

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



**In Re:** JUSTIN J. MARCUM, a member of  
The West Virginia State Bar

**Bar No.:** 11636  
**Supreme Court No.:** 20-0133  
**I.D. Nos.:** 17-03-552, 17-05-577  
18-06-059, 18-05-378

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**REPORT OF THE HEARING PANEL SUBCOMMITTEE**

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**I. PROCEDURAL HISTORY**

Formal charges were filed against Justin J. Marcum (hereinafter “Respondent”) with the Clerk of the Supreme Court of Appeals (hereinafter “Supreme Court”) on or about February 21, 2020, and served upon Respondent via certified mail by the Clerk on February 24, 2020. Disciplinary Counsel filed her mandatory discovery on or about March 16, 2020. Respondent filed his Answer to the Statement of Charges on or about March 25, 2020, and provided his mandatory discovery on April 15, 2020.

Thereafter, this matter proceeded to hearing in Williamson, West Virginia, on September 21, 2020. The Hearing Panel Subcommittee was comprised of Timothy E. Haught, Esquire, Chairperson, Rhonda L. Harsh, Esquire, and Mrs. Cynthia Tawney, Layperson. Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel, appeared on behalf of the Office of Lawyer Disciplinary Counsel (hereinafter “ODC”). Lonnie C. Simmons, Esquire, appeared on behalf of Respondent, who also appeared. The Hearing Panel Subcommittee heard testimony from Robin P. Cisco, Esquire, Jackie Lee Marcum, II, Paul D. Brown, Jr., Ricky A. Haney, Jeffrey S. Simpkins, Esquire, W. Stephen Flesher, Esquire,

Lora L. Cline, Bert W. Gibson, Robert E. Albury, Jr., Louis Dante Ditrapano, Esquire, Charles Eubanks, Robert H. Davis, Jr., Esquire, and Respondent. In addition, ODC Exhibits 1-74,<sup>1</sup> Respondent's Exhibits 1-13 and Joint Exhibits J1 and J2<sup>2</sup> were admitted into evidence.

While the parties agreed in the Joint Stipulation of Facts admitted as Joint Exhibit 2 that such allegations had been made, this Joint Stipulation did not constitute proof of those allegations. The ODC still had the burden of proving the allegations by clear and convincing evidence through admissible testimony and exhibits presented at the evidentiary hearing. Thus, these proposed findings of fact are based upon the admissible evidence presented.

Based upon the evidence and the record, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board hereby makes the following Findings of Fact, Conclusions of Law and Recommended Sanctions regarding the final disposition of this matter.

## **II. FINDINGS OF FACT**

1. Respondent is a lawyer practicing in Williamson, which is located in Mingo County, West Virginia. ODC 25, Bates 188. Respondent, having passed the bar exam, was admitted to The West Virginia State Bar on October 19, 2011. ODC 25, Bates 187. As such, Respondent is subject to the disciplinary jurisdiction of the Supreme Court

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<sup>1</sup> Respondent did not object to the admission of the exhibits, but noted that some exhibits, in particular, affidavits, constituted inadmissible hearsay and that any findings of fact would have to be based upon admissible evidence presented in the hearing.

<sup>2</sup> Joint Exhibit 2 set out what was covered in the Statement of Charges and not what was presented at the hearing.

of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.

2. Respondent is married and has two children who are six and eight, respectively. Respondent grew up in Mingo County, went to Marshall University and West Virginia University for undergrad, and to the Appalachian School of Law. He was licensed as a lawyer in West Virginia in 2011 and licensed in Kentucky in 2016. Since about 2012, Respondent has maintained a solo law practice, doing civil and criminal work in state and federal courts. Hrg. Trans. 284-287. Respondent served as a member of the West Virginia House of Delegates and was running for the Senate when he decided to focus on his own health and withdrew from the Senate race. Hrg. Trans. 302-03.

#### **COUNT I – I.D. No. 17-03-552**

##### **ALLEGATIONS CONTAINED IN STATEMENT OF CHARGES**

3. On November 1, 2017, Complainant Jeffrey S. Simpkins, Esquire, filed a complaint alleging that Respondent had, on August 8, 2017, made uninitiated contact with his client, K.P.B.,<sup>3</sup> for approximately thirty (30) minutes while she was incarcerated in the Southwestern Regional Jail (hereinafter “SWRJ”). ODC 1, Bates 1-33.
4. Mr. Simpkins said he was retained by K.P.B. on August 3, 2017, to pursue damages regarding an incident wherein a Mingo County Civilian Court Bailiff had taken

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<sup>3</sup> Because of the sensitive nature of the facts alleged in this case, initials are used herein for the victim. *See State v. Edward Charles L.*, 183 W.Va. 641, 645 n. 1, 398 S.E.2d 123, 127 n.1 (1990). *See also* Rule 40(e)(1) of the Rules of Appellate Procedure.

K.P.B. to a boiler room in the Courthouse and subjected her to the imposition of sexual acts while she was in handcuffs and leg irons. ODC 1, Bates 4. Mr. Simpkins said that Respondent was aware that K.P.B. already had representation, but still attempted to solicit her case. ODC 1, Bates 5. Mr. Simpkins did not explain in his complaint the factual basis for his assertion that Respondent was aware that K.P.B. had legal representation.

5. On or about August 19, 2017, K.P.B. sent a letter to Mr. Simpkins to advise him that Respondent had visited her at SWRJ, telling her that her mother and father had told him that she needed an attorney, and asked him to visit her at the jail. K.P.B. said she told Respondent that she already had an attorney, and he acknowledged that he was aware of that fact. K.P.B. said she advised Respondent that he had misrepresented the facts because her parents were divorced and were not on speaking terms and, therefore, she knew they had not requested that he visit her in jail. Id. K.P.B. said she advised Respondent that Mr. Simpkins was representing her in both her criminal and civil cases, and she was satisfied with the representation. Id.

