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**OCT - 4 2021**

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

**Re:** Patrick Doheny, a member of  
The West Virginia State Bar

**Bar No.:** 8799  
**Supreme Court No.:** 18-0363

**I.D. No.:** 17-01-439

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

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**I. PROCEDURAL HISTORY**

On or about April 24, 2018, the Office of Disciplinary Counsel (hereinafter "ODC") filed its Notice of Reciprocal Disciplinary Action Pursuant to Rule 3.20 of the Rules of Lawyer Disciplinary Procedure. On or about September 10, 2020, ODC filed its Motion for Reciprocal Discipline against the Respondent Patrick Doheny. The basis for the motion arose from a Private Reprimand which had been issued in a lawyer disciplinary proceeding against the Respondent by the Disciplinary Board of the Supreme Court of Pennsylvania thus, in ODC's view, invoking Rule 3.20 of the West Virginia Rules of Lawyer Disciplinary Procedure (hereinafter "RLDP").

On or about October 8, 2020, the Respondent filed a Motion to Dismiss and a Motion to Seal the Record, both of which were filed with the West Virginia Supreme Court of Appeals. It

should be noted that a prior Motion to Dismiss the reciprocal disciplinary action and a Motion to Seal the Record had been filed with the Court on May 25, 2018, prior to the filing of the Motion for Reciprocal Discipline, which was provisionally refused by Order entered on October 4, 2018. On January 28, 2021, the Court once again refused, without comment, Respondent's 2020 motions to dismiss and to seal the record.

On or about February 4, 2021, ODC filed a "Renewed Request for a Scheduling Conference" which was granted and held on February 22, 2021, before the Hearing Panel Subcommittee (hereinafter "HPS") comprised of Kelly D. Ambrose, Esquire, Chair, Henry W. Morrow, Jr., Esquire, and Dr. K. Edward Grose, Laymember. It must be noted that up to this point, none of the parties had requested a formal hearing in this matter and no hearing is required under Rule 3.20, RLDP. The Hearing Panel Subcommittee is permitted to take action without conducting a formal hearing under Rule 3.20(a).

Nevertheless, and without addressing the need for a hearing, a schedule for a prehearing conference and hearing on the Motion was established. The prehearing conference was scheduled for May 26, 2021, via Microsoft teams, and the hearing scheduled for June 8, 2021, in person, in Morgantown, West Virginia.

At the prehearing conference held on May 26, 2021, the Hearing Panel Subcommittee subsequently determined and thereafter ordered that the established schedule previously ordered was improvidently awarded and directed the parties to file briefs on the issue of subject matter jurisdiction of the HPS and Supreme Court of Appeals and continued indefinitely the hearing on the Motion until the issue of subject-matter jurisdiction could be decided.

Pursuant to Rule 3.20(a), RLDP, this Hearing Panel Subcommittee “. . . may take action with conducting a formal hearing.” At this time, and based upon the record before it, the Hearing Panel Subcommittee elects to file its findings and recommendations without conducting a formal hearing. The basis for taking this action is that the questions presented are questions of law and not questions of fact as the relevant facts are not in dispute.

The Findings and Recommendations made herein are entered as a result of the Prehearing Conference conducted on May 26, 2021 and the briefs and responses filed by the parties following the prehearing conference.

## **FINDINGS AND RECOMMENDATIONS**

On January 13, 2013, Respondent was convicted in the State of Pennsylvania of multiple criminal offenses arising from a motor vehicle accident, and while the record is not clear, presumably one or more of these offenses constituted a felony for which either Rule 3.18 or Rule 3.19 of the *West Virginia Rules of Lawyer Disciplinary Procedure* would apply. As required by those Rules, Respondent self-reported his conviction to ODC on February 13, 2013. On January 10, 2017, Respondent self-reported the issuance of a private reprimand issued by the Disciplinary Board of the Supreme Court of Pennsylvania. Notwithstanding the foregoing, on April 24, 2018, ODC filed a “Notice of Reciprocal Disciplinary Action Pursuant to Rule 3.20 of the Rules of Lawyer Disciplinary Procedure.” [ODC Brief - Pages 1-3]

