



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

FILE COPY

LAWYER DISCIPLINARY BOARD,

Petitioner,

vs.

No. 18-0363

Patrick Doheny,

Respondent.

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BRIEF OF THE OFFICE OF LAWYER DISCIPLINARY COUNSEL

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I. STATEMENT OF THE CASE

A. NATURE OF PROCEEDINGS AND RECOMMENDATION OF THE HEARING PANEL SUBCOMMITTEE

On January 23, 2013, Respondent was convicted of (1) Aggravated Assault by Motor Vehicle while Driving Under the Influence, (2) Driving Under the Influence of Alcohol or Controlled Substance, (3) Driving Under the Influence of Alcohol, high rate of alcohol, (4) Driving Under the Influence of Alcohol or Controlled Substance, and (5) Failure to Keep Right. Respondent had also been charged, but was acquitted of, reckless driving. The convictions arose out of a motor vehicle accident that occurred on the night of October 5, 2011, wherein Respondent's vehicle crossed the center line of a roadway and collided with a motorcycle traveling in the oncoming direction. The operator of the motorcycle sustained serious bodily injuries. A civil action was also filed due to the accident, which resulted in a civil settlement.

As a result of his criminal conviction in Commonwealth of Pennsylvania v. Patrick J. Doheny, Jr., Criminal Docket No: CP-02-CR-0001734-2012, Respondent was sentenced on June 24, 2013, as follows: (1) placement into a county intermediate punishment program (IPP) for a period of eighteen (18) months which consisted of house arrest, work release, and the wearing of an ankle monitoring device; (2) probation for a period of four years supervised by the Allegheny County Adult Probation Office subject to the following conditions: (a) payment of restitution in the amount of \$1.00; (b) have no contact with victim; (c) perform 100 hours of community service; and (d) do not operate a motor vehicle unless and until driver's license is restored; (3) court-ordered drug and alcohol evaluation; (4) safe driving classes; and (5) payment of a \$500.00

fine. Respondent's punishment commenced on June 24, 2013, and his probation continued until June of 2017.¹

Respondent self-reported his conviction to ODC by letter dated February 13, 2013, and ODC opened a complaint identified as I.D. No. 13-01-081.² In addition to providing information on his criminal conviction, Respondent self-reported the Pennsylvania disciplinary action taken against him to ODC by letter dated January 10, 2017. Respondent attached to his letter the Private Reprimand, the Order accepting the Report and Recommendation of the Hearing Panel Committee, and the Report and Recommendation of the Hearing Panel Committee.

On April 24, 2018, the Office of Lawyer Disciplinary Counsel (hereinafter "ODC") filed a "Notice of Reciprocal Disciplinary Action Pursuant to Rule 3.20 of the Rules of Lawyer Disciplinary Procedure." Paragraph 9 of that Notice advised Respondent that Disciplinary

¹Respondent filed a direct appeal of his criminal conviction in or about January 2014, and the Superior Court of Pennsylvania affirmed Respondent's criminal convictions by Order entered on April 29, 2015. Respondent then filed a Petition for Allowance of an Appeal with the Supreme Court of Pennsylvania on the basis of newly discovered evidence obtained during his direct appeal. The Supreme Court of Pennsylvania denied Respondent's Allowance of an Appeal on February 8, 2016, and the matter became final on March 9, 2016. Respondent next filed a Petition for Post-Conviction Collateral Relief on February 8, 2017, wherein he sought reversal, in the form of acquittal or new trial, of his conviction. An evidentiary hearing was held on June 5, 2017, and by Order entered June 5, 2017, the Court of Common Pleas of Allegheny County dismissed his Petition for Post-Conviction Collateral Relief. Respondent filed a Notice of Appeal of the denial of his Petition for Post-Conviction Collateral Relief on June 9, 2017. Upon information and belief, Respondent's appeal of the dismissal of his Petition for Post-Conviction Collateral Relief remains pending.

²On September 23, 2015, the Chair of the Investigative Panel of the West Virginia Lawyer Disciplinary Board issued a stay on I.D. No. 13-01-081 pending the resolution of Respondent's underlying criminal charges and Pennsylvania disciplinary proceedings. In Legal Ethics Committee v. Pence, 161 W.Va. 240, 253, 240 S.E.2d 668, 674 (1977), the Court found that Legal Ethics Committee (now known as the Lawyer Disciplinary Board) should not defer disciplinary proceedings where only a civil case is also pending involving substantially similar factual allegations but disciplinary proceedings should be deferred until there a termination of pending criminal litigation involving substantially similar factual allegations, provided that the respondent-attorney proceeds with reasonable dispatch to insure the prompt prosecution and conclusion of the pending litigation.

Counsel will request that the HPS impose a similar, but not the same sanction as the Disciplinary Board of the Supreme Court of Pennsylvania because the West Virginia Rules of Lawyer Disciplinary Procedure do not provide for a private reprimand as a permissible sanction. In Paragraph 10 of that notice, in accordance with Rule 3.20(d) of the Rules of Lawyer Disciplinary Procedure, ODC advised Respondent of his right to challenge the validity of his Pennsylvania discipline, advised of his right to request a formal hearing and provide a complete copy of the record to the ODC within thirty (30) days.

Instead, on May 23, 2018, Respondent filed his "Motion to Dismiss Notice of Reciprocal Disciplinary Action for Lack of Jurisdiction and to Seal Record of Proceedings" with the Supreme Court of Appeals of West Virginia.

On June 4, 2018, Senior Lawyer Disciplinary Counsel filed "Office of Lawyer Disciplinary Counsel's Response to Respondent's 'Motion to Dismiss Notice of Reciprocal Disciplinary Action for Lack of Jurisdiction and to Seal Record of Proceedings'" with the Supreme Court of Appeals of West Virginia.

On October 4, 2018, the Supreme Court of Appeals of West Virginia issued an Order refusing Respondent's Motion to Dismiss and Motion to Seal.

After ODC filed a Motion for Reciprocal Discipline pursuant to Rule 3.20(a) of the Rules of Lawyer Disciplinary Procedure, on or about October 2, 2020, Respondent filed a "Response to [ODC's] Motion for Reciprocal Disciplinary and Request to Dismiss Notice of Reciprocal Disciplinary Action and to Seal Record of Proceedings" with the Supreme Court of Appeals of West Virginia.

ODC filed a "Response to 'Respondent's Response to [ODC's] Motion for Reciprocal Disciplinary and Request to Dismiss Notice of Reciprocal Disciplinary Action and to Seal

Record of Proceedings” and “Motion to File Out of Time” with the Supreme Court of Appeals on October 26, 2020.

