member Richard M. Yurko, Esquire, was recused and a new member had not yet been appointed, the matter was rescheduled to February 26, 2015.

At the second prehearing held on February 26, 2015, Respondent advised the parties that he had sent a signed copy of his Response to the Supreme Court of Appeals of West Virginia. The Supreme Court emailed a copy of both the signed and unsigned copy it had received to the Office of Disciplinary Counsel. Disciplinary Counsel made an oral motion to withdraw its "Motion to Deem Admitted the Factual Allegations in the Statement of Charges." All other motions were discussed in-depth and the Hearing Panel Subcommittee ruled on all motions as follows: (1) the oral motion to withdraw the "Motion to Deem Admitted the Factual Allegations in the Statement of Charges" was granted; (2) the "Motion to Exclude Testimony of Witnesses and Documentary Evidence or Testimony of Mitigating Factors" was granted, but Respondent would be permitted to testify on his own behalf and present mitigating factors; (3) the "Motion for Leave to Conduct Additional Discovery and

to Disclose Additional Witnesses" was granted; (4) the "Notice of Intent to Introduce Evidence Pursuant to Rule 404(b) of the West Virginia Rules of Evidence" was granted; (5) the "Notice of Potential Conflict of Interest" was deemed moot as Mr. Yurko had recused himself and a new member appointed in his stead; (6) the "Supplemental Notice of Intent to Introduce Evidence Pursuant to Rule 404(b) of the West Virginia Rules of Evidence" was granted; (7) the "Supplemental Motion for Leave to Conduct Additional Discovery and to Disclose Additional Witnesses" was granted; and (8) the "Motion to Continue the March 3, 2015 Hearing" was granted. Respondent's objections to the same were noted and his right to renew his objections was preserved. A prehearing was set for June 2, 2015, and the hearing was set for June 10 and 11, 2015.

Because Disciplinary Counsel's expert witness could not be available for the June 10 and 11, 2015 hearing dates, Disciplinary Counsel filed a "Motion to Continue June 10-11, 2015 Hearing," and also a "Motion to Allow Telephonic Testimony of Witnesses." Both motions were granted at the June 2, 2015 prehearing, and the hearing was rescheduled for August 11 and 12, 2015. On July 22, 2015, Mr. Hunter, Laymember on the Hearing Panel Subcommittee, advised that he had a conflict with the August11 and 12, 2015 hearing date. The hearing assitant obtained new dates from all parties and the matter was set for hearing on November 17 and 18, 2015. Due to a scheduling conflict with one of Disciplinary Counsel's witnesses, a second "Motion to Take Witness Testimony by Telephone" was filed on October 27, 2015. Respondent was given until November 3, 2015, to file an objection via email, but declined to do so. The motion was granted by Order entered November 10, 2015.

Thereafter, this matter proceeded to hearing in Charleston, West Virginia, on November 17, 2015. The Hearing Panel Subcommittee was comprised of Paul T. Camilletti, Esquire, Chairperson, John W. Cooper, Esquire, and Jon Blair Hunter, Layperson. Joanne M. Vella Kirby, Lawyer Disciplinary Counsel, and Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. Respondent appeared *pro se*, via telephone. The Hearing Panel Subcommittee heard testimony from Anita R. Casey, Stuart A. McMillan, Brent Wear, Mark A. Kepple, Benjamin C. McKinney, Elaine M. Bixler, Mary E. "Betsy" Casto, Kenneth Wayne Blake and Respondent. In addition, ODC Exhibits 1–32 were admitted into evidence.

Based upon the evidence and the record, the Office of Disciplinary Counsel submits to the Hearing Panel Subcommittee of the Lawyer Disciplinary Board the following Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions regarding the final disposition of this matter.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a lawyer known to have engaged in the practice of law in Ohio County, West Virginia, Hancock County, West Virginia, Brooke County, West Virginia and Marion County, West Virginia, and, as such, is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.[1]

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[1] Pursuant to Rule 1 of the West Virginia Rules of Lawyer Disciplinary Procedure, the West Virginia Rules of Professional Conduct govern the conduct of an attorney who practices law in this state or provides or offers to provide legal services in this state, even where such attorney's practice consists entirely of federal matters. In such circumstances, the West Virginia Office of Disciplinary Counsel and the West

Complaint of the Office of Disciplinary Counsel
I.D. No.14-03-152

2. Respondent is licensed to practice law in the Commonwealth of Pennsylvania, and has been assigned Attorney Registration No. 95072. (ODC Exhibits 1, 26).

3. On March 5, 2014, the Office of Disciplinary Counsel received a complaint form from Stuart A. McMillan, Esquire, joined by Mark A. Kepple, Esquire, in which they alleged, upon information and belief, that in late 2013 and early 2014, Respondent was practicing law without a license and was representing to have a West Virginia bar number when he was not licensed to practice law in West Virginia. (Transcript at p. 14, lines 14-24, p. 15, lines 1-22, p. 35, lines 10-24, p. 36, lines 1-2, p. 70, lines 6-14; ODC Exhibit 3). Attorneys McMillan and Kepple attached a pleading to the complaint from the Circuit Court of Ohio County, West Virginia, in which Respondent filed a "Praecipe for Entry of Appearance" in the civil action styled Shane N. Sneddon v. Daniel W. Jasper and William J. Wentzel, No. 13-C-385. Id. In the aforementioned pleading, dated December 10, 2013, Respondent entered an appearance on behalf of defendant Daniel W. Jasper and signed the same "Kevin McCloskey, Esquire, WVATTY I.D. NO. 11529." Id.