6. Mr. Simpkins stated that after Respondent had the conversation with K.P.B. and learned confidential information that could be harmful to her, he then undertook the representation of the civilian court bailiffs. ODC 1, Bates 5-6. Mr. Simpkins did not explain in his complaint the factual basis for his assertion that Respondent learned confidential information from K.P.B. that could be harmful to her. Mr. Simpkins provided a copy of an October 20, 2017 letter sent to him by Respondent wherein



Respondent states that his office has been retained by Larry “Yogi” Croaff, Dustin Scarberry and Billy Brian Haney, Civilian Court Bailiffs, for representation in a civil suit against Mr. Simpkins alleging slander. ODC 1, Bates 27.

7. Mr. Simpkins provided an Affidavit signed by K.P.B.’s mother wherein she stated that she had no contact or conversations with Respondent in regards to the representation of K.P.B., and that Respondent had provided a false statement to jail authorities in order to solicit K.P.B. as a client. ODC 1, Bates 25-26.
8. Mr. Simpkins provided an Affidavit signed by K.P.B.’s father wherein he stated that he never had any contact or conversations with Respondent or any of his affiliates in regards to the representation of K.P.B., and that Respondent had provided a false statement to jail authorities in order to solicit K.P.B. as a client. ODC 1, Bates 30-31.
9. By letter dated November 9, 2017, Mr. Simpkins filed a second complaint against Respondent, which was merged with the initial complaint. ODC 3, Bates 36-39. Mr. Simpkins stated that his office was retained by Edith Puckett, Phillip Puckett and Barbara Marcum regarding an automobile accident which occurred on December 27, 2008. ODC 3, Bates 36. Mr. Simpkins said that upon learning that the case had the appearance of fraud, he withdrew from the representation on January 6, 2009. Id. Mr. Simpkins said those individuals were subsequently indicted, prosecuted, convicted, and spent time in jail for insurance fraud. ODC 3, Bates 36-37. Mr. Simpkins said that after receiving the initial ethics complaint, he was advised by Mary Davis, a relative of Edith Puckett, that Respondent had contacted Edith

Puckett, Phillip Puckett and Barbara Marcum and asked them to sign false affidavits stating that they had provided Mr. Simpkins with car wreck claims in exchange for money. ODC 3, Bates 37. Mr. Simpkins believed Respondent was retaliating against him for filing the initial ethics complaint. ODC 3, Bates 36.

10. On November 15, 2017, Respondent filed a response to the first complaint. ODC 4, Bates 40-61. Respondent admitted that he went to the jail for approximately thirty (30) minutes on August 8, 2017. ODC 4, Bates 41. He stated that he briefly met with K.P.B. on that date, but said he also met with three (3) other clients. ODC 4, Bates 41-42. Respondent said he told K.P.B. that someone in her family had called a friend of his asking him to stop by to see her. ODC 4, Bates 42. Respondent said he asked K.P.B. if she had an attorney and, when she responded yes, he told her he could not talk with her because she already had counsel. Id. Respondent denied asking K.P.B. anything about her case, saying that he immediately left the room upon learning that she already had representation. Id. Respondent said that K.P.B. did not communicate any information about her case in the short amount of time that he met with her. Id.
11. Respondent stated that a friend of his, Ricky Haney, had been contacted by two individuals, one of them being K.P.B.'s mother. ODC 4, Bates 42-43. Respondent stated that these individuals asked Mr. Haney to have Respondent contact K.P.B. and, further, he did not know that she already had representation when he went to the jail. Id. Respondent provided an affidavit signed by Ricky Haney attesting that

K.P.B.'s mother and her friend had contacted him to request that Respondent meet with her daughter. ODC 4, Bates 48-50.

12. Respondent said that on October 20, 2017, some eleven (11) weeks after his meeting with K.P.B., he notified Mr. Simpkins that he was representing the bailiffs. ODC 4, Bates 44. Respondent said he did not learn anything substantive from K.P.B., but, after receiving this ethics complaint, withdrew from his representation of the bailiffs. Id.
13. Respondent said K.P.B. lied in the letter she sent to Mr. Simpkins, and he further accused Mr. Simpkins of filing a frivolous ethics complaint because he did not investigate the matter before he filed the complaint. ODC 4, Bates 44-45.
14. Mr. Simpkins filed a reply on and provided a second affidavit from K.P.B.'s mother wherein she states that she did not contact Respondent or Ricky Haney, did not have any conversations with either one, and is not friends with Katrina Young. ODC 5, Bates 62-93, 90. She stated that Mr. Haney's affidavit was false, misleading and a mischaracterization of the facts. ODC 5, Bates 90.
15. On February 7, 2019, Respondent filed a response to the second complaint. ODC 12, Bates 103-108. Respondent admitted that he met with Earn Davis and Phillip Puckett regarding Mr. Puckett's criminal case for insurance fraud but stated that he never met Edith Puckett or Barbara Marcum. ODC 12, Bates 104. Respondent stated that he did not solicit any of those people as clients. ODC 12, Bates 105. Respondent stated that he did prepare the affidavits based on the information he was given when he met with Mr. Davis and Mr. Puckett, and said he merely prepared the affidavits

as part of his intake process. ODC 12, Bates 104. Respondent stated that Mr. Puckett informed him that Mr. Simpkins had coached, counseled, informed, and directed Mr. Puckett to make sure the wreck was a rear-end collision. Id. Respondent said that Mr. Davis told him that Mr. Simpkins had given him cash on five separate occasions for car wreck referrals. ODC 12, Bates 105. Respondent said he declined to take the lawsuit out of professional courtesy and because the statute of limitations had possibly passed. ODC 12, Bates 104.