By Order entered January 28, 2021, the Supreme Court of Appeals of West Virginia granted ODC’s Motion to File a response out of time and refused the Motion to Dismiss and the Motion to Seal.

The HPS, comprised of Kelly D. Ambrose, Esquire, Chairperson; Henry W. Morrow, Jr., Esquire; Dr. K. Edward Grose, Laymember, subsequently set a Scheduling Order, including a hearing date in this matter but following a pre-hearing held by video conference, the HPS entered an “Order from Pre-Hearing Conference Held May 26, 2021,” wherein the HPS determined that upon review of the record, the Scheduling Order was “improvidently awarded.” The HPS also stated that pursuant to Rule 3.20, the HPS has determined that an evidentiary hearing is not necessary.³ The HPS also found that a “threshold issue to be addressed in these proceedings is whether the HPS, and ... the West Virginia Supreme Court of Appeals, has subject matter jurisdiction of this matter based upon the uncontested record” The HPS requested that the parties submit briefs on the “sole issue of subject matter jurisdiction based upon the claim advanced by the Respondent that under Rules 3.20(b) and 3.20(c), that jurisdiction is only achieved when ‘public discipline has been rendered in the foreign jurisdiction.’”

After briefs were submitted by ODC and Respondent, the HPS issued a Recommended Decision which was filed with the Supreme Court of Appeal on October 4, 2021. The HPS found that the “express language” of Rules 3.20(b) and 3.20(c) of the Rules of Lawyer Disciplinary Procedure “require that a lawyer be publicly disciplined in the foreign jurisdiction in order for

³Rule 3.20(a) of the Rules of Lawyer Disciplinary Procedure provides, in part, that “...a Hearing Panel Subcommittee may take action without conducting a formal hearing.”

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 [HPS] that the Panel and the West Virginia Supreme Court of Appeals are without subject matter jurisdiction to hear the matter. Therefore, [the HPS] recommend[ed] that this action be dismissed for lack of subject matter jurisdiction." Furthermore, the HPS recommended that Respondent's Motion to Seal the Record in this matter be granted.

B. FINDINGS AND RECOMMENDATIONS OF THE HEARING PANEL SUBCOMMITTEE

The HPS found that the facts are not in dispute. [Recommended Decision of the [HPS] of the West Virginia Lawyer Disciplinary Board Findings of Fact, Conclusions of Law and Recommended Decision, p. 4] As previously stated, Respondent was convicted in the State of Pennsylvania of multiple criminal offenses arising from a motor vehicle accident, and that while the record was not clear, presumably one or more these offenses constituted a felony for which either Rule 3.18 or Rule 3.19 of the 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. Thereafter, ODC initiated reciprocal disciplinary proceedings on April 24, 2018.

The HPS determined that "the threshold issue before [it] is whether the private reprimand issued to Respondent in Pennsylvania satisfies the subject matter jurisdictional requirements of Rule 3.20, RLDP." [Id.] The HPS stated that under Pennsylvania rules, a private reprimand is not public information subject to disclosure except in certain circumstances and that none of the exceptions applied in this circumstance. Rule 402 of the Pennsylvania Rules of Disciplinary Enforcement ("Pa.R.D.E."). [Id.] [Attachment 1] The HPS noted that West Virginia does not

have a “complementary disciplinary rule which allows for the imposition of a ‘private reprimand.’” Indeed, all proceedings under the West Virginia Rules of Disciplinary Procedure are public and the public is entitled to information regarding disciplinary matters pursuant to Rule 2.6 of the Rules of Lawyer Disciplinary Procedure. See also, Daily Gazette Company, Inc. v. Committee on Legal Ethics of the West Virginia State Bar, 174 W.Va. 359, 326 S.E.2d 705 (1984). [Id.]

The HPS noted that Rule 3.20(b) and Rule 3.20(c) of the Rules of Lawyer Disciplinary Procedure provide, in part, that a 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 shall notify the ODC and that once notice that a member of the West Virginia State Bar has been publicly disciplined has been received by ODC, ODC is required, following an investigation, to refer the matter to the HPS for appropriate action. [Id., p. 5] Furthermore, Rule 3.20(e), in part, provides that the HPS 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 HPS determines that one of four other possibilities as set forth in the Rule are applicable. The HPS found that neither ODC nor Respondent suggested or sought an alternative finding under Rule 3.20(e). [Id.] Instead, ODC argued that even though West Virginia does not include a private reprimand, West Virginia can still impose any of the sanctions set forth in Rule 3.15 of the Rules of Lawyer Disciplinary Procedure, and that an admonishment might be the appropriate sanction. The HPS disagreed and found that ODC’s position ignores the plain language of Rule 3.20(e) and the holding in Syllabus Point 5, Committee of on Legal Ethics v. Battistelli, 185 W.Va. 109, 405 S.E.2d 242 (1991). [Id., p. 5-6]

The HPS also found that Rule 3.20 of the Rules of Lawyer Disciplinary Procedure is a jurisdictional rule and is not ambiguous or otherwise open to interpretation beyond its plain meaning. [Id., p. 6] “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 herein.” Syllabus Point 1, Dunlap v. State Compensation Director, 149 W.Va. 266, 140 S.E.2d 448 (1965); Syllabus Point 3, State ex rel. Phalen v. Roberts, 245 W.Va. 311, 858 S.E.2d 936 (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 to arbitrarily 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.” Syllabus Point 11, Brooke B. v. Ray C., 230 W.Va. 355, 738 S.E.2d 21 (2013).” Syllabus Point 5, Phalen, Id. [Id., p. 6-7]

Because the HPS found that the language of Rule 3.20(b) was plain and unambiguous, the HPS noted that Respondent was not required to report the private reprimand he received from Pennsylvania and ODC was not authorized to act because it had not received public discipline imposed by Pennsylvania against Respondent. [Id., p. 8] The HPS further stated that Respondent’s self-reported discipline did not “otherwise grant subject matter jurisdiction to ODC, the [HPS] and [the] Supreme Court of Appeals.” The HPS noted that

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.2d 294.

State ex. Rel. Smith v. Thornsberry, 214 W.Va. 228, 233, 588 S.E.2d 217, 222 (2003). The Supreme Court also held that

“Consent of the 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). [Id.]

Likewise, the HPS found that the general powers of ODC and the Court to investigate and regulate attorney conduct did not supersede the specific, definite, and unambiguous language of Rule 3.20 of the Rules of Lawyer Disciplinary Procedure. [Id.]

