

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

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LAWYER DISCIPLINARY BOARD,

Petitioner,

vs.

FILE COPY

No. 18-0363

PATRICK DOHENY,

Respondent.

**REPLY BRIEF OF THE OFFICE OF
LAWYER DISCIPLINARY COUNSEL**

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I. REPLY TO RESPONDENT'S BRIEF

This matter is before this Honorable Court pursuant to the "Recommended Decision of the Hearing Panel Subcommittee of the West Virginia Lawyer Disciplinary Board Findings of Fact, Conclusions of Law and Recommended Decision" filed on October 4, 2021, wherein a Hearing Panel Subcommittee of the Lawyer Disciplinary Board [hereinafter "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 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.

The Office of Lawyer Disciplinary Counsel [hereinafter "ODC"] objected 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).

II. ARGUMENT

A. EXCLUSIVE AUTHORITY TO DEFINE, REGULATE AND CONTROL THE PRACTICE OF LAW IN WEST VIRGINIA RESTS WITH SUPREME COURT OF APPEALS.

This Honorable Court retains jurisdiction over decisions regarding attorney discipline in this State. The ODC is authorized to investigate allegations of misconduct and recommend disciplinary action against members of the West Virginia State Bar. “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].

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. 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). Respondent is an active member of the West Virginia State Bar and as such, he is subject to the authority of the West Virginia Supreme Court of Appeals. 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.

Nonetheless, ODC does not agree with Respondent’s assertion that “private discipline” is “the functional equivalent of ‘no discipline whatsoever.’” [Respondent Brief, p. 18] The ABA Standards for Imposing Lawyer Sanctions states that “admonition” is also known as a “private reprimand.” While this type of discipline may be a non-public sanction, the designation still declares the attorney’s conduct to be improper while not placing limits on the attorney’s right to practice. See, *ABA Standards for Imposing Lawyer Sanctions*, Section 2.6. Furthermore, in West Virginia, an “admonition” would be the least serious of formal discipline in West Virginia in cases of minor misconduct and when there is little or no injury to a client, the public, the legal system, or the professional.

B. FINAL DISPOSITIONS OF ATTORNEY DISCIPLINE PROCEEDINGS 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.¹ The ODC objects to the recommendation that this matter be sealed. Respondent misconstrues ODC’s assertion that it has no mechanism for sealing the final disposition of the instant proceedings. Respondent argues that should this Honorable Court agree with the HPS’ recommendation to dismiss the proceedings then there would not be a final disposition requiring that the record remain public. ODC’s reference to the “final disposition” is to the final action of the West Virginia Supreme Court in disposing of this action either in the

¹ However, ODC previously stated in its responses to Respondent’s motions to seal that it did not object 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.

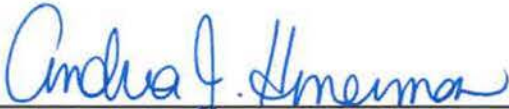
form of an opinion or a memorandum decision. See, Rules 21 and 22 of the West Virginia Rules of Appellate Procedure. At the conclusion of proceedings, the final disposition, including final dispositions wherein complaints were filed against attorneys but no investigations were initiated, are accessible 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 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).² 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).

² 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.

III. 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, is subject to that authority in this jurisdiction; and that the motion to seal be denied for the reasons stated herein.

Respectfully submitted,
The Office of Lawyer Disciplinary Counsel
By Counsel



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CERTIFICATE OF SERVICE

This is to certify that I, Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 23rd day of February, 2022, served a true copy of the foregoing **"REPLY 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:

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And upon the Hearing Panel Subcommittee at the following addresses:

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