16. Respondent stated that he had been friends with Earn and Mary Davis for many years and, when Mary Davis filed for divorce, she hired Mr. Simpkins to represent her. Respondent represented Earn Davis. Id.
17. Disciplinary Counsel took K.P.B.'s sworn statement on February 12, 2019.<sup>4</sup> ODC 13, Bates 109-134. K.P.B. stated that Respondent came to the jail on August 8, 2017, and that she went to the interview room believing she was meeting with Mr. Simpkins because she was told her attorney was there to meet with her. ODC 13, Bates 117-118. K.P.B. said that Respondent told her he knew that Mr. Simpkins was her lawyer, but that she should fire Mr. Simpkins and hire Respondent because he was a former assistant prosecutor and member of the House of Delegates and could get the results she needed. ODC 13, Bates 118-119. K.P.B. said Respondent told her he ran into her mom and dad in town and they wanted him to come meet with her.

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<sup>4</sup> K.P.B. did not appear to testify for the disciplinary hearing. While K.P.B. had indicated to Disciplinary Counsel via Facebook that she would appear, no subpoena was issued for her. Hrg. Trans. 351-352.



ODC 13, Bates 118. K.P.B. said she knew that was a lie because her parents were no longer together and not on speaking terms. Id. K.P.B. said Respondent tried to ask her about her civil case against the bailiff, about what had happened between her and the bailiff and if the bailiff had raped her. ODC 13, Bates 120-122. K.P.B. said she did tell Respondent that she had been raped but could not recall what else she told him about the incident. ODC 13, Bates 122. K.P.B. said Respondent did have a folder with her name on it, but she told Respondent that she was not going to fire Mr. Simpkins and asked him to leave. ODC 13, Bates 123-124. K.P.B. said that Respondent met with her for about ten minutes. ODC 13, Bates 121.

18. Disciplinary Counsel took Mary Davis' sworn statement on February 12, 2019.<sup>5</sup> ODC 14, Bates 135-155. Ms. Davis stated that she has known Respondent for approximately sixteen (16) years, that they are former friends, and he is a friend of her ex-husband. ODC 14, Bates 138-139. Mr. and Mrs. Davis wanted to adopt a child that they had taken care of since he was five and a half (5 ½) months old, and the child was now fourteen (14) years old. ODC 14, Bates 140. Ms. Davis said that at some point in 2018, Respondent came to their house one night and asked Mr. Davis to "sign some papers against Jeff [Mr. Simpkins] for an accident". ODC 14, Bates 143, 147. She said that Respondent told Mr. Davis that, if he signed the papers, he would handle the adoption for free. ODC 14, Bates 143. Ms. Davis said that Respondent also asked Mr. Davis to get Edith Puckett, Phillip Puckett, and Barbara

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<sup>5</sup> Ms. Davis did not appear at the disciplinary hearing.

Marcum to sign papers as well. Id. Ms. Davis said Mr. Davis told her he signed the false affidavit for Respondent when he signed papers for the adoption. ODC 14, Bates 148. Ms. Davis said she knew the affidavit was false because she knew the accident was a setup and Mr. Simpkins did not have anything to do with it. ODC 14, Bates 149. Ms. Davis stated that Respondent was already representing them in the adoption matter, and then subsequently represented her ex-husband in the divorce. ODC 14, Bates 142-143. Ms. Davis said that Respondent then left her name off the adoption papers. ODC 14, Bates 141. Ms. Davis said her ex-husband was trying to take the child out-of-state, instead of them having 50/50 custody. ODC 14, Bates 141-142. She said the adoption did not go through because she would not sign any papers. ODC 14, Bates 142-143. Ms. Davis said she did not think it was right for Respondent to handle the adoption for them and then represent her ex-husband in the divorce. ODC 14, Bates 151.

19. Disciplinary Counsel took Ricky Haney's sworn statement on February 12, 2019. ODC 15, Bates 156-157. Mr. Haney said he is the brother of Billy Brian Haney<sup>6</sup>, a Civilian Court Bailiff for the Mingo County Sheriff's Department. ODC 15, Bates 159. Mr. Haney said he has known Respondent since Respondent was born and they are close friends. ODC 15, Bates 160. Mr. Haney said a lot of times someone will come up to him and tell him they want Respondent, and if someone tells him they

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<sup>6</sup> Billy Brian Haney is one of the Civilian Court Bailiff's listed by Respondent as a client in the October 20, 2017 letter he sent to Mr. Simpkins. ODC1, Bates 27.

need an attorney he will pass the message on to Respondent. ODC 15, Bates 161. Mr. Haney said he has never asked for or been offered any payment for the referrals, and he has no other interaction with the clients. Id. Mr. Haney said he does do some handyman work for Respondent's father. ODC 15, Bates 162. Mr. Haney said that an individual named Katrina Young called him around two or three in the morning and told him she was with K.P.B.'s mother and that "they" wanted Respondent to represent K.P.B. ODC 15, Bates 165-166. Mr. Haney stated that he was told that it was the case involving the bailiff, but he has never met Missy Brown. ODC 15, Bates 166-167, 169. Mr. Haney said he knew who K.P.B. was when he got the call, and that he also knew that she was represented by Mr. Simpkins at that time because his brother was a bailiff. ODC 15, Bates 170. Mr. Haney said he told Respondent to contact K.P.B., and that Respondent "chewed him out" when he returned from the jail because K.P.B. already had counsel. ODC 15, Bates 173-174.