The HPS also noted that ODC’s reliance on In re: Hittinger, M.R. 20212, 05 RC 1515, (Supreme Court of Illinois September 26, 2005) (unreported) [Attachment 2] was misplaced because Illinois Supreme Court Rule 763(a), the rule upon which the discipline in that case was imposed is not comparable to Rule 3.20 of the West Virginia Rules of Lawyer Disciplinary Procedure and because the case is distinguishable from the instant case. 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) [Attachment 3]. [Id., p. 8-9] Furthermore, the HPS stated that 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) [See Attachment 3]. [Id., p. 9] The HPS found that compared to Illinois, West Virginia did not seem to have the same flexibility with respect to jurisdiction and sanctions in such cases under West Virginia's rules absent one of the four qualifiers set forth in Rule 3.20(e) of the West Virginia Rules of Lawyer Disciplinary Procedure. [Id.] The HPS noted that the Supreme Court has held that

Article VI, Section 28-A(e) [now Rule 3.20(e)] of the By-Laws of the West Virginia State Bar requires the 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 those exceptions is applicable, it must make appropriate findings.

Syllabus Point 5, Committee on Legal Ethics v. Battistelli, 185 W.Va. 109, 405 S.E.2d 242 (1991). [Id., p. 10]

Accordingly, the HPS recommended that the instant action be dismissed and that Respondent's Motion to Seal be granted. [Id., p. 11]

II. SUMMARY OF ARGUMENT

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

This Honorable Court retains jurisdiction over decisions regarding attorney discipline in this State and Respondent, as an active member of The West Virginia State Bar, is subject to that

authority in this jurisdiction. The Office of Disciplinary Counsel is authorized to investigate allegations of misconduct and recommend disciplinary action against members of the West Virginia State Bar. The filing of a notice of reciprocal discipline against a member of the West Virginia State Bar as the result of the issuance of a private reprimand in another jurisdiction is an issue of first impression. However, it is also acknowledged that the HPS's recommendation that this proceeding should be dismissed due to "plain and unambiguous" language in Rule 3.20(b) and Rule 3.20(c) of the Rules of Lawyer Disciplinary Procedure may, in the end, be the correct outcome.

However, the Office of Disciplinary Counsel objects to the recommendation from the Hearing Panel Subcommittee that these proceedings be sealed. There is no private discipline in this jurisdiction and no mechanism in the Rules of Lawyer Disciplinary Procedure which permit ODC to keep the disposition of Respondent's West Virginia disciplinary proceedings private. Indeed, all proceedings under the West Virginia Rules of Disciplinary Procedure are public and the public is entitled to information regarding disciplinary matters pursuant to Rule 2.6 of the Rules of Lawyer Disciplinary Procedure. See also, Daily Gazette Company, Inc. v. Committee on Legal Ethics of the West Virginia State Bar, 174 W.Va. 359, 326 S.E.2d 705 (1984).

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The ODC filed its objection to the HPS's recommended decision on November 2, 2021. This Honorable Court's November 3, 2021 Order indicated that "[t]he Clerk of Court will, on a later date, provide the parties with a Notice of Argument under Rule 19(b) containing further information on the date and time of oral argument."

IV. STANDARD OF PROOF

In Syllabus Point 3 of Committee on Legal Ethics of the West Virginia State Bar v. McCorkle, 192 W.Va. 286, 452 S.E.2d 377 (1994), this Court held that,

A de novo standard applies to a review of the adjudicatory record made before the [Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the [Board's] recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the [Board's] findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.

While the Lawyer Disciplinary Board makes recommendations to this Court regarding sanctions to be imposed upon an attorney for ethical violations, “[t]his Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law.” Syllabus Point 3, Committee on Legal Ethics of the West Virginia State Bar v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984).

V. ARGUMENT

A. THIS HONORABLE COURT HAS EXCLUSIVE AUTHORITY TO DEFINE, REGULATE AND CONTROL THE PRACTICE OF LAW IN WEST VIRGINIA.

It is acknowledged that the initiation of reciprocal discipline as the result of a private reprimand is an issue of first impression in this jurisdiction. Furthermore, it is acknowledged that the HPS’s recommendation that this proceeding should be dismissed pursuant to lack of subject-matter jurisdiction due to “plain and unambiguous” language in Rule 3.20(b) and Rule 3.20(c) of the Rules of Lawyer Disciplinary Procedure may, in the end, be the correct outcome. However, this Honorable Court retains jurisdiction over decisions regarding attorney discipline in this State and Respondent, as an active member of The West Virginia State Bar, is still subject to that authority in this jurisdiction.

This Honorable Court has the exclusive authority to define, regulate and control the practice of law in West Virginia, and has proper jurisdiction and authority to investigate and prosecute Respondent for alleged violations of the Rules of Professional Conduct. “In the exercise of this authority to regulate and control the practice of law, we have delegated to the [Board] certain administrative, investigative, and adjudicatory functions.” Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 505 S.E.2d 619 (1998) quoting Committee on Legal Ethics v. McCorkle, 192 W.Va. 286, 288, 452 S.E.2d 377, 379 (1994). Further, the Office of Disciplinary Counsel was established by this Court to prosecute violations of the Rules of Professional Conduct. [Rule 4.4 of the West Virginia Rules of Lawyer Disciplinary Procedure]. Nothing done in the investigation has been in violation of the authority provided by this Court.

The Rules of Lawyer Disciplinary Procedure promulgated by this Court outline the responsibilities, duties and ‘powers’ of the ODC. These Rules are vested in sound public policy and further the stated goals of the self-regulated lawyer disciplinary system in this State and ODC’s actions in this matter protects the public, protects the integrity of the disciplinary system, protects the administration of justice, and deters other attorneys from engaging in similar misconduct.