4. Upon receipt of the above-referenced complaint, the Office of Disciplinary Counsel confirmed that West Virginia bar number 11529 belongs to Benjamin Cline McKinney, Esquire. (Transcript at p. 51, lines 1-24, p. 52, lines 1-24, p. 53, lines 1-

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Virginia Lawyer Disciplinary Board have jurisdiction to investigate the alleged misconduct and recommend disciplinary action against the attorney regardless of whether the attorney is a member of the West Virginia State Bar. Syl. pt. 5, State ex rel. York v. West Virginia Office of Disciplinary Counsel et al., 231 W.Va. 183, 744 S.E.2d 293 (2013).

24, p. 54, lines 1-24, p. 55, lines 1-23; ODC Exhibit 14). Attorney McKinney was admitted to the West Virginia bar on April 26, 2011 and is employed as an associate attorney with the law firm Steptoe &Johnson, PLLC, 1085 Van Voorhis Road, Suite 400, Morgantown, West Virginia 26507. Id.

5. By letter dated March 12, 2014, the Office of Disciplinary Counsel initiated a complaint against Respondent pursuant to Rule 2.4 of the West Virginia Rules of Lawyer Disciplinary Procedure. (Transcript at p. 71, lines 14-24, p. 72, lines 1-22; ODC Exhibit 5). The complaint was sent to Respondent requesting a verified response to the same within 20 days of receipt.[2] Id.

6. By letter dated March 12, 2014, the Office of Disciplinary Counsel requested that Madeleine J. Nibert, Esquire, Bar Admissions Administrator for the West Virginia Board of Law Examiners, provide any information regarding any application by bar exam or reciprocity for admission to the practice of law by Respondent. (Transcript at p. 70, lines 15-24, p. 71, lines 1-13; ODC Exhibit 4).

7. On March 13, 2014, the Office of Disciplinary Counsel received a facsimile from the Honorable James P. Mazzone in reference to a civil action styled Laura J. Fisher, Individually and as Parent and Natural Guardian of Katelynn M. Smith and Maeghan B. Fisher, infants, and Jeffrey Fisher v. Kylie Matics and Joseph D. Matics, Case No. 14-C-19, which was pending in the Circuit Court of Hancock County, West Virginia. (ODC Exhibit 6). The facsimile included a letter to the Court, dated March 3, 2014,

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[2] The complaint was sent to Respondent at 428 Forbes Avenue, Suite 909, Pittsburgh, Pennsylvania 15219, which was the address that Respondent noted on the pleading he filed in the Circuit Court of Ohio County, West Virginia on or about December 10, 2013. Id.

from Attorney Kepple, in which he advised the Court that Respondent was not licensed to practice law in West Virginia. (Transcript at p. 41, lines 19-24, p. 42, lines 1-24, p. 43, lines 1-9; ODC Exhibit 6). On or about February 10, 2014, Respondent had entered an appearance on behalf of defendants Kylie Matics and Joseph D. Matics and signed the same "Kevin McCloskey, Esquire, PA I.D. NO. 95072." Id.

8. On March 13, 2014, the Office of Disciplinary Counsel requested certified copies of the case files in the aforementioned matters pending before the Circuit Court of Ohio County, West Virginia and the Circuit Court of Hancock County, West Virginia. (Transcript at p. 72, lines 23-24, p. 73, lines 1-15; ODC Exhibit 7). Upon receipt of the case files, the Office of Disciplinary Counsel discovered that on or about February 20, 2014, in the case styled Laura J. Fisher, Individually and as Parent and Natural Guardian of Katelynn M. Smith and Maeghan B. Fisher, infants, and Jeffrey Fisher v. Kylie Matics and Joseph D. Matics, No. 14-C-19, which was pending in the Circuit Court of Hancock County, West Virginia, Plaintiffs' counsel had filed a "Motion to Strike Entry of Appearance." (ODC Exhibit 9 at pp. 120-122). In support of the Motion, Plaintiffs' counsel asserted "[u]pon information and belief, counsel for the Defendants, Kevin McCloskey is not licensed to practice law in the State of West Virginia," and, "[a]s such, his Entry of Appearance in this matter should be stricken." Id. Thereafter, on or about February 21, 2014, Attorney Kepple and the law firm of Bailey & Wyant, PLLC entered a Notice of Appearance on behalf of the Defendants. (Transcript at p. 43, lines 10-23; ODC Exhibit 9 at pp. 117-119). Similarly, on or about February 21, 2014, in the case styled Shane N. Sneddon v. Daniel W. Jasper and

William J. Wentzel, No. 13-C-385, which was pending in the Circuit Court of Ohio County, West Virginia, Attorney Kepple and the law firm of Bailey & Wyant, PLLC entered a Notice of Appearance on behalf of Defendant Jasper, after it was discovered that Respondent is not licensed to practice law in West Virginia. (Transcript at p.43, line 24, p. 44, lines 1-17; ODC Exhibit 11 at pp. 178-180).