20. Disciplinary Counsel took Respondent's sworn statement on March 8, 2019. ODC 17, Bates 184-292. Respondent said he met with K.P.B. for less than five minutes, that he asked her if she needed to talk to him. ODC 17, Bates 198. Respondent said that she answered "No, I have an attorney", so he left. Id. Respondent said that Ricky Haney had asked him to stop by the jail to see K.P.B., saying that K.P.B.'s mother and Katrina Young had called to make the request. ODC 17, Bates 198-199. Respondent said he never personally spoke with either of K.P.B.'s parents and stated that he did not know that K.P.B. had an attorney. ODC 17, Bates 199-201. He said he assumed that she had counsel for the criminal matter but had no details of who

the attorney was. ODC 17, Bates 201. Respondent said he did not think of K.P.B. as a prospective client and denied telling K.P.B. that he served in the House of Delegates and could do more for her because of that position. ODC 17, Bates 202, 204. Respondent also denied learning any information from K.P.B. that could be used against her in the defamation suit that he was going to file against Mr. Simpkins on behalf of the civilian court bailiffs. ODC 17, Bates 203. Respondent said that the only action he took in the defamation claim was to send the letter to Mr. Simpkins, and he did not believe that he had a conflict when he sent the letter. ODC 17, Bates 204-205. Respondent said he did not get K.P.B.'s consent to represent the bailiffs, and he then withdrew because there was "probably a conflict" because of the issue with K.P.B. Id. Regarding the issue of the false affidavits, Respondent said Earn Davis' family went to jail for insurance fraud, and that Mr. Davis told him that Mr. Simpkins told him how to stage car wrecks and get money for them. ODC 17, Bates 209, 211. Respondent said Mr. Davis told him that Mr. Simpkins would give him four or five hundred dollars for every car wreck. ODC 17, Bates 211-212. Respondent admitted that he prepared the affidavits based on the information provided to him by Earn Davis and Phillip Puckett but stated that he never met Edith Puckett or Barbara Marcum. ODC 17, Bates 214-215. Respondent said he would provide a signed copy of the affidavits. ODC 17, 217. Respondent denied offering free legal work in exchange for the signed affidavits. ODC 17, Bates 218. Respondent said there was no signed contract for him to handle the adoption case, and Mr. Davis never paid the filing fee to get the case started. ODC 17, Bates 219.



Respondent denied going to the Davis' house to ask Earn Davis to file a false affidavit. ODC 17, Bates 220.

21. Respondent subsequently advised Disciplinary Counsel that he was unable to find any signed copies of the affidavits of Earn Davis and Phillip Puckett. ODC 20, Bates 308. Respondent later found them and provided copies to Disciplinary Counsel. Respondent's 3 and 4, Bates R0013-R0015.

### **EVIDENCE ADMITTED AT HEARING**

22. Count I alleged ethics issues in connection with a jail visit Respondent had with K.P.B., Respondent's representation of Earn Davis in a divorce proceeding from his former wife Mary Davis, and Respondent allegedly obtaining false affidavits from Earn Davis and Phillip Puckett. During the hearing, the only testimony presented relevant to Count I was from Mr. Simpkins, Mr. Haney, and Respondent. Mr. Simpkins was not present in the jail when K.P.B. met with Respondent, so he did not have any admissible testimony relating to what was discussed during that meeting. Mr. Brown, who was K.P.B.'s father, only testified that he had never contacted Respondent about representing K.P.B. Hrg. Trans. 72. Respondent had never alleged he had any contact with Mr. Brown. As noted in footnote 4, K.P.B. had agreed through a Facebook message to the ODC to appear at the hearing, but she failed to appear. Thus, Respondent's testimony as to what was discussed during his short meeting with K.P.B. is not refuted by any other evidence. Neither Mary Davis, Earn Davis, Phillip Puckett nor K.P.B.'s mother testified at the hearing, so

they did not provide any direct admissible evidence to support the allegations relating to them asserted in Count I.

23. Mr. Haney, who testified that he was a friend of Respondent, explained that Respondent's meeting in the jail with K.P.B. came about because of a telephone call he received from someone named Katrina Young. Ms. Young put K.P.B.'s mother on the phone and K.P.B.'s mother stated she wanted Respondent to meet with and represent K.P.B. As a result of that phone call, Mr. Haney told Respondent to meet at the jail with K.P.B., which he did. Hrg. Trans. 74-75. During this telephone call, nobody mentioned that K.P.B. already was represented by a lawyer. Hrg. Trans. 77.
24. Although Mr. Simpkins testified at the hearing, he was not present during the short meeting at the jail between K.P.B. and Respondent, so he did not have any actual knowledge or admissible evidence as to the substance of their discussion. K.P.B. signed a fee agreement with Mr. Simpkins dated August 3, 2017, the meeting between K.P.B. and Respondent occurred on August 8, 2017, Mr. Simpkins received a letter from K.P.B. dated 8/19/17, informing him of the jail meeting with Respondent, and the initial civil complaint Mr. Simpkins filed on behalf of K.P.B. was dated October 17, 2017. ODC 1, Bates 24; Respondent 2, Bates 4; Hrg. Trans. 102-103.
25. With respect to the possible conflict of interest allegation involving Respondent's representation of Earn Davis in his divorce from Mary Davis, a video recording of the final divorce hearing between Mary and Earn Davis was played. In this recording, Respondent raised the issue about a possible conflict of interest, Mary

Davis and Mr. Simpkins stated on the record that any possible conflict of interest was waived, and the Family Court Judge said okay. Hrg. Trans. 113. This video and a transcript of this final divorce hearing will be included in the record.

26. Respondent testified that for a short period of time, he represented Court Bailiffs Yogi Croft, Brian Haney, and Dusty Scarberry by sending one letter to Mr. Simpkins. He did not represent Court Bailiff Nathan Hatfield, who was the Bailiff convicted of sexually assaulting K.P.B. Hrg. Trans. 288. Respondent testified that the meeting he had with K.P.B. at the jail, which was prompted by information provided by Mr. Haney, consisted of him introducing himself, stating that he understood she wanted to speak with him, and K.P.B. stating, "No, I have an attorney." Hrg. Trans. 246, 248. As soon as she provided that information, Respondent ended the meeting, he moved as he had other clients to deal with. Hrg. Trans. 248. Respondent denied speaking with K.P.B. about her case. Hrg. Trans. 248. Respondent estimated that he spoke with K.P.B. for less than five minutes. Hrg. Trans. 245. The jail log-in sheet shows that while Respondent was at the jail, he met with a total of four different people in one-half hour. Hrg. Trans. 246.
27. The only work Respondent did for the Court Bailiffs was to send a letter to Mr. Simpkins based upon certain comments he had made which reflected upon all the Court Bailiffs, rather than just to Mr. Hatfield. Hrg. Trans. 250-51. Respondent did not believe writing this letter on behalf of three Court Bailiffs and having a short jail meeting with K.P.B., where he learned nothing about the substance of her civil

action, constituted any conflict of interest. Hrg. Trans. 249-250. Respondent said K.P.B. was never an actual client of his. Hrg. Trans. 288.