Reciprocal discipline is well established in attorney discipline and is used to prevent a lawyer admitted to practice in more than one jurisdiction from avoiding the effect of discipline by practicing in another jurisdiction, to prevent the re-litigation of misconduct that already has been established in another jurisdiction, and to protect the public from lawyers who commit such misconduct. See Disciplinary Counsel v. Lapine, 128 Ohio St.3d 87, 942 N.E.2d 328 (2010). See also, People v. Bode (Colo.O.P.D.J.2005), 119 P3d 1098, 1100 (the purpose of reciprocal discipline is “to enhance public confidence in the profession by preventing lawyers admitted to

practice in more than one jurisdiction from avoiding the effect of discipline by simply practicing in another jurisdiction”). Under the circumstances of this case, i.e., Respondent is located in Pennsylvania, Respondent was criminally convicted in Pennsylvania and attorney disciplinary proceedings had been initiated in Pennsylvania, ODC monitored the status of the Pennsylvania proceedings and did wait for the Pennsylvania disciplinary proceedings to conclude with a final adjudication. The disciplinary order from Respondent’s Pennsylvania matter is “a final adjudication” of misconduct constituting grounds for discipline of a lawyer establishing the jurisdiction of the HPS to “take action” in this matter pursuant to the provision of Rule 3.20(a) of the Rules of Lawyer Disciplinary Procedure. Rule 3.20(a) states that

A final adjudication in another jurisdiction, whether state or federal, of misconduct constituting grounds for discipline of a lawyer or a voluntary surrender of a license to practice law in connection with a disciplinary proceeding shall, for the purposes of proceedings pursuant to these rules conclusively establish such conduct. Accordingly, a Hearing Panel Subcommittee may take action without conducting a formal hearing.

The HPS suggested that this matter was better pursued pursuant to other Rules of Lawyer Disciplinary Procedure, such as Rule 3.18 [Conviction of crime that reflects adversely on a lawyer’s honesty, trustworthiness or fitness] or Rule 3.19 [Conviction of felony that does not reflect adversely on a lawyer’s honesty trustworthiness or fitness as a lawyer in other respects]. However, if ODC had not been advised of the outcome of his Pennsylvania disciplinary matter and had ODC pursued the matter pursuant to Rule 3.19 of the Rules of Lawyer Disciplinary Procedure, then Respondent would have been in the position of defending himself in parallel disciplinary proceedings in two jurisdictions based upon the same Pennsylvania criminal conviction⁴. Respondent could have possibly been in an untenable position of having to notify

⁴ See page 7 of the HPS’s recommended decision wherein the HPS stated “[t]hus, in the very first instance, the Respondent in this case was **not** required to report the private reprimand he received from Pennsylvania and ODC

Pennsylvania disciplinary authorities of West Virginia discipline based upon on the same Pennsylvania criminal conviction for which had he already been disciplined in Pennsylvania. The West Virginia Rules of Lawyer Disciplinary Procedure do not provide guidance on private discipline to either the ODC, the Lawyer Disciplinary Board or for that matter, members of the West Virginia Bar who may practice in jurisdictions where private discipline is an available option under applicable rules in other jurisdictions. Regardless of the final outcome of this matter, the goal of attorney discipline, which is the protection of the public, is better served when lawyers self-report disciplinary action taken against them, regardless of whether the discipline is public or private.

It is acknowledged that pursuing reciprocal discipline of a private reprimand would be an issue of first impression in this jurisdiction. However, at least two other jurisdictions have issued public discipline against attorneys based upon the issuance of private discipline in another jurisdiction. In Kentucky Bar Association v. Shane, 553 S.W.2d 467 (Ky. 1977), the Supreme Court of Kentucky issued a public reprimand against an out of state attorney who had been issued a private reprimand by the Cincinnati Bar Association for violating Disciplinary Rule 7-104(A)(1) which prohibited contact with a party the lawyer knew was represented by counsel. After the Board of Governors of the Kentucky Bar Association determined that the attorney had also violated the same rule and voted for a public reprimand, the attorney argued that his punishment should be no more severe than that issued by the Cincinnati Bar Association. While this case is not technically a reciprocal disciplinary action, the Kentucky Supreme Court noted that the attorney was subject to the jurisdiction of the Court and that the Court was “not bound by the disciplinary penalties imposed in a foreign jurisdiction for the same conduct for which he is

was not authorized to act because it had not received notice of public discipline imposed by Pennsylvania against Respondent.” [Emphasis in original].

to answer in Kentucky.” Shane, 553 S.W.2d 467 (Ky. 1977). In an unreported reciprocal matter, the Supreme Court of Illinois also publicly reprimanded an attorney who had been issued a private reprimand in Indiana. *See also*, In re Hittinger, M.R. 20212, 05 RC 1515 (September 26, 2005) (unreported). In that case, the Supreme Court of Illinois, without comment, entered an order publicly reprimanding the attorney. It was argued in the underlying pleadings that even though applicable Illinois rules did not provide for the sanction of a private reprimand, the Supreme Court had previously issued public censures against attorneys for the same underlying misconduct.

The HPS stated that reliance on In Re Hittinger is misplaced because it did not find that the Illinois reciprocal discipline rule, Illinois Supreme Court Rule 763, to be comparable to West Virginia’s reciprocal discipline rule, Rule 3.20 of the Rules of Lawyer Disciplinary Procedure. In addition, the HPS found that West Virginia did not have the “same flexibility with respect to jurisdiction and sanctions in such cases under [West Virginia] rules absent one of the four qualifiers set forth in Rule 3.20(e), RLDP.” See, Recommended Decision of the [HPS] of the West Virginia Lawyer Disciplinary Board Findings of Fact, Conclusions of Law and Recommended Decision, p. 9. The HPS also stated that neither ODC nor Respondent argued that one of the four exceptions in Rule 3.20(e) applied in this matter. However, in its initial Notice of Reciprocal Discipline filed on April 24, 2018, advised that due to the fact that private discipline was not an available sanction in West Virginia, ODC would seek a different type of sanction.

The West Virginia Rules of Lawyer Disciplinary Procedure do not provide for a private reprimand as a permissible sanction. Rule 3.15 of the Rules of Lawyer Disciplinary Procedure [Permissible Sanctions] provides, in part, as follows, [a] Hearing Panel Subcommittee may recommend or the Supreme Court of Appeals may impose any one or more of the following

sanctions for a violation of the Rules of Professional Conduct or pursuant to Rule 3.14: (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....” Grounds for discipline are enumerated in Rule 3.14 of the Rules of Lawyer Disciplinary Procedure. This rule specifically provides that engaging in conduct violating applicable rules of professional conduct of another jurisdiction can be a basis for sanctioning an attorney.