It is critical to the disposition of this case to note that ODC's action against the Respondent is a proceeding pursuant to Rule 3.20, RLDP, and is not a proceeding under either Rule 3.18, RLDP, or Rule 3.19, RLDP. Therefore, the threshold issue before us is whether the private reprimand issued to the Respondent in Pennsylvania satisfies the subject-matter jurisdictional requirements of Rule 3.20, RLDP. The Respondent's criminal conviction is irrelevant to the disposition of this specific matter.

As stated earlier, the facts of this case are not in dispute. The Respondent was issued what is defined as a "private" reprimand by order of the Supreme Court of Pennsylvania. Under the Pennsylvania disciplinary scheme, a private reprimand is one of several sanctions that can be levied against an attorney who violates the Rules of Professional Conduct. See: 204 *Pennsylvania Code* § 83.204, Rule 204(a)(6). Under the Pennsylvania Rules, a private reprimand is not public information subject to disclosure except in certain enumerated circumstances. See: 204 *Pennsylvania Code* § 83.402, Rule 402. None of those exceptions apply here. It is not disputed that in the State of Pennsylvania the public is not entitled to information regarding the Respondent's disciplinary action and that Respondent's disciplinary file is not public information subject to disclosure except under those limited circumstances set forth in Rule 402.

West Virginia does not have a complementary disciplinary rule which allows for the imposition of a "private" reprimand. See: Rule 3.15, RLDP. Indeed, all proceedings under the West Virginia Rules of Disciplinary Procedure are public and the public is entitled to information regarding disciplinary matters. See Rule 2.6, RLDP, and *Dailey Gazette Company, Inc., v.*

*Committee on Legal Ethics of the West Virginia State Bar*, 174 W.Va. 359, 326 S.E.2d 705 (1984). Simply put, the State of West Virginia does not have the same sanction for Respondent's conduct as does the State of Pennsylvania.

Notwithstanding the foregoing, ODC brought this matter under the provisions of Rule 3.20 RLDP. That rule provides, in pertinent part:

Any lawyer who is a member, active or inactive, of the West Virginia State Bar against whom any form of public discipline has been imposed by the authorities of another jurisdiction, whether state or federal, . . . shall notify the Office of Disciplinary Counsel of such action in writing within ten days thereof.

Rule 3.20(b), RLDP, (emphasis added). Once such a report has been received Disciplinary Counsel is required to act:

Upon receiving notice that a lawyer who is a member, active or inactive, has been publicly disciplined . . . Disciplinary Counsel shall, following an investigation pursuant to these rules, refer the matter to a Hearing Panel Subcommittee for appropriate action.

Rule 3.20(c), RLDP, (emphasis added). Furthermore, Rule 3.20(e) provides that the Hearing Panel Subcommittee "shall" refer the matter to the Supreme Court of Appeals with the recommendation that the same discipline be imposed as was imposed by the foreign jurisdiction, unless the Subcommittee determines one of four other possible findings as set forth in the Rule are applicable. Neither the Respondent or Disciplinary Counsel has suggested or sought an alternative finding under Rule 3.20(e). Instead, Disciplinary Counsel has argued that even though West Virginia does not include a private reprimand in its scheme of permissible sanctions, West Virginia can still impose any of the sanctions set forth in Rule 3.15, RLDP, suggesting that an "admonishment" might be the most appropriate sanction West Virginia could impose. [ODC Brief, pages 9 - 11]

We disagree. Counsel ignores the plain language of Rule 3.20(e) and the holding in Syllabus Point 5, *Committee on Legal Ethics of the West Virginia State Bar v. Battistelli* 185 W.Va. 109, 405 S.E.2d 242 (1991).