9. On March 14, 2014, the Office of Disciplinary Counsel received a letter from Ms. Nibert from the West Virginia Board of Law Examiners, which included a copy of documents from Respondent's file with the Board of Law Examiners. (Transcript at p. 73, lines 16-24, p. 74, lines 1-12; ODC Exhibit 8 (admitted under seal)). Ms. Nibert provided the aforementioned file pursuant to the "Affidavit of Authorization and Release" Respondent executed on or about October 18, 2006 as part of his bar application, in which Respondent acknowledged his understanding that the information about him in the possession of the Board of Law Examiners could be disclosed among the Board, the West Virginia State Bar, and disciplinary agencies, but that it would otherwise be kept confidential. Id. Ms. Nibert confirmed that Respondent has never been admitted to practice law in West Virginia. Id.

10. Because Respondent failed to file a response to the complaint as directed, by letter dated April 10, 2014, the Office of Disciplinary Counsel directed Respondent to file a response to the complaint by April 22, 2014, and advised Respondent that his failure to respond would result in a subpoena being issued for his appearance at the Office of Disciplinary Counsel for a 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. (Transcript at p. 75, lines 12-24, p. 76, lines 1-5; ODC Exhibit 12). The letter was sent to Respondent at 428 Forbes Avenue, Suite 909, Pittsburgh, Pennsylvania 15219 via certified and first class mail. Id.

11. On or about April 13, 2014, the Office of Disciplinary Counsel received copies of the letters previously sent to Respondent at 428 Forbes Avenue, Suite 909, Pittsburgh, Pennsylvania 15219. (Transcript at p. 78, line 24, p. 79, lines 1-22; ODC Exhibit 17). The letters, which were addressed to Respondent and were unopened, arrived in an envelope addressed to the Office of Disciplinary from Karen L. Hughes, Esquire, Employees of Government, Employees Insurance Company, 428 Forbes Avenue, Suite 909, Pittsburgh, Pennsylvania 15219, along with an unsigned, handwritten note attached to the "green card," which read "Mr. McCloskey is no longer employed at this law firm. Thank you." Id.

12. On or about April 14, 2014, Respondent called the Office of Disciplinary Counsel and advised that he no longer worked at the 428 Forbes Avenue, Suite 909, Pittsburgh, Pennsylvania 15219 address and provided his telephone number, (412) 952-2738. (Transcript at p. 76, lines 6-24, p. 77, lines 1-15; ODC Exhibit 13). On or about April 17, 2014, Respondent again called the Office of Disciplinary Counsel and provided the following address at which he could receive correspondence: 1251 Meadowbrook Drive, McMurray, Pennsylvania 15317. Id. By letter dated April 17, 2014, the Office of Disciplinary Counsel provided Respondent with copies of the two letters that had been previously sent to Respondent advising him of the complaint, and directed him to file a response to the complaint within 20 days, pursuant to Rules 2.4 and 2.5 of the

West Virginia Rules of Lawyer Disciplinary Procedure. Id. The April 17, 2014 letter was sent to Respondent at the 1251 Meadowbrook Drive, McMurray, Pennsylvania 15317 address. Id.

13. On or about July 10, 2014, the Office of Disciplinary Counsel received an "Affidavit of Benjamin Cline McKinney," which was executed on June 24, 2014. (Transcript at p. 51, lines 1-24, p. 52, lines 1-24, p. 53, lines 1-24, p. 54, lines 1-24, p. 55, lines 1-23; ODC Exhibit 14). In the Affidavit, Attorney McKinney stated that he is an attorney practicing with the law firm of Steptoe & Johnson, PLLC, 1085 Van Voorhis Road, Suite 400, Morgantown, West Virginia 26505[3] and that he was assigned West Virginia bar number 11529 upon his admission to practice law in the State of West Virginia on April 26, 2011. Id. Attorney McKinney further stated that on or about March 11, 2014, he was notified of reports that Respondent had affixed his West Virginia bar number on pleadings filed in the Circuit Court of Ohio County, West Virginia under Respondent's name. Id. Attorney McKinney additionally stated that he never gave Respondent or any other individual permission to use his West Virginia bar number on pleadings, and that he was not aware that Respondent had affixed his West Virginia bar number to any document prior to March 11, 2014. Id.

14. By letter dated August 20, 2014, the Office of Disciplinary Counsel sent two original Subpoena *duces tecum* to Angie Mitas, Esquire, Disciplinary Board of the Supreme Court of Pennsylvania, 437 Grant Street, Pittsburgh, Pennsylvania 15219 to be served

[3] It appears that the Affidavit contains a typographical error, in that the zip code for the law firm's address in Morgantown, West Virginia is 26507, as opposed to 26505.

upon Respondent. (Transcript at p. 77, lines 16-24, p. 78, lines 1-10; ODC Exhibit 15). The Subpoena *duces tecum* commanded Respondent's presence to testify in the taking of a sworn statement at the Office of Disciplinary Counsel on September 30, 2014 at 2:00 p.m., and to produce any and all documentation pertaining to the complaint pending against him before the Office of Disciplinary Counsel. Id.