In this case, the reciprocal discipline notice advised that a different discipline from the foreign jurisdiction would be sought by ODC pursuant to Rule 3.20(e) of the Rules of Lawyer Disciplinary Procedure which provides, in part, that “[a]t the conclusion of proceedings brought under this section, the [HPS] 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 it is determined by the [HPS] that (4) the misconduct proved warrants that a substantially different type of discipline be imposed by the Supreme Court of Appeals.” The least serious of formal discipline in West Virginia is an admonishment. This level of sanction is applied in cases of minor misconduct and when there is little or no injury to a client, the public, the legal system, or the professional. The ABA Standards for Imposing Lawyer Sanctions states that "admonition" is also known as a "private reprimand" and that as a non-public sanction, it still declares the attorney's conduct to be improper but does not limit the attorney's right to practice. See, *ABA Standards for Imposing Lawyer Sanctions*, Section 2.6. Furthermore, under Rule 4 of the Rules of Lawyer Disciplinary Procedure, ODC is required to “evaluate all information coming to its attention by complaint or from other sources alleging lawyer misconduct or incapacity.” In addition, Rule 3.30(a) of the Rules of Lawyer Disciplinary

Procedure, provides that “[a] final adjudication in another jurisdiction, whether state or federal of misconduct constituting grounds for discipline of a lawyer ... shall, for the purposes of proceedings pursuant to these rules conclusively establish such conduct....”

The Supreme Court of Appeals of West Virginia has issued admonishments or admonitions against attorneys. *See, Lawyer Disciplinary Board v. Beveridge*, 194 W.Va. 154, 459 S.E.2d 542 (1995)(per curiam) (Supreme Court, as the final arbiter and exercising *de novo* review, found recommended sanction of suspension to be too harsh and instead issued an admonishment against attorney for violating Rules 1.3, 1.4(b), 8.1(b), among other sanctions); *Lawyer Disciplinary Board v. Mooney*, No. 33595 (W.Va. Supreme Court, May 5, 2008) (attorney admonished for violating Rules 1.3, 1.4(a) and (b), and 8.1(b), imposed one year period of supervised practice; ordered to undergo comprehensive psychological counseling and follow recommended treatment plan; complete additional six hours of CLE over and above that required; and pay costs); *Lawyer Disciplinary Board v. Burke*, 230 W.Va. 158, 737 S.E.2d 55 (2013) (attorney acting as special counsel for bankruptcy trustee admonished for violations of Rules 1.15, 1.3 and 1.4, pay costs of proceeding and satisfy any obligations imposed on him in a pending adversary proceeding filed in bankruptcy court); *Lawyer Disciplinary Board v. Lindroth*, No. 16-0016 (W.Va. Supreme Court, October 5, 2016) (attorney admonished for violating Rule 1.8(e) and further ordered to complete an additional nine hours of continuing legal education in the area of ethics and pay costs).

Furthermore, this Court has issued a different sanction in a reciprocal matter. In *Lawyer Disciplinary Board v. Basdekis*, No. 16-0134 (W.Va. Supreme Court, January 25, 2017), the attorney was issued four (4) month suspension, the execution of which was suspended in favor of an eighteen (18) month period of supervised probation. In the original jurisdiction, the attorney

had been issued the same discipline but the probation was “unsupervised.” The Court adopted the HPS’s recommendation of supervised probation which noted that the change from unsupervised probation to supervised probation was being made because the attorney in question was now located in West Virginia.

B. ALL FINAL DISPOSITIONS OF ATTORNEY DISCIPLINARY PROCEEDINGS IN WEST VIRGINIA ARE PUBLIC.

In addition to recommending dismissal of these proceedings against Respondent, the HPS also recommended that Respondent’s motion to seal, filed at multiple instances in this proceeding, be granted. The ODC objects to the recommendation that this matter be sealed.⁵ There is no private discipline in this jurisdiction and no mechanism in the Rules of Lawyer Disciplinary Procedure which permit ODC to keep the disposition of Respondent's West Virginia disciplinary proceedings private. Indeed, all final dispositions of attorney disciplinary proceedings in West Virginia are public and at the conclusion of proceedings are placed in a file that is accessible to the public. The Supreme Court of Appeals of West Virginia has held that “[u]nder the [West Virginia Constitution] art. III, § 17, which provides that ‘The courts of this state shall be open,’ there is a right of public access to attorney disciplinary proceedings.” Daily Gazette Co. v. Committee on Legal Ethics, 174 W.Va. 359, 365, 326 S.E.2d 705, 711 (1984). The Daily Gazette Court also found there “[w]here formal disciplinary charges in an attorney disciplinary proceeding are filed, following a determination that probable cause exists to substantiate allegations of an ethical violation, the hearing on such charges shall be open to the public, who shall be entitled to all reports, records, and nondeliberative materials introduced at

⁵ However, ODC previously stated in its responses to Respondent’s motions to seal that it did not object to the to the sealing of Attachments A & B [the Pennsylvania documents relating to the private reprimand provided by Respondent] which were previously filed with the Notice of Reciprocal Discipline on April 24, 2018. See, ODC’s “Response to Respondent’s ‘Motion to Dismiss Notice of Reciprocal Disciplinary Action for Lack of Jurisdiction and to Seal Record of Proceedings’” filed on June 4, 2018.

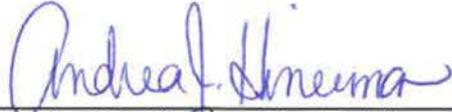
such hearing, including the record of the final action taken." Daily Gazette, 174 W.Va. at 367, 326 S.E.2d at 713. The Court has also stated that "[t]he right to public access to attorney disciplinary proceedings precludes the utilization of private reprimand as a permissible sanction." Syl. Pt. 7, Daily Gazette Co. v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984).⁶ Finally, the principal purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Syl. pt. 3, Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); and Syl. pt. 2, Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999).

VI. CONCLUSION

Accordingly, the Office of Lawyer Disciplinary Counsel respectfully requests that this Honorable Court find that this Court retains jurisdiction over decisions regarding attorney discipline in this State; that Respondent, as an active member of the West Virginia State Bar who was disciplined by a foreign jurisdiction, is subject to that authority in this jurisdiction; and that the motion to seal be denied for the reasons stated herein.

⁶ ODC is aware of one West Virginia case, In re L.E.C., 171 W.Va. 670, 301 S.E.2d 627 (1983), decided under previous rules, Article VI, § 17(c), By-Laws of the West Virginia State Bar, and prior to this Court's decision in Daily Gazette wherein a West Virginia attorney had been issued a private reprimand by the Committee on Legal Ethics and the attorney had appealed the issuance of the private reprimand to the Supreme Court. The Court noted that "[a] private reprimand is not insignificant. A lawyer's good record is important to him." In re L.E.C., 171 W.Va. at 672, 301 S.E.2d at 629.

Respectfully submitted,
The Office of Lawyer Disciplinary Counsel
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ATTACHMENT

1



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of the Supreme Court of Pennsylvania

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PENNSYLVANIA RULES OF DISCIPLINARY ENFORCEMENT

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MISCELLANEOUS PROVISIONS

Rule 401. Expenses.