28. As for Mary and Earn Davis, Earn Davis at one time did ask Respondent to represent him in connection with an adoption, but Respondent never formally represented him in any adoption proceeding. Hrg. Trans. 291. Also, as shown in the video of the final divorce hearing held on October 9, 2018, it was Respondent who raised the possible conflict of interest issue and both Mary Davis and her lawyer, Mr. Simpkins, acknowledged on the record that any possible conflict of interest was waived and Mingo County Family Court Judge Sabrina Deskins agreed on the record. Hrg. Trans. 289, 291-292. Respondent also testified that he had never met with Mary Davis or represented her. Hrg. Trans. 289.
29. Respondent denied lying to the ODC about soliciting K.P.B. as a client and further denied lying to the ODC about asking Earn Davis to create a false affidavit. Hrg. Trans. 294-296. Respondent denied all of the specific allegations made by K.P.B. regarding the substance of their discussion. Hrg. Trans. 294-295. Because K.P.B. did not testify, Respondent's testimony on this point is unrefuted by any other admissible evidence. Respondent denied asking Earn Davis to create a false affidavit. Hrg. Trans. 295. The contents of his affidavit were consistent with rumors that had been circulating in the area for years. Id. Finally, as to the charge that he met with K.P.B. knowing that she already had retained counsel, Respondent denied this allegation as well. Hrg. Trans. 296-297. At the time he met with K.P.B., her



initial civil complaint had not been filed and there was no reason for him to know she already had retained counsel. Id.

**COUNT II – I.D. No. 17-05-577**

**ALLEGATIONS CONTAINED IN STATEMENT OF CHARGES**

30. On November 16, 2017, Complainant Lora L. Cline filed a complaint against Respondent stating that her mobile home had burned down on April 17, 2016, and she reached an agreement with the insurance company over the insurance claim.<sup>7</sup> ODC 24, Bates 316-327. Complainant said that she received a telephone call from Respondent's office asking her to come to his office. ODC 24, Bates 317. Complainant stated that when she arrived at Respondent's office, she was placed in a room with Darrell Dotson, her ex-companion. Id. Complainant said that Respondent yelled at her to hire him to represent her, or he would tie up the matter in court so she would not get the insurance money. Id. Complainant related that she was living in her garage at that time, so she signed the insurance paperwork in order to get the insurance money. Id. Complainant stated that she then received a telephone call from Respondent's office stating that they had received a check for her, and Complainant indicated that the check was for less than was sent by the insurance company. Id.

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<sup>7</sup> Ms. Cline testified during the disciplinary hearing that her case had not settled prior to meeting with Respondent. Hrg. Trans. 158, 160-161, 164.

31. Complainant said that she only signed one insurance check for \$500.00, dated April 18, 2016, to cover clothes. Id. An insurance check dated June 13, 2016, for \$30,999.97 was made out to Complainant, and Complainant indicated that the signature on the back of the check was not her signature. Id., ODC 24, Bates 322. Two other insurance checks dated June 9, 2016, for \$103,327.35 and \$306.92 made out to Complainant and Mr. Dotson were endorsed by Respondent, with a notation that he was the attorney for Complainant and Mr. Dotson. ODC 24, Bates 317, 320-321. Complainant stated that Respondent's endorsement was without her permission. ODC 24, Bates 317. Complainant said that Respondent forged her name to the June 13, 2016 check. Id., ODC 24, Bates 322. Complainant said that Respondent took a large percentage of the settlement money, and the amount was \$44,833.20.<sup>8</sup> ODC 24, Bates 317. Complainant said that she had negotiated with the insurance company prior to hiring Respondent. Id. Complainant stated that when she received a copy of her client file from Respondent, it contained only a few pages. Id. Complainant believed Respondent took advantage of her in the situation. Id.

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<sup>8</sup> Complainant filed a different complaint on September 20, 2016, which was closed without an investigation by letter dated September 27, 2016. ODC 24, Bates 323-327, ODC 26, Bates 337-338. In that complaint, Complainant stated that her mobile home had burned down, and she offered to split the insurance money for the dwelling only with Mr. Dotson. ODC 24, Bates 323-324. Complainant said that Mr. Dotson and Respondent scared her to settle the case, and the settlement included the dwelling and contents. ODC 24, Bates 324. The Settlement Sheet showed a total settlement was \$134,634.24, with \$103,327.35 for the dwelling, \$306.92 for other, and \$30,999.97 for contents. ODC 24, Bates 326-327. Respondent's fee was 35%, but he took a reduced fee of \$44,833.20 and \$100.00 for expenses. ODC 24, Bates 326. Complainant received \$55,336.16 and Mr. Dotson received \$33,364.88. Id. The Settlement Sheet was signed by Complainant, Mr. Dotson, and Respondent on June 21, 2016. ODC 24, Bates 327.