15. On September 10, 2014, the Office of Disciplinary Counsel received correspondence dated September 8, 2014 from Mark A. Pastore, Investigator, which included an "Affidavit of Service" executed September 8, 2014 and one of the aforementioned original Subpoena *duces tecum*. (Transcript at p. 78, lines 11-23; ODC Exhibit 16). Mr. Pastore stated that on September 8, 2014 at 8:59 a.m., he personally served the Subpoena *duces tecum* upon Respondent in the lobby of the Frick Building, 437 Grant Street, Suite 1300, Pittsburgh, Pennsylvania 15219. Id. Mr. Pastore further stated that Respondent acknowledged that his current address is 236 Donna Avenue, Morgantown, West Virginia 26505. Id.

16. On September 29, 2014 at 2:35 p.m., the Office of Disciplinary Counsel received a letter from Respondent, which was sent via facsimile and was on letterhead that included the 236 Donna Avenue, Morgantown, West Virginia 26505 address, the telephone number (412) 952-2738 and the electronic mail address is kevinemcloskeyesq@gmail.com (Transcript at p. 79, lines 23-24, p. 80, lines 1-24, p. 81, lines 1-18; ODC Exhibits 18, 18A). The letter, which was dated September 25, 2014, acknowledged that Respondent had received the above-referenced Subpoena *duces tecum* on or about September 9, 2014, stated that Respondent would be unable

to appear pursuant to the Subpoena and requested that the Subpoena be withdrawn and reissued. Id. The letter also stated that Respondent had "not been granted an opportunity to review any other paperwork [aside from the Subpoena] and/or documentation concerning this alleged complaint," and that the Subpoena was "the only document [Respondent has] received" from the Office of Disciplinary Counsel. Id.

17. On September 29, 2014 at approximately 4:50 p.m., Joanne M. Vella Kirby, Lawyer Disciplinary Counsel with the Office of Disciplinary Counsel called Respondent at (412) 952-2738, the number Respondent provided on his letter sent the same day via facsimile, and left a voice mail message in which she informed Respondent that his request to withdraw the Subpoena was denied and that Respondent would be required to appear for his sworn statement, as commanded pursuant to the Subpoena, on September 30, 2014 at 2:00 p.m. (Transcript at p. 157, lines 23-24, p. 158, lines 1-24, p. 159, lines 1-13; ODC Exhibit 19).

18. Respondent did not appear for the scheduled sworn statement. (Transcript at p. 157, lines 23-24, p. 158, lines 1-24, p. 159, lines 1-24, p. 160, lines 1-24, p. 161, lines 1-24, p. 162, lines 1-24, p. 163, lines 1-11; ODC Exhibit 19).

19. Thereafter, on or about October 1, 2014, the Office of Disciplinary Counsel sent Respondent a letter via electronic mail and regular U.S. mail. (Transcript at p. 157, lines 23-24, p. 158, lines 1-24, p. 159, lines 1-13; ODC Exhibit 19). The letter confirmed that on September 29, 2014 at approximately 4:50 p.m., Disciplinary Counsel Vella Kirby left a voicemail message for Respondent on the telephone

number he provided on his September 29, 2014 letter, in which Respondent was informed that he was not relieved of his obligation to appear pursuant to the Subpoena and that he would be expected to appear at the Office of Disciplinary Counsel. Id. The letter further confirmed that Respondent failed to appear, as required by the Subpoena, at the Office of Disciplinary Counsel on September 30, 2014 at 2:00 p.m. Id.

20. On October 6, 2014, the Office of Disciplinary Counsel received a letter from Respondent, dated October 2, 2014, in which Respondent stated that upon review of his telephone records from September 29, 2014, "it appears that [he] did not receive a phone call or voicemail" from the Office of Disciplinary Counsel, and further requested that the Office of Disciplinary Counsel "[p]lease check to ensure that [the Office of Disciplinary Counsel] has the proper contact information." (Transcript at p. 81, lines 22-24, p. 82, lines 1-17, p. 159, lines 14-24, p. 160, lines 1-7; ODC Exhibit 20).

21. Because Respondent engaged in the practice of law in West Virginia without a license when he signed his name to a pleading, dated December 10, 2013, before the Circuit Court of Ohio County, West Virginia and represented that he had a West Virginia bar number when he was not licensed to practice law in West Virginia, Respondent has violated Rule 5.5(a) of the Rules of Professional Conduct, which provides as follows:

> **Rule 5.5. Unauthorized practice of law.**
> A lawyer shall not:
> (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction[.]

22. Because Respondent engaged in the practice of law in West Virginia without a license when he signed his name to a pleading, dated February 10, 2014, before the Circuit Court of Hancock County, West Virginia, Respondent has violated Rule 5.5(a) of the Rules of Professional Conduct as set forth above.