The salaries of the Disciplinary Board employees, their expenses, administrative costs, expenses of the members of the Board and of hearing committees, and expenses and compensation, if any, of special masters shall be paid by the Board out of the funds collected under the provisions of Enforcement Rule 219 (relating to annual registration of attorneys) and Enforcement Rule 208 (relating to costs). The Board shall annually obtain an independent audit by a certified public accountant of the funds entrusted to it and their disposition and shall file a copy of such audit with the Court.

Rule 402. Access to Disciplinary Information and Confidentiality.

(a) Except as provided in subdivisions (b), (d) and (k), all proceedings under these rules shall be open to the public after:

- (1) the filing of an answer to a petition for discipline;
- (2) the time to file an answer to a petition for discipline has expired without an answer being filed;
- (3) the filing and service of a petition for reinstatement; or
- (4) the Board has entered an Order determining a public reprimand.

(b) Notwithstanding subdivision (a), an informal proceeding under these rules in which it is determined that private discipline should be imposed but that subsequently results in the filing of formal charges shall not be open to the public until or unless the Supreme Court enters its order for the imposition of public discipline.

(c) Until the proceedings are open under subdivision (a) or (b), all proceedings involving allegations of misconduct by or disability of an attorney shall be kept confidential unless:

(1) the respondent-attorney requests that the matter be public, or waives confidentiality for a particular purpose specified in writing;

(2) the investigation is predicated upon a conviction of the respondent-attorney for a crime or reciprocal discipline;

(3) the proceeding is based on an order of temporary suspension from the practice of law entered by the Court pursuant to Enforcement Rule 208(f)(1) (relating to emergency temporary suspension orders and related relief);

(4) in matters involving alleged disability, the Supreme Court enters its order transferring the respondent-attorney to inactive status pursuant to Enforcement Rule 301 (relating to proceedings where an attorney is declared to be incompetent or is alleged to be incapacitated); or

(5) there is a need to notify another person or organization, including the Lawyers' Fund for Client Security, in order to protect the public, the administration of justice, or the legal profession.

(d) This rule shall not be construed to:

(1) Deny access to relevant information at any point during a proceeding under these rules to:

(i) authorized agencies investigating the qualifications of judicial candidates,

(ii) the Judicial Conduct Board with respect to an investigation it is conducting,

(iii) other jurisdictions investigating qualifications for admission to practice;

(iv) law enforcement agencies investigating qualifications for government employment;

(v) lawyer disciplinary enforcement agencies in other jurisdictions investigating misconduct by the respondent-attorney; or

(vi) the Pennsylvania Lawyers Fund for Client Security Board investigating a claim for reimbursement arising from conduct by the respondent-attorney.

(2) Require Disciplinary Counsel to refrain from reporting to law enforcement authorities the commission or suspected commission of any criminal offense or information relating to a criminal offense.

(3) Prevent the Pennsylvania Lawyers Fund for Client Security from utilizing information obtained during any investigation to pursue subrogation claims.

(e) Subdivision (a) shall not be construed to provide public access to:

(1) the work product of the Board, Disciplinary Counsel, hearing committee members, or special masters;

(2) deliberations of a hearing committee, special master, the Board or the Court; or

(3) information subject to a protective order issued by the Board under subdivision (f).

(f) The Board, may upon application of any person and for good cause shown, issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential, and the Board may direct that proceedings be conducted so as to implement the order, including requiring that a hearing be conducted in such a way as to preserve the confidentiality of the information that is the subject of a protective order.

(g) Except as provided in subdivision (h), if nonpublic information is requested pursuant to subdivision (d)(1)(i), (iii), (iv) or (v) and the respondent-attorney has not signed an applicable waiver of confidentiality, the respondent-attorney shall be notified in writing at the last known address of the respondent-attorney of what information has been requested and by whom, together with a copy of the information proposed to be released to the requesting agency or board. The notice shall advise the respondent-attorney that the information will be released 20 days after mailing of the notice unless the lawyer objects to the disclosure. If the lawyer timely objects to the disclosure, the information shall remain confidential unless the requesting agency or board obtains an order of the Supreme Court requiring its release or the respondent-attorney withdraws the objection.

(h) If an agency or board requesting the release of information under subdivision (d)(1) other than the Judicial Conduct Board and the Pennsylvania Lawyers Fund for Client Security Board has not obtained an applicable waiver of confidentiality from the respondent-attorney, and the agency or board requests that the information be released without giving notice to the respondent-attorney, the requesting agency or board shall certify that:

(1) the request is made in furtherance of an ongoing investigation into misconduct by the respondent-attorney;

(2) the information is essential to that investigation; and

(3) disclosure of the existence of the investigation to the respondent-attorney would seriously prejudice the investigation.

(i) The Board shall transmit notice of all public discipline imposed by the Supreme Court, transfers to or from inactive status for disability, and reinstatements to the National Lawyer Regulatory Data Bank maintained by the American Bar Association.

(j) This rule does not permit broadcasting, televising, recording or taking photographs during a proceeding under these rules, except that a hearing committee, a special master, the Board or the Supreme Court when conducting a proceeding may authorize the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record or for other purposes of judicial administration.

(k) If a formal proceeding results in the imposition of private discipline or dismissal of all the charges, the proceeding shall cease to be open to the public when the decision to impose private discipline or dismiss the charges becomes final, unless the respondent-attorney requests that the record of the proceeding remain open to the public.

Note: Paragraph (d)(2) is based on 18 Pa. C.S. 5108 (relating to compounding). Otherwise Disciplinary Counsel may be in the anomalous position of violating Rule 8.4 of the Pennsylvania Rules of Professional Conduct.

Although subdivision (k) provides that a formal proceeding that becomes open to the public under subdivision (a) will subsequently be closed if it results in the imposition of

private discipline or dismissal of all the charges, the closing of the proceeding cannot change the fact that the proceeding was open to the public for a period of time. Thus, subdivision (k) makes clear that the respondent-attorney may request that the record of the proceeding remain open to demonstrate that the charges were dismissed or only private discipline was imposed.

Rule 403. Emeritus Status.

(a) **Qualifications.** An attorney admitted in Pennsylvania who is registered as retired and who seeks to provide pro bono services under this rule shall transfer to emeritus status by complying with the requirements listed below.