32. On December 14, 2017, Respondent filed a response. Respondent stated that he was hired by Complainant on May 25, 2016, for representation in a home insurance case after her home burnt down. ODC 26, Bates 330. The Attorney/Client Contract signed by Complainant on May 25, 2016, indicated that Respondent would receive 35% of any settlement.<sup>9</sup> ODC 26, Bates 344-347. Respondent said that Complainant and Mr. Dotson jointly owned the trailer that Complainant was living in at the time it was destroyed by the fire. ODC 26, Bates 331. Respondent stated that the meeting was between him and Complainant on May 25, 2016, and Mr. Dotson was not present during the meeting. Id. However, Respondent said that he “fully discussed the four-page contract and that [he] would represent both [Complainant] and Mr. Dotson since their issues did not conflict with each other.” Id. Respondent stated that his notes show that he met with her on two separate occasions and that he talked on the telephone with her on at least three different times. ODC 26, Bates 333. Respondent said that every telephone call was between him and her, and he had no knowledge if Mr. Dotson was with her or not. ODC 26, Bates 330.
33. Respondent stated that Complainant had insurance on the home and agreed to give one-half of the proceeds from the trailer to Mr. Dotson. ODC 26, Bates 331. The rest of the insurance money was to go to Complainant. Id. Respondent said that

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<sup>9</sup> Respondent had been previously hired by Mr. Dotson for his fire insurance claim, and Mr. Dotson had indicated that Complainant was struggling to get her insurance money and would also be hiring Respondent. ODC 26, Bates 333. Respondent stated that he remembered Mr. Dotson calling Complainant while Mr. Dotson was at Respondent’s office, and Mr. Dotson telling Complainant that Respondent agreed to represent both. Id.

Complainant admitted in her complaint that he did obtain a settlement, and that she agreed to give half to Mr. Dotson. Id. Further, Complainant agreed with the amounts that were settled for, but Complainant's only issue was Respondent's attorney fee. Id. Respondent indicated that he sent an engagement letter to Complainant on May 26, 2016, discussing his representation of her, and noted the discussion about splitting the proceeds with Mr. Dotson. Id. Respondent stated that Complainant never had any issues with his representation of her and Mr. Dotson, and he did not see a conflict of interest present in his representation of them both. Id.

34. On June 21, 2016, Respondent said that he, Complainant, and Mr. Dotson met at his office, along with Respondent's secretary to act as a witness, to discuss the case and the settlement. Id. Respondent stated that he, Complainant, and Mr. Dotson then proceeded to sign the settlement sheet.<sup>10</sup> Id. Respondent noted that he met with Complainant prior to the meeting to explain everything and see if she had any questions, and Respondent's notes do not show any questions from Complainant. Id. Respondent said that Complainant indicated that she wanted to split the money with Mr. Dotson. Id. Respondent stated that he specifically met with Complainant and Mr. Dotson individually to make sure they were happy and had no issues with the case. Id. Respondent said that both were well informed, and were not pressured,

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<sup>10</sup> The Settlement Sheet had a section entitled "Joint Representation Agreement." ODC 24, Bates 326. That section stated that "[b]y signing below, it is our understanding that a potential conflict of interest may arise and that we are waiving that conflict of interest. We are satisfied with the representation in this case and hereby understand that our individual legal positions may differ at some point but by settling the matter as noted herein, we voluntarily waive this issue. Furthermore, by signing below, we understand this and agree to this conflict waiver and to the settlement noted above." Id.



forced, or coerced into signing or doing anything. Id. Respondent stated that Complainant appeared to be pleased with his representation as Complainant could not make any progress with the insurance company until she hired Respondent. Id. Respondent denied that he ever yelled at Complainant and denied that he said he would tie the matter up in court. ODC 26, Bates 331-332.

35. Regarding the checks, Respondent denied signing Complainant's name to any checks. ODC 26, Bates 332. Respondent said that the \$500.00 check never went through his office, and noted that the check was cashed at a bank that he had never used.<sup>11</sup> Id. Respondent stated that when he received the settlement checks, he called Complainant to inform her of their arrival and that the bank would put a hold on them. Id. Respondent said that he then discussed with Complainant that he would sign them as her attorney and would then deposit the checks into his client trust account. Id. Respondent stated that the \$30,999.97 check was signed by both him and Complainant, and it was deposited on a different date. Id. Respondent said that his deposits of the checks into his client trust account was per Complainant's instructions. Id. Respondent also noted that he discounted his fees to make Complainant happy. Id.
36. On December 27, 2017, Complainant filed a reply. ODC 27, Bates 353-355. Complainant denied hiring Respondent and said that Mr. Dotson hired Respondent.

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<sup>11</sup> Disciplinary Counsel noted that the \$500.00 was not reflected on the settlement sheet. ODC 24, Bates 326-327.

ODC 27, Bates 353. Complainant denied speaking on the telephone with Respondent but admitted to speaking with his secretary on one occasion. Id. Complainant stated that she then went to Respondent's office but denied that she had a private meeting with Respondent. Id. Complainant said that when she asked for a complete copy of her client file, she found that it only included a few pages. Id. Complainant stated that she had already agreed to a settlement amount with the insurance company, and when she called to find out when a check would be sent to her, she was told that the insurance company's attorney was involved. Id. Complainant alleged that Respondent had already talked to the insurance company before talking with Complainant. Id.

37. Complainant denied that Respondent explained the settlement sheet with her. ODC 27, Bates 354. Complainant said that she was given the settlement sheet by Respondent's secretary to sign when she went to pick up her check. Id. Complainant indicated that she was making some progress with the insurance company based upon the \$500.00 check being sent to her. Id. Complainant again denied that she signed the \$30,999.97 check and stated that someone signed for her without her knowledge. Id. Complainant said that she had to accept the check provided by Respondent because she had lost everything and was homeless. Id. Complainant stated that she had filled out all the paperwork for the insurance company and made all the telephone calls. ODC 27, Bates 355. Complainant said that she had offered Mr. Dotson half of the money for the home, but Mr. Dotson did not trust her, so

there was no agreement between them. Id. Complainant stated that Mr. Dotson hired Respondent to protect Mr. Dotson's portion of the insurance money. Id.