This matter is governed by Rule 3.20, RLDP, not by rule 3.15, RLDP, as suggested by ODC. We believe the resolution to this case is simple, clear and straightforward without any of the ambiguity and confusion raised by both parties in their briefs and responses and the voluminous record in this case, most of which is irrelevant to our disposition of this matter. In its argument, Disciplinary Counsel contends that Rule 3.20, RLDP is not a jurisdictional rule [ODC Response Brief, Page 2], and even more confusingly suggests that the language of Rule 3.20(a), RLDP, somehow changes the meaning of Rules 3.20 (b) and (c), RLDP [ODC Response Brief, Page 3]. We, however, find the language to be crystal clear that Rule 3.20, RLDP, is a Rule which confers subject-matter jurisdiction and which is not ambiguous or otherwise open to interpretation beyond its plain meaning by the Hearing Panel Subcommittee or the Supreme Court of Appeals.

“‘Where the language of a statute is plain and unambiguous, there is no basis for application of rules of statutory construction; but courts must apply the statute according to the legislative intent plainly expressed therein.’ Syllabus Point 1, *Dunlap v. State Compensation Director*, 149 W. Va. 266, 140 S.E.2d 448 (1965).” Syl. Pt. 7, *State v. Mills*, 243 W. Va. 328, 844 S.E.2d 99 (2020).” Syllabus Point 3, *State ex rel Phalen v. Roberts*, No. 20-1023, January 2021 Term, Filed June 16, 2021. “‘Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.’ Syllabus Point 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970).” Syllabus Point 4, *Phalen*, Id. “‘It is not for this Court

arbitrarily to read into a statute that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.’ Syl. Pt. 11, *Brooke B. v. Ray C.*, 230 W.Va. 355, 738 S.E.2d 21 (2013).” Syllabus Point 5, *Phalen*, Id (emphasis added). We believe these statements accurately define the law and our responsibilities with respect to this case.

Rule 3.20(a), RLDP, merely establishes that the adjudication in another jurisdiction of misconduct conclusively establishes that conduct without the need for evidence and proof of such conduct in any proceeding brought in West Virginia, thus permitting the Hearing Panel Subcommittee to act without a formal hearing and the production of evidence which would ordinarily be required under any other circumstance. While the last sentence is a rule of procedure, the main body and import of the Rule is a rule of evidence.

Rule 3.20(b), RLDP, clearly and without any ambiguity, states that only lawyers that have been publicly disciplined in another jurisdiction are required to self-report the action and discipline from the other jurisdiction. Similarly, Rule 3.20(c), RLDP, requires that Disciplinary Counsel act only when it receives notice that a lawyer has been publicly disciplined. Thus, in the very first instance, the Respondent in this case was **not** required to report the private reprimand he received from Pennsylvania and ODC was not authorized to act because it had not received a notice of public discipline imposed by Pennsylvania against Respondent. The Rule, in our opinion, is clear and we do not find the other arguments presented by the parties applicable for our limited jurisdictional analysis.

Does the fact that Respondent self-reported discipline which he was not required to report otherwise grant subject-matter jurisdiction to ODC, the Hearing Panel Subcommittee and Supreme Court of Appeals? We think not.

Unlike personal jurisdiction, subject-matter jurisdiction may not be waived or conferred by consent and must exist as a matter of law for the court to act. For this reason, lack of jurisdiction of the subject matter may be raised for the first time in this Court and even upon this Court's own motion. Syl. Pt. 6, *State ex rel. Hammond v. Worrell*, 144 W.Va. 83, 106 S.E.2d 521 (1958), citing Syl. Pt. 3, *Charleston Apartments Corp. v. Appalachian Electric Power Co.*, 118 W.Va. 694, 192 S.E. 294.

*State ex rel. Smith v. Thornsbury*, 214 W.Va. 228, 233, 588 S.E.2d 217, 222 (2003). The Supreme Court has also held:

“‘Consent of parties cannot confer upon a court jurisdiction which the law does not confer, or confers upon some other court, although the parties may by consent submit themselves to the jurisdiction of the court. In other words, consent cannot confer jurisdiction of the subject-matter, but it may confer jurisdiction of the person.’ *Yates v. Taylor County Court*, 47 W.Va. 376, Syl. 2 [35 S.E. 24].”