23. Because Respondent failed to comply with the Office of Disciplinary Counsel's lawful requests 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 an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

24. Because Respondent engaged in the practice of law in West Virginia without a license as set forth above in Paragraphs 22 and 23, Respondent has violated Rules 8.4(b)[4]; 8.4(c) and 8.4(d) of the Rules of Professional Conduct, which provide as follows:

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[4] **W.Va. Code §30-2-4. Practice without license or oath; penalty; qualification after institution of suits.** It shall be unlawful for any natural person to practice or appear as an attorney at law for another in a court of record in this state, or to make it a business to solicit employment for any attorney, or to furnish an attorney or counsel to render legal services, or to hold himself out to the public as being entitled to practice law, or in any other manner to assume, use, or advertise the title of lawyer, or attorney and counselor at law, or counselor, or attorney and counselor, or equivalent terms in any language, in such manner as to convey the impression that he is a legal practitioner of law, or in any manner to advertise that he, either alone or together with other persons, has, owns, conducts or maintains a law office, without first having been duly and regularly licensed and admitted to practice law in a court of record of this state, and without having subscribed and taken the oath required by the next preceding section. Any person violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than one thousand dollars; but this penalty shall not be incurred by any attorney who institutes suits in the circuit courts after obtaining a license, if he shall qualify at the first term thereafter of a circuit court of any county of the circuit in which he resides.

> **Rule 8.4. Misconduct.**
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> It is professional misconduct for a lawyer to:
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> * * *
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> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
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> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;

25. As an aggravating factor, Respondent has exhibited a pattern and practice of misconduct by engaging in the practice of law in a jurisdiction when not authorized to do so. (Transcript at p. 59, lines 15-24, p. 60, lines 1-24, p. 61, lines 1-24, p. 62, lines 1-23; ODC Exhibits 1, 26). On or about October 8, 2013, The Disciplinary Board of the Supreme Court of Pennsylvania administered a Public Reprimand against Respondent, in pertinent part, because Respondent violated Rule 5.5(b)(2) of the Pennsylvania Rules of Professional Conduct, which provides as follows:

> **Rule 5.5. Unauthorized practice of law; Multijurisdictional Practice of Law.**
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> * * *
>
> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
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> * * *
>
> (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

Id. Furthermore, in or about October of 2007, Respondent received an Informal Admonition by The Disciplinary Board of the Supreme Court of Pennsylvania for having violated Rule 5.5(b)(2) of the Pennsylvania Rules of Professional Conduct. Id.

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, 144, 451 S.E.2d 440, 445 (1994) (internal citations omitted).

Factors to be considered in imposing appropriate sanctions are found in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure. These factors consist of: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. *See also*, Syl. pt. 4, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998).

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

Lawyers owe duties of candor, loyalty, diligence and honesty to their clients, the public and the legal system. Lawyers are officers of the court, and as such, must operate within the bounds of the law and abide by the rules of procedure which govern the administration of justice in our State. Furthermore, a lawyer's duties also include maintaining the integrity of the legal profession.

The evidence in this case establishes by clear and convincing proof that Respondent has violated several duties owed to the public, to the legal system and to the legal profession.

Respondent engaged in the unauthorized practice of law when he signed his name to pleadings filed in West Virginia courts without being licensed to practice law in West Virginia. The Definition of the Practice of Law includes, but is not limited to, whenever "(3) one undertakes, with or without compensation and whether or not in connection with another activity, to represent the interest of another before any judicial tribunal or officer ..." (Michie's West Virginia Code Annotated).

At the hearing, Respondent testified that although he was once licensed to practice law in Pennsylvania, he is not currently licensed and that he voluntarily resigned his Pennsylvania law license in July of 2015.[5] (Transcript at p.127, lines 20-24, p. 128, lines 1-23). Respondent also testified that he is not licensed to practice law in West Virginia, nor has he ever been. (Transcript at p. 127, lines 17-19, p. 129, lines 21-24, p. 130, lines 1-2, p. 133, lines 1-24, p. 134, lines 1-12; ODC Exhibit 8 (admitted under seal)). Furthermore, Anita Casey, the Executive Director of the West Virginia State Bar, testified that Respondent is not a member of the West Virginia State Bar and that he has not been admitted to practice law in West Virginia *pro hac vice.* (Transcript at p. 9, lines 12-24, p. 10, lines 1-24, p. 11, lines 1-3). Thus, by engaging in the unauthorized practice of law, Respondent violated his duties to the public, the legal system and the legal profession.

Additionally, Respondent violated his duties to the legal system and the legal profession in that he failed to comply with the Office of Disciplinary Counsel's lawful requests for information during the course of his disciplinary matter. Specifically,

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[5] As of the date of the submission of "Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions," the Disciplinary Board of the Supreme Court of Pennsylvania's website lists the status of Respondent's law license in Pennsylvania as "Administrative Suspension." *See* http://www.padisciplinaryboard.org/look-up/pa-attorney-search.php.

Respondent failed to file a response to the complaint against him, despite having knowledge of the complaint's existence. Mary E. "Betsy" Casto, a Legal Assistant with the Office of Disciplinary Counsel, testified as to the Office of Disciplinary Counsel's efforts to provide Respondent with the complaint, which included mailing the complaint to Respondent at different addresses the Office of Disciplinary Counsel located, including an address Respondent provided to Ms. Casto telephonically on or about April 17, 2014. (Transcript at p. 71, lines 17-24, p. 72, lines 1-22, p. 75, lines 12-24, p. 76, lines 1-24, p. 77, lines 1-15).