38. On January 18, 2018, Respondent filed additional correspondence. ODC 29, Bates 357-362. Respondent stated that Complainant's complaint and reply was "filled with many misconceptions and unfounded allegations." ODC 29, Bates 357. Respondent said that Complainant had stated that she hired him, and that she agreed to split the money for the dwelling with Mr. Dotson. ODC 29, Bates 358. Respondent noted that Complainant had signed both a retainer agreement and a settlement sheet with him. Id. Respondent stated that Complainant signed the settlement sheet of her own freewill and accord, that she was free to leave at any time, and free to not approve the settlement. ODC 29, Bates 359. Respondent said that he met with Complainant to sign the settlement sheet. Id. Respondent believed that Complainant was upset with the amount of his attorney fees. Id.
39. On or about February 5, 2018, Complainant filed a lawsuit against Respondent, Respondent's law firm, Mr. Dotson, and American Modern Home Insurance ("AMH"). ODC 30, Bates 363-402. Complainant was represented by W. Stephen Flesher, Esquire, in the lawsuit. ODC 30, Bates 365. The lawsuit noted that AMH had agreed to pay Complainant \$134,634.24 for the loss of her mobile home prior to Respondent's involvement in the case. ODC 30, Bates 371. When Complainant contacted AMH about when she would receive the amount, AMH told her that payment would be delayed because an attorney was now involved. Id. Thereafter, on or about May 23, 2016, Complainant received a call from Respondent asking her

to come to his office. ODC 30, Bates 372. Complainant appeared at Respondent's office on May 25, 2016, and Respondent demanded that she sign a paper authorizing him to represent her. Id. Ultimately, Complainant received \$55,336.16, an amount substantially less than \$134,634.24. Id. The allegations included a violation of the Rules of Professional Conduct for Respondent taking unreasonable fee, soliciting a client, conflict of interest, dealing with unrepresented client, and engaging in fraudulent acts. ODC 30, Bates 373-375.

40. On March 1, 2018, Respondent provided additional correspondence. ODC 32, Bates 404-414. Respondent stated that he was first contacted by Complainant when she called his office requesting help with her case between April 29, 2016, and May 25, 2016. ODC 32, Bates 404. Respondent said that Complainant first met with his legal assistant, who died on October 5, 2017, and then met him on May 25, 2016. Id. Respondent denied that he contacted Complainant prior to her hiring him, and he remembered Mr. Dotson telling him that Complainant would be calling soon because she was unable to settle the case. Id. Respondent stated that he was never told by Complainant that she had been offered \$134,634.24 by the insurance company, and he was never told by the insurance company that such an offer had already been made. Id. Respondent was unsure as to why Complainant would need an attorney if she had already been offered that amount. ODC 32, Bates 405. Respondent said that during at least one conversation with Complainant, she indicated that she was glad the matter was moving forward. ODC 32, Bates 407.



41. Respondent provided an affidavit signed by Mr. Dotson on February 26, 2018. ODC 32, Bates 411-414. Mr. Dotson indicated that Complainant had called him about wanting to settle the insurance claim because the company would not settle and were not cooperative with her. ODC 32, Bates 411. Mr. Dotson stated that he hired Respondent on April 29, 2016, and after his visit with Respondent on that date, he called Complainant about Respondent being able to represent both without any money up front. ODC 32, Bates 411-412. Mr. Dotson said that Complainant called him several times about wanting a meeting scheduled at Respondent's office to get her settlement money. ODC 32, Bates 413. Mr. Dotson denied that Respondent "yelled, threatened, or forced" Complainant to anything or to sign papers. ODC 32, Bates 412.
42. On March 13, 2018, Respondent provided additional correspondence wherein it appeared that AMH had no record of an offer to pay the policy prior to the notice that Respondent had been retained. ODC 34, Bates 422-423.
43. On March 23, 2018, in additional correspondence, Respondent denied that he violated Rule 1.7 of the Rules of Professional Conduct. ODC 35, Bates 424-433. Respondent noted that the double wide that burnt had been in both Complainant and Mr. Dotson's names, and both had agreed to split the insurance proceeds from the double wide. ODC 35, Bates 424. Respondent said that his agreement was with Complainant, and Complainant was going to split the proceeds with Mr. Dotson. Id. Respondent stated that Complainant had told him throughout his representation that she wanted to split the proceeds of the double wide with Mr. Dotson. Id. Respondent

said he saw no direct adversity in his representation of Complainant, and he was not limited in his responsibilities to Mr. Dotson as his portion of the proceeds had already been agreed upon by Complainant. ODC 35, Bates 424-425. Respondent stated that he did have Complainant sign an informed consent regarding the concurrent conflict of interest of representing both Complainant and Mr. Dotson when she signed the settlement agreement, as Complainant appeared to be upset at Respondent's fees in the matter. Id. Respondent said that Complainant freely signed the joint representation agreement, and such was discussed with her during a private meeting with her only. Id.

44. On March 7, 2018, Disciplinary Counsel subpoenaed all documents and correspondence from AMH regarding all settlements offers made in Complainant's insurance claim. ODC 36, Bates 435.
45. AMH provided the subpoenaed documents on March 30, 2018. ODC 36, Bates 434-464. The documents noted that the fire occurred on April 17, 2016. ODC 36, Bates 438. Complainant signed an "Advance Payment Receipt and Reservation of Rights" document on April 22, 2016 for a partial payment of \$500.00 for the claim for insurance benefits. ODC 36, Bates 459. On May 2, 2016, Respondent sent a letter to AMH about representing Mr. Dotson. ODC 36, Bates 436.
46. The notes of the conversation between the adjuster for AMH, Complainant, and Respondent showed that on May 20, 2016, the adjuster spoke with Complainant, who indicated that she and Mr. Dotson had agreed on how to split the payments. ODC 36, Bates 446. The adjuster indicated that he needed Respondent to send a

letter of release. Id. Thereafter, on the morning of May 26, 2016, the adjuster spoke with Complainant about needing the letter from Respondent after she again explained that there was an agreement between her and Mr. Dotson to split the proceeds. Id. In the afternoon of May 26, 2016, the adjuster spoke with Respondent, who indicated that he was representing both parties, and the adjuster indicated that he would get the claim wrapped up next week because all of the parties were straight. Id. Also on May 26, 2016, Respondent sent a letter to AMH about him representing Complainant. ODC 36, Bates 437.