Syllabus Point 4, *State ex rel. Hammond v. Worrell*, 144 W.Va. 83, 106 S.E.2d 521 (1958).

Disciplinary Counsel also argues at various points throughout its brief and subsequent response brief that jurisdiction exists by virtue of the general powers vested in ODC and the Supreme Court to investigate and regulate attorney conduct while avoiding any substantive discussion about the specific limitations and precise wording of Rule 3.20. Can the general powers of the Court and ODC supercede a specific, definite and unambiguous Rule? Again, we think not. It is axiomatic that “[a] specific section of a statute controls over a general section of the statute.” Syllabus Point 2, *State ex rel. Myers v. Wood*, 154 W.Va. 431, 175 S.E.2d 637 (W. Va. 1970).

We also believe that Disciplinary Counsel’s reliance upon an Illinois disciplinary case to be misplaced. Disciplinary Counsel cites *In re: Hittinger*, an unreported State of Illinois

disciplinary case, in support of ODC's contention that the Court has the authority to impose alternative discipline notwithstanding the fact that the sanction imposed by Pennsylvania is not available under our disciplinary rules in West Virginia. [ODC Brief, Page 10] A close examination of the Petition filed in that case [filed with ODC's Brief] as well as the Illinois Rule upon which the discipline was based, Illinois Supreme Court Rule 763, and a comparison of the Illinois Rule with Rule 3.20, RLDP, reveals that the two rules are simply not the same. Illinois Rule 763 provides, in pertinent part:

If an attorney licensed to practice law in Illinois and another jurisdiction is disciplined in the other jurisdiction, the attorney may be subjected to the same *or comparable discipline in Illinois*, upon proof of the order of the other jurisdiction imposing the discipline. For purposes of this rule, "other jurisdiction" is defined as the District of Columbia; a country other than the United States; a state, province, territory, or commonwealth of the United States or another country.

*Illinois Supreme Court Rule 763(a)* (emphasis added). West Virginia has no comparable rule. Not only does Illinois permit the imposition of "comparable" discipline in a reciprocal disciplinary proceeding, the Illinois Rule also permits an independent investigation and independent award of sanctions without regard to the sanctions imposed by the other jurisdiction:

Nothing in this rule shall prohibit the institution of independent disciplinary proceedings in this State against any attorney based upon his conduct in another jurisdiction, and, in the event the Administrator elects to proceed independently, any discipline imposed in this State shall not be limited to the discipline ordered by the other jurisdiction. *Illinois Supreme Court Rule 763(e)*.

West Virginia Rule 3.20 is not comparable to Illinois Rule 763, the Rule upon which the decision in the *Hittinger* case derives. West Virginia does not have the same flexibility with respect to jurisdiction and sanctions in such cases under our rules absent one of the four qualifiers set forth in Rule 3.20(e), RLDP. The Supreme Court has held:

Article VI, Section 28-A(e) [now Rule 3.20(e)] of the By-Laws of the West Virginia State Bar requires imposition of the identical sanction imposed by a foreign jurisdiction in the absence of one of the enumerated exceptions contained in subsections (1) through (4). If the Committee believes one of these exceptions is applicable, it must make appropriate findings

Syllabus Point 5, *Committee on Legal Ethics of the West Virginia State Bar v. Battistelli* 185 W.Va. 109, 405 S.E.2d 242 (1991).<sup>1</sup> Neither ODC nor Respondent has argued or recommended that one of the four exceptions contained in Rule 3.20(e) applies in this case and the Subcommittee hereby finds that none of the four exceptions apply in this case. Thus, the *Hittinger* decision does not support Disciplinary Counsel's position in this case and is distinguishable from the case at bar.