Respondent acknowledged the telephone conversation he had with Ms. Casto, but testified that he never received the complaint. (Transcript at p. 142, lines 3-24, p. 143, lines 1-13, p. 150, lines 19-24, p. 151, lines 1-24, p. 152, lines 1-24, p. 153, lines 1-24, p. 154, lines 1-24, p. 155, lines 1-24, p. 156, lines 1-9). Respondent further testified that he was aware that a complaint had been opened against him in West Virginia, but despite his knowledge about the complaint's existence, Respondent failed to respond to the complaint. Id. Furthermore, Respondent failed to appear at the Office of Disciplinary Counsel for the taking of his sworn statement, despite having acknowledged that he had been served with a subpoena, that he knew that he had not been relieved of his obligation to appear in accordance with the subpoena and that he failed to file a motion to quash the subpoena. (Transcript at p. 156, lines 17-24, p. 157, lines 1-24, p. 158, lines 1-24, p. 159, lines 1-24, p. 160, lines 1-19).

Finally, Respondent violated his duties to the public, the legal system and the legal profession in that: (1) he committed a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in other respects when he practiced law in West

Virginia without a law license in violation of West Virginia Code §30-2-4 and (2) he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and engaged in conduct that is prejudicial to the administration of justice when he practiced law in West Virginia without a law license in violation of West Virginia Code §30-2-4 and when he affixed attorney Benjamin C. McKinney's West Virginia bar number on pleadings filed in the Circuit Court of Ohio County, West Virginia.

B. Respondent acted intentionally and knowingly.

"Intent" as defined by the American Bar Association is the conscious objective or purpose to accomplish a particular result, whereas "knowledge" as defined by the American Bar Association is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. Annotated ABA Standards for Imposing Lawyer Sanctions, Definitions (2015).

Respondent acted intentionally or knowingly in the underlying matters. Respondent engaged in the unauthorized practice of law when he signed his name to pleadings filed in West Virginia courts without being licensed to practice law in West Virginia.

Respondent denied that he filed pleadings in the Circuit Courts of Ohio and Hancock County, West Virginia in the cases Shane N. Sneddon v. Daniel W. Jasper and William J. Wentzel, No. 13-C-385 and Laura J. Fisher, Individually and as Parent and Natural Guardian of Katelynn M. Smitth and Maeghan B. Fisher, infants, and Jeffrey Fisher v. Kylie Matics and Joseph D. Matics, No. 14-C-19. (Transcript at p. 143, lines 17-24, p. 144, lines 1-24, p. 145, lines 1-24, p. 146, lines 1-24, p. 147, lines 1-24, p. 148, lines 1-24, p. 149, lines 1-24, p. 150, lines 1-18; ODC Exhibits 9, 11). Respondent further denied that he prepared, signed

or authorized anyone else to sign on his behalf any of the aforementioned documents. Id. Finally, Respondent denied that he obtained Mr. McKinney's West Virginia bar number, that he ever used Mr. McKinney's bar number or that he authorized anyone else to do so. Id.

Respondent testified that his theory as to how his name and signature appeared on pleadings in the aforementioned cases was that someone from his former employer forged his signature without his knowledge or consent. Id. Additionally, Respondent testified that "there was some bad blood" between Respondent and his former office supervisor. (Transcript at p. 164, lines 19-24, p. 165, lines 1-24, p. 166, lines 1-3). Finally, Respondent acknowledged that he did not have any proof that anyone forged his signature without his knowledge or consent, that his theory was "all speculation" and that he never filed a disciplinary complaint against his former supervisor for her alleged conduct. Id.

The evidence establishes that Respondent signed his name to the pleadings at issue. Kenneth Wayne Blake, a forensic document examiner, testified as an expert witness on behalf of the Office of Disciplinary Counsel. (Transcript at p. 86, lines 9-24, p. 87, lines 1-24, p. 88, lines 1-24, p. 89, lines 1-15; ODC Exhibits 21, 24, 30, 32). Mr. Blake testified that, on or about February 10, 2015, he examined five questioned signatures on two documents and concluded that the five questioned signatures were written by one writer. (Transcript at p.90, lines 4-24, p. 91, lines 1-24, p. 92, lines 1-23, p. 93, lines 1-24, p. 94, lines 1-6; ODC Exhibits 24, 30). The aforementioned five questioned signatures were documents filed in the Circuit Courts of Ohio and Hancock County, West Virginia in the cases Shane N. Sneddon v. Daniel W. Jasper and William J. Wentzel, No. 13-C-385 and Laura J. Fisher, Individually and as Parent and Natural Guardian of Katelynn M. Smitth and Maeghan B. Fisher, infants,

and Jeffrey Fisher v. Kylie Matics and Joseph D. Matics, No. 14-C-19. Id. The question was whether Respondent had signed the pertinent documents.

Thereafter, Mr. Blake examined three known signatures, which were three regular course of business documents bearing signatures submitted as the known signatures of Respondent, and concluded that these documents were written by one writer. Id. Finally, Mr. Blake compared the five questioned signatures with the three known signatures and concluded that the five questioned signatures were more likely than not written by the writer of the known signatures, or Respondent. Id. Respondent clearly acted intentionally or knowingly in the underlying matters.