(b) **Application Procedure.** Prior to the representation described in (d), an attorney shall complete and submit to the Attorney Registration Office an Application for Emeritus Status which shall include the following:

(1) The name, attorney identification number, telephone number, current email and residence address of the attorney, the latter of which shall be an actual street address, a rural route box number, or a post office box number. Upon an attorney's written request submitted to the Attorney Registration Office and for good cause shown, the contact information will be nonpublic information and will not be published on the Board's website or otherwise disclosed;

(2) A list of all courts (except courts of this Commonwealth) and jurisdictions in which the attorney has been licensed to practice law, with the current status thereof;

(3) Prior disciplinary record in other jurisdictions;

(4) The list of approved Continuing Legal Education courses that the attorney has completed during the 12 - month period immediately preceding the submission of the Application for Emeritus Status, totaling no fewer than 6 credit hours, 5 of which shall be in the substantive area of law and 1 of which shall be in ethics;

(5) Verification that the attorney is authorized solely to provide pro bono services to eligible legal aid organizations;

(6) Verification that the attorney is not permitted to handle client funds;

(7) Verification that the attorney will neither ask for nor receive compensation of any kind for the legal services authorized under this rule;

(8) A registration fee of \$35.00.

(c) **Transfer to Emeritus Status.** Upon review of the completed form, verification of the information and approval by the Attorney Registration Office, the application shall be processed by the Attorney Registration Office and the attorney's status as retired shall be changed to emeritus.

(d) **Limitation of Practice.** An emeritus attorney is authorized solely to provide pro bono legal services under the auspices of an eligible legal aid organization and without charge or an expectation of fee by the attorney.

(e) **Eligible Legal Aid Organization.** An "eligible legal aid organization" for the purposes of this rule is a not-for-profit organization that provides legal services.

(f) **Approval of Eligible Legal Aid Organization.** Prior to the commencement of services described in (d), the emeritus attorney shall submit an Eligible Legal Aid Organization Form to the Board for approval. The emeritus attorney shall submit a separate form for each eligible legal aid organization for which the attorney expects to perform pro bono services. The form shall include the following:

(1) The name and address of the Eligible Legal Aid Organization and the name of the supervising attorney;

(2) A description of the legal services performed by the organization and the nature of the duties expected to be performed by the emeritus attorney;

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DECISION FROM DISCIPLINARY REPORTS AND DECISIONS SEARCH

***Petition Allowed by the Illinois Supreme Court
and Imposing Reciprocal Discipline***

Allowed September 26, 2005

IN THE SUPREME COURT OF ILLINOIS

In the Matter of:

JOSEPH BRIAN HITTINGER,

Supreme Court No. M.R. 20212

Attorney-Respondent,

Commission No. 05 RC 1505

No. 6204291.

**PETITION FOR RECIPROCAL DISCIPLINE
PURSUANT TO SUPREME COURT RULE 763**

Mary Robinson, Administrator of the Attorney Registration and Disciplinary Commission, by her attorney, Susan Frederick Rhodes, pursuant to Supreme Court Rule 763, reports to this court that the Supreme Court of the State of Indiana has privately reprimanded Respondent, Joseph Brian Hittinger. The Administrator petitions this court to impose reciprocal discipline upon Respondent by reprimanding him or by imposing such other discipline as the Court deems just. In support of her petition, the Administrator states:

I. BACKGROUND

1. Respondent was admitted to the practice of law in Illinois in 1990 and licensed in Indiana in 1992.
2. Respondent is registered in Illinois as active for the year 2005.

II. INDIANA DISCIPLINARY PROCEEDINGS

A. Procedural History

3. The Disciplinary Commission of the Supreme Court of Indiana filed a two-count complaint for disciplinary action against Respondent on August 5, 2003. Ex. 1.

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4. The Disciplinary Commission and Respondent subsequently submitted to the Indiana Supreme Court a Statement of Circumstances and Conditional Agreement for Discipline. Ex. 2. The parties agreed that Respondent engaged in misconduct and that a private reprimand was an appropriate sanction. *Id.* The Indiana Supreme Court approved the Conditional Agreement and filed a *per curiam* opinion in the matter on December 23, 2004. *Id.* The Court entered a final order of a private reprimand of Respondent on January 5, 2005. Ex. 3. [FN1]

B. Statement of Facts

5. Respondent's client and the client's employee were charged with multiple charges of conspiracy to defraud the United States, food stamp trafficking and filing false income tax returns. Ex. 2-1. The employee was represented by other counsel. *Id.*

6. Respondent and his co-counsel determined that it would be in the best interest of their client to have his trial severed from the trial of his employee. Ex. 2-2. Respondent concluded that the best way to accomplish a severed trial would be if his client's employee agreed to waive his Fifth Amendment rights and testify favorably for his client. *Id.* Respondent concluded that a signed affidavit from the employee would be the best way to show his intention to testify for Respondent's client. *Id.*

7. Respondent spoke several times with counsel for the employee about severing their clients' trial, and at no time did counsel give Respondent any indication of whether she was in favor or opposed to the severance. *Id.* On August 9, 2000, Respondent's co-counsel faxed to counsel for the employee a copy of a form of affidavit that he wanted the employee to sign to allow for the severance of the trials. *Id.*

¹ Although Respondent's sanction was a private reprimand, Rule 23, section 22(a) of the Indiana Rules for Admission to the Bar and the Discipline of Attorneys provides that after a verified complaint has been filed with the Court, all proceedings and papers filed of record with the Clerk shall be open and available to the public. *See* Ex. 4.

PAGE 3:

8. On August 24, 2000, the date that all pretrial motions were due to be filed in the case, Respondent met with his client at his store; Respondent's client's employee was also there working at the time. Ex. 2-2, 2-3. Respondent had his client file with him, including the proposed affidavit that had previously been faxed to counsel for the employee. Ex. 2-2. Respondent's client took Respondent to his home, which was attached to his store, and Respondent gave him the copy of the affidavit. *Id.* Respondent explained to his client that the affidavit had been faxed to the employee's counsel and was intended to support the severance of the trial, but that the employee's counsel had not given any indication as to whether the employee would sign the affidavit. *Id.*

9. Respondent's client then left his home to talk to his employee and to see if his employee would sign the affidavit. *Id.* About ten minutes later, Respondent's client returned to his home with his employee, who had the affidavit in his hand. *Id.* They spoke to each other, in the presence of Respondent, and the employee signed the affidavit. *Id.* The employee never spoke to his counsel about the affidavit. *Id.*

10. Respondent then left and drove to the federal courthouse, where he filed the affidavit. Ex. 2-3. The next day, Respondent filed a motion to sever his client's trial from the employee's trial. *Id.*

11. On September 7, 2000, counsel for the employee filed a motion to strike the affidavit and to prohibit its use, claiming that she had not spoken to her client about whether he should sign the affidavit. *Id.* On September 13, 2000, after counsel for the employee informed the court that her client would not testify as the affidavit claimed he would, Respondent withdrew the motion to sever the trial. *Id.*

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C. Factors in Mitigation.