Finally, one cannot escape the fact that in considering this matter we are left with the simple words of Rule 3.20, RLDP, and whether the Court, in adopting the Rule, intentionally included the word "public" as a limit to the jurisdiction the Court could exercise over an attorney who has been privately reprimanded. If so, the Rule established in Syllabus Point 5, *Phalen*, cited supra, applies and the Court cannot remove a word intentionally placed in its Rule just as it could not remove a word intentionally placed by the Legislature in a statute. In our opinion, the word "public" was intentionally placed in this Rule. We believe the fact that West Virginia can only engage in public discipline as decided in the *Dailey Gazette* opinion, cited supra, coupled with the fact that West Virginia does not recognize a "private" reprimand among its permissible sanctions for attorney misconduct, notwithstanding the fact that such discipline likely existed in other jurisdictions prior

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<sup>1</sup> Article VI of the By-Laws of the West Virginia State Bar were superceded by the Rules of Lawyer Disciplinary Procedure by Order of the Supreme Court of Appeals effective July 1, 1994. While Article VI, Section 28-A(e) and Rule 3.20, RLDP, are not entirely identical, the substantive provisions were retained unchanged in Rule 3.20, RLDP, and any differences between the two rules are largely stylistic and not applicable to our discussion.

to our adoption of the Rules, these factors, taken together, evidence an intentional choice of the Court to avoid any involvement in “private” discipline, either in our state or by dealing with any private discipline from any other state or jurisdiction. Certainly, the Court has the authority to change the Rule and to follow the path set by Illinois. Be that as it may, for today, and in our opinion, the rule is clear.

## **CONCLUSION AND RECOMMENDATION**

The express language of Rules 3.20(b) and 3.20(c), West Virginia Rules of Lawyer Disciplinary Procedure, require that a lawyer be publicly disciplined in the foreign jurisdiction in order for proceedings to be instituted under Rule 3.20, RLDP. Inasmuch as Respondent’s discipline was a private reprimand and not subject to public disclosure under Pennsylvania law, it is the opinion of the Hearing Panel Subcommittee that the Panel and the West Virginia Supreme Court of Appeals are without subject-matter jurisdiction to hear this matter. Therefore, we recommend that this action be dismissed for lack of subject-matter jurisdiction.

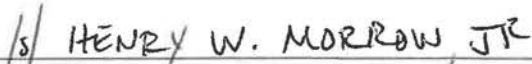
Furthermore, since the record of Respondent’s discipline in Pennsylvania is a private sanction, not subject to public disclosure, and, since in our opinion private discipline fails to meet the requirements within the clear dictates of Rule 3.20, RLDP, we recommend Respondent’s Motion to Seal the Record in this matter be granted.

Respectfully Submitted.



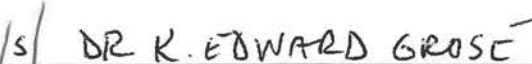
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**KELLY D. AMBROSE, ESQUIRE, CHAIR**  
Attorney Member



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**HENRY W. MORROW, JR., ESQUIRE**  
Attorney Member



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**DR. K. EDWARD GROSE**  
Lay Member

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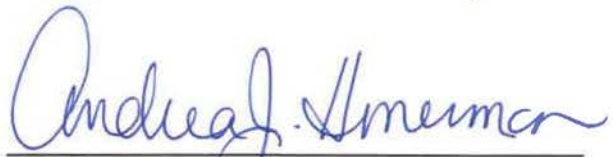
**CERTIFICATE OF SERVICE**

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This is to certify that I, Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 4<sup>th</sup> day of October, 2021, served a true copy of the foregoing **"RECOMMENDED DECISION OF THE HEARING PANEL SUBCOMMITTEE OF THE WEST VIRGINIA LAWYER DISCIPLINARY BOARD FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED DECISION"** upon Respondent Patrick Doheny by mailing the same via United States Mail, with sufficient postage, to the following address:

Patrick Doheny, Esquire  
Post Office Box 23354  
Pittsburgh, Pennsylvania 15222

  
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Andrea J. Hinerman