C. The amount of actual and potential injury caused by Respondent's misconduct is great.

The potential harm to the public, the legal system and the legal profession at the hands of Respondent is great. Because the legal profession is largely self-governing, it is vital that lawyers abide by the rules of substance and procedure that shape the legal system. Indeed, the rules enacted by the Supreme Court of Appeals governing the practice of law and conduct of lawyers have force and effect of law. See W.Va. Const. Art. VIII, § 3 ("The court shall have power to promulgate rules ... for all of the courts of the State relating to ... practice and procedure, which shall have the force and effect of law"). Respondent's noncompliance with these rules as exhibited in the record is clearly detrimental to the legal system and legal profession, and his conduct has brought the legal system and legal profession into disrepute. The conduct exhibited by Respondent also undermines the integrity and public confidence in the administration of justice.

Furthermore, Benjamin McKinney testified that he experienced "some level of anxiety" when he first learned that Respondent had used his West Virginia bar number without his knowledge or contest, and that his role in the disciplinary proceeding has been "a little unnerving." (Transcript at p. 54, lines 4-24, p. 55, lines 1-8). Additionally, Mark Kepple, the attorney who was retained to take over the cases in which Respondent had engaged in the unauthorized practice of law, testified that he was concerned that default judgment could be entered against his client in certain cases because proper, signed pleadings had not been entered due to the fact that Respondent engaged in the unauthorized practice of law by signing his name to said pleadings. (Transcript at p. 38, lines 3-24, p. 39, lines 1-24, p. 40, lines 1-24). Indeed, Mr. Kepple noted that in the case Albert Stephenson and Venera Stephenson v. Shane E. Pasqualia, No. 13-C-411, Circuit Court of Ohio County, West Virginia, the Court had entered final default liability judgment against his client after striking Respondent's filing for failure to file a timely answer pursuant to Rule 11. Id. Based on the foregoing, it is clear that the amount of actual and potential injury as a result of Respondent's misconduct is great.

D. There are several aggravating factors present.

The Scott court adopted mitigating factors in a lawyer disciplinary proceeding and stated that mitigating factors "are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 214, 579 S.E.2d 550, 555 (2003) (quoting ABA Standards for Imposing Lawyer Sanctions, 9.31 (1992)). In this case, there are no mitigating factors present, and thus,

Respondent may not receive the benefit of any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Supreme 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. at 216, 579 S.E.2d at 557 (quoting ABA Standards for Imposing Lawyer Sanctions, 9.21 (1992)).

Standard 9.22(a) of the ABA Standards for Imposing Lawyer Sanctions indicates that prior disciplinary offenses constitute an aggravating factor. Respondent has been previously disciplined for engaging in the unauthorized practice of law. Elaine Bixler, the Secretary of the Disciplinary Board of the Supreme Court of Pennsylvania, testified about Respondent's previous discipline in Pennsylvania for similar conduct. (Transcript at p. 59, lines 15-24, p. 60, lines 1-24, p. 61, lines 1-24, p. 62, lines 1-23; ODC Exhibits 1, 26). Specifically, on or about October 8, 2013, the Disciplinary Board of the Supreme Court of Pennsylvania administered a Public Reprimand against Respondent, in pertinent part, because Respondent engaged in the unauthorized practice of law in violation of the Pennsylvania Rules of Professional Conduct. Id. Furthermore, in or about October of 2007, The Disciplinary Board of the Supreme Court of Pennsylvania issued an Informal Admonition against Respondent because Respondent engaged in the unauthorized practice of law in violation of the Pennsylvania Rules of Professional Conduct. Id.

Additionally, Standard 9.22(c) of the ABA Standards for Imposing Lawyer Sanctions indicates that a pattern of misconduct constitutes an aggravating factor. Respondent has exhibited a pattern and practice of engaging in the unauthorized practice of law. In addition to having signed his name to pleadings before the Circuit Courts of Ohio and Hancock County, West Virginia in the cases Shane N. Sneddon v. Daniel W. Jasper and William J. Wentzel, No. 13-C-385 and Laura J. Fisher, Individually and as Parent and Natural Guardian of Katelynn M. Smitth and Maeghan B. Fisher, infants, and Jeffrey Fisher v. Kylie Matics and Joseph D. Matics, No. 14-C-19, Respondent also signed his name to pleadings in other cases. Specifically, Respondent engaged in the unauthorized practice of law by signing his name to pleadings in the following cases: (1) Travis Corbin v. Hugh H. Tustin, Jr., No. 13-C-165, Circuit Court of Brooke County, West Virginia; (2) Dustin Cory Smith v. Kathleen R. Huffman, No. 13-C-361, Circuit Court of Marion County, West Virginia; and (3) Albert Stephenson and Venera Stephenson v. Shane E. Pasqualia, No. 13-C-411, Circuit Court of Ohio County, West Virginia. (Transcript at p. 45, lines 11-24, p. 46, lines 1-24; ODC Exhibits 25, 27, 28).[6]

IV. RECOMMENDED SANCTIONS

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)

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[6] As was the case when questioned about his involvement in the Sneddon and Fisher cases, Respondent denied having engaged in the unauthorized practice of law by signing his name to pleadings in the Corbin, Smith and Stephenson cases. (Transcript at p. 163, lines 13-24, p. 164, lines 1-24, p. 165, lines 1-24, p. 166, lines 1-24, p. 167, lines 1-24, p.168, lines 1-24, p. 169, lines 1-24, p. 170, lines 1- 24, p. 171, lines 1-9). Respondent again testified that his theory as to how his name and signature appeared on pleadings in the aforementioned cases was that someone from his former employer forged his signature without his knowledge or consent. Id.

limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment.