12. It was considered in mitigation that Respondent promptly withdrew his motion to sever when he learned of the objection to the affidavit. Ex. 3-5. He also cooperated with the Commission during the investigation, and he had no prior history of disciplinary action. *Id.* It was further considered in mitigation that Respondent's actions were not motivated by his own personal gain, but rather by his effort to zealously represent his client. *Id.*

III. INDIANA RULES OF PROFESSIONAL MISCONDUCT

13. The Supreme Court of the State of Indiana found that Respondent violated the following Indiana Rules of Professional Conduct: [FN2]

- a. Rule 4.2, prohibiting a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order; and
- b. Rule 4.4, prohibiting a lawyer from using means that have no substantial purpose other than to embarrass, delay, or burden a third person, or from using methods of obtaining evidence that violate the legal rights of such a person.

Ex. 2-3, 2-4; Ex. 4.

IV. REQUEST FOR RECIPROCAL DISCIPLINE

14. Illinois Supreme Court Rule 763 provides that if any attorney licensed to practice in Illinois is disciplined in a foreign state, he may be subjected to the same or comparable discipline in Illinois as that imposed by the foreign state upon proof of the foreign state's order

² A copy of the pertinent Indiana Rules of Professional Conduct is attached as Exhibit 4.

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of discipline. *See also In re Witte*, 99 Ill. 2d 301, 458 N.E.2d 484 (1983); *In re Neff*, 83 Ill. 2d 20, 413 N.E.2d 1282 (1980).

15. In this case, the Supreme Court of Indiana Rules of Professional Conduct violated by Respondent correspond to the following Illinois Rules of Professional Conduct:

- a. Rule 4.2, prohibiting a lawyer from communicating or causing another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party or as may otherwise be authorized by law; and
- b. Rule 4.4, prohibiting a lawyer from using means that have no substantial purpose other than to embarrass, delay, or burden a third person, or from using methods of obtaining evidence that violates the legal rights of such a person.

16. Although Supreme Court Rule 770 does not include the sanction of a private reprimand, this Court has imposed a reprimand or a censure as a sanction for an attorney's unauthorized contact with a represented party. In *In re Kuenstler*, 04 CH 14, M.R. 19672 (Nov. 17, 2004), an attorney was censured when he took the deposition of a witness in a case he was defending, without the knowledge or consent of the witness' counsel, knowing that the witness was also a plaintiff in a related case in which he represented the same client and that the witness was represented by counsel. In *In re Gonnella*, 00 CH 43, M.R. 17337 (March 22, 2001), an attorney representing a client on allegations of child abuse was censured after meeting with his client's minor son without permission of the minor's appointed counsel. In *In re Varlas*, 99 RC

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1508, M.R. 15932 (Sept. 29, 1999), an attorney was reprimanded for neglecting her client's divorce matter and for initiating direct communication with the adverse party outside the presence of his counsel.

V. CONCLUSION

WHEREFORE, the Administrator requests that this Court enter an order of reciprocal discipline upon Respondent by reprimanding him or by imposing such other discipline as the Court deems just.

Respectfully submitted,

Mary Robinson,
Administrator
Attorney Registration and
Disciplinary Commission

By: Susan Frederick
Rhodes

Susan Frederick Rhodes
Counsel for the Administrator
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130 East Randolph Drive
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(312) 565-2600

**DECISION FROM DISCIPLINARY REPORTS AND DECISIONS
SEARCH**

M.R.20212 - In re: Joseph Brian Hittinger. (September 26, 2005)

Disciplinary Commission.

The petition by the Administrator of the Attorney Registration and Disciplinary Commission to impose reciprocal discipline pursuant to Supreme Court Rule 763 is allowed, and respondent Joseph Brian Hittinger, who has been disciplined in the State of Indiana, is reprimanded in the State of Illinois.

Order entered by the Court.

ATTACHMENT

3



Reporter of
Decisions
Reason: I attest to
the accuracy and
integrity of this
document
Date: 2021.05.19
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Rule 763. Reciprocal Disciplinary Action

(a) 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.

(b) The Administrator shall initiate proceedings under this rule by filing a petition with the court, to which a certified copy of the order of the other jurisdiction is attached. The Administrator shall serve the petition upon the attorney in any manner in which service of process is authorized by Rule 765(a).

(c) Within 21 days after service of a copy of the petition upon him the attorney may file a request for a hearing on the petition. If the court allows the request for a hearing, the hearing shall be held before the Hearing Board no less than 14 days after notice thereof is given to the attorney respondent and the Administrator. At the hearing the attorney may be heard only on the issues as to (1) whether or not the order of the other jurisdiction was entered; (2) whether it applies to the attorney; (3) whether it remains in full force and effect; (4) whether the procedure in the other jurisdiction resulting in the order was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process of law; and (5) whether the conduct of the attorney warrants substantially less discipline in Illinois.

(d) If an attorney is suspended until further order of the Court or disbarred in Illinois pursuant to this rule, reinstatement in Illinois shall be governed by the provisions of Rule 767.

(e) 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.

Adopted March 30, 1973, effective April 1, 1973; amended September 21, 1994, effective October 1, 1994; amended February 9, 2015, eff. immediately; amended June 22, 2017, eff. July 1, 2017; amended Dec. 28, 2017, eff. Feb. 1, 2018.

CERTIFICATE OF SERVICE

This is to certify that I, Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 20th day of December, 2021, served a true copy of the foregoing "**BRIEF OF THE OFFICE OF LAWYER DISCIPLINARY COUNSEL**" upon Respondent Patrick Doheny by mailing the same via United States Mail with sufficient postage, to the following address:

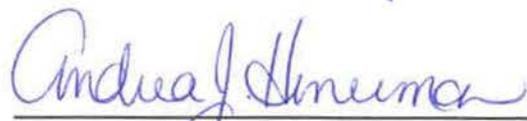
Patrick Doheny, Esquire
Post Office Box 23354
Pittsburgh, Pennsylvania 15222

And upon the Hearing Panel Subcommittee at the following addresses:

Kelly D. Ambrose, Esquire
Human Resource Officer
1703 Coonskin Drive
Charleston, West Virginia 25311

Henry W. Morrow, Jr., Esquire
Post Office Box 459
Charles Town, West Virginia 25414

Dr. K. Edward Grose
2305 Winchester Road
Charleston, West Virginia 25303



Andrea J. Hinerman