The West Virginia Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syl. pt. 3, *in part*, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), *cited in* Committee on Legal Ethics v. Morton, 186 W.Va. 43, 45, 410 S.E.2d 279, 281 (1991). The principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Syl. pt. 3, Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); syl. pt. 2, Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999).

"In deciding on the appropriate disciplinary action for ethical violations, [the Supreme 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." Syl. pt 2, Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993); syl. pt 3, Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); syl. pt. 5, Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); syl pt. 3, Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); and syl pt. 3, Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000).

The American Bar Association has recognized that disbarment is generally appropriate when: (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud,

deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice. Additionally, disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system. See, ABA Standards for Imposing Lawyer Sanctions, 5.11, 7.1.

Although Respondent is not licensed to practice law in this state, an appropriate sanction must be imposed upon him to punish and/or prevent the serious misconduct that he has committed. In Lawyer Disciplinary Board v. Olen L. York, III, No. 12-1149 (WV 10/15/14) (unreported case), the Supreme Court ordered that the respondent be prohibited from applying for admission to The West Virginia State Bar for a period of one year, that the respondent be prohibited from appearing in any West Virginia state court for a period of one year, that respondent shall, prior to applying for admission to The West Virginia State Bar, take twelve hours of continuing legal education in office management and/or ethics and that respondent pay the costs of the disciplinary proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure. Respondent was licensed to practice law in Ohio and before the United States Patent and Trademark Office, but was not licensed to practice law in West Virginia. While employed as an independent contractor with a law firm in Huntington, West Virginia, respondent performed patent work for the law firm's clients, received individual payment for such work from the law firm's clients and deposited those funds into his personal bank accounts without promptly transmitting to the law firm the portion of those funds to which they were entitled.

Furthermore, examples of sanctions considered or imposed by other courts in situations similar to this case include public reprimands, a temporary or permanent prohibition on future admission, including *pro hac vice* admission, injunctive relief, contempt sanctions, fines and payment of costs. See, e.g, In re Cortigene, 144 So.3d 915 (La. 2014); In re Parilman, 947 N.E.2d 915 (Ind. 2011); In re Van Son, 742 S.E.2d 660 (S.C. 2013); Iowa Supreme Court Attorney Disciplinary Board v. Carpenter, 781 N.W.2d 263 (Iowa 2010); In re Tonwe, 929 A.2d 774 (Del. 2007); In re Discipline of Doz, 160 P.3d 881 (Nev. 2007); Attorney Grievance Com'n of Maryland v. Barneys, 805 A.2d 1040 (Md. 2002).

Respondent has intentionally engaged in conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on his fitness to practice. Furthermore, Respondent has knowingly engaged in conduct that violates duties he owes as a professional. Respondent engaged in such conduct with the intent to obtain a benefit for himself, and has caused serious or potentially serious injury to his client, the public and the legal system. For the public to have confidence in our State's disciplinary and legal systems, lawyers who engage in the type of conduct exhibited by Respondent must be restrained from the practice of law for a significant period of time. Such sanction is also necessary to deter other lawyers from engaging in similar conduct and to restore the faith of the general public in the integrity of the legal profession. Respondent has presented no compelling extenuating circumstances that would justify a departure from the sanction deemed generally appropriate under the ABA Standards for Imposing Lawyer Sanctions and precedent in this State and others. To protect the public and the administration of justice, it is necessary to restrict Respondent's future privilege to practice law before West Virginia courts.

For the reasons set forth above, the Office of Disciplinary Counsel recommends the following sanctions:

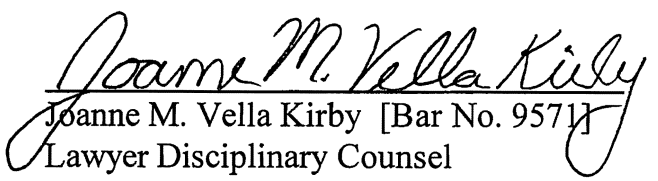
A. That Respondent be prohibited from admission to The West Virginia State Bar, including admission *pro hac vice*, for no less than five (5) years;

B. That Respondent be prohibited from appearing in any West Virginia court for no less than five (5) years;

C. That should he ever seek admission to The West Virginia State Bar in the future, Respondent be required to first take twelve (12) hours in continuing legal education with a focus on law office management and/or legal ethics; and

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

Respectfully submitted,
The Office of Disciplinary Counsel
By counsel



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CERTIFICATE OF SERVICE

This is to certify that I, Joanne M. Vella Kirby, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 11th day of January, 2016, served a true copy of the foregoing **"DISCIPLINARY COUNSEL'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED SANCTIONS"** upon Respondent Kevin E. McCloskey, by mailing the same via United States Mail, with sufficient postage, to the following address:

Kevin E. McCloskey, Esquire
236 Donna Avenue
Morgantown, West Virginia 26505

And upon the Hearing Panel Subcommittee at the following addresses:

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