47. On June 3, 2016, the adjuster requested payment for the settlement with the amounts listed as \$103,327.35, \$306.92, and \$30,999.97. ODC 36, Bates 446. It appears the settlement amount was granted by AMH on June 7, 2016. ODC 36, Bates 444. On June 9, 2016, Respondent sent a letter to AMH stating that there were no liens on the claim that would hinder settlement in the matter. ODC 36, Bates 441. There was a hand written letter from Complainant that appeared to be dated or received June 29, 2016, to the adjuster for AMH asking for a check for the property clean up to be sent to her at her address with the notation "Do not send to that stupid Layer [sic]." ODC 36, Bates 442.
48. Disciplinary Counsel took Respondent's sworn statement on March 8, 2019. ODC 17, Bates 183-292. Respondent stated AMH backed up the position that they never made an offer to Ms. Cline until Respondent was involved in the case. ODC 17, Bates 226. Further, the attorney for Ms. Cline indicated that they would dismiss the ethics complaint if the matter were settled. ODC 17, Bates 228-229. Respondent

said he would provide a copy of the discovery regarding AMH's position, and the email from Ms. Cline's attorney. ODC 17, Bates 227, 229. Respondent stated it was a typical insurance case but did not know if the insurance company did not want to settle the matter or had just made an offer. ODC 17, Bates 231. Further, Respondent said he did not obtain informed consent confirmed in writing from Ms. Cline or Mr. Dotson when he started representing them. ODC 17, Bates 244.

49. On March 11, 2019, Disciplinary Counsel sent a follow up letter to Respondent's counsel about the agreement to produce "a copy of the insurance company document(s) provided in discovery in the Lora Cline civil case wherein it indicates that the case was not settled prior to [Respondent's] involvement therein; and . . . a copy of the email from Ms. Cline's attorney wherein they offer to dismiss the ethics complaint as part of the settlement of the law suit." ODC 18, Bates 298. It was requested that the information be provided within twenty days of receipt of the letter. Id.
50. On March 14, 2019, Respondent provided a copy of AMH's Objections and Responses from the civil case filed on February 1, 2019. ODC 38, Bates 586-605. In response to the interrogatory about identifying any settlement amount agreed to prior to Respondent's involvement, AMH said it "did not agree to any settlement with . . . Lora Cline [prior to the involvement of [Respondent.]]" ODC 38, Bates 586, 591. As for the email, it was not provided, but stated that "[c]ounsel for Ms. Cline did state in a telephone call with [Respondent's] counsel that as part of any settlement, Ms. Cline would withdraw her ethics complaint." ODC 38, Bates 587.

51. On October 16, 2019, the Mingo County Circuit Court entered a Time Frame Order in Cline v. Marcum, et al., Civil Action No. 18-C-4, that set a trial for October 19, 2020. ODC 41, Bates 1126-1127.
52. On or about July 28, 2020, the Circuit Court of Mingo County entered an agreed order noting that all claims raised have been resolved and dismissing Civil Action No. 18-C-4, with prejudice. (Respondent's Exhibit No. 9).

### **EVIDENCE ADMITTED AT HEARING**

53. Count II alleges ethics issues regarding Respondent's representation of Lora Cline and Darrell Dotson, whose mobile home owned equally by them was destroyed by fire and they were seeking to recover fire insurance proceeds. Respondent was accused of charging an unreasonable fee for his legal services, of having a conflict of interest in representing Ms. Cline and Mr. Dotson, of soliciting Ms. Cline as a client, of lying to the ODC about soliciting Ms. Cline, and of depriving Ms. Cline of her proper portion of the settlement Respondent obtained on behalf of Ms. Cline and Mr. Dotson. Ms. Cline, W. Stephen Flesher, Respondent, and Robert H. Davis, Jr., were the witnesses presented at the hearing, who provided testimony relevant to these allegations.
54. Mr. Flesher is the lawyer who represented Ms. Cline in the civil action filed against Respondent and others regarding the settlement reached in her mobile home fire insurance claim. Hrg. Trans. 123. He denied being involved in the decision to send copies of the civil complaint he filed against Respondent to members of the West Virginia Legislature, where Respondent at that time was a member. Hrg. Trans. 135.



Mr. Simpkins testified that he believed he was the person responsible for this mailing. Hrg. Trans. 114. Mr. Flesher understood that Ms. Cline and Mr. Dotson were fifty/fifty owners of the mobile home and that they had made an agreement to split the proceeds of the insurance policy related to the destruction of the mobile home equally. Ms. Cline had a separate claim for the loss of her personal property, in which Mr. Dotson had no claim or interest. Hrg. Trans. 136-37.

55. Ms. Cline identified her signature on the fee agreement she signed with Respondent, agreed that the deed to the mobile home was titled in her name as well as Mr. Dotson, acknowledged the letter from Respondent thanking her for retaining him to represent her and also acknowledging that Ms. Cline and Mr. Dotson had reached an agreement as to the distribution of any insurance proceeds, and identified her signature on the final settlement sheet. Hrg. Trans. 154-55; ODC 26, Bates 344-47, 348, 349, 350-51. Ms. Cline testified that Mr. Dotson is the person who called her about being represented by Respondent. Hrg. Trans. 156. During the hearing, contrary to the representations she made in her civil complaint and after a long line of questioning by Mr. Simmons, Laura Cline admitted she had not reached a settlement with the insurance company prior to retaining Mr. Marcum. Hrg. Trans. 160-161. This answer was consistent with the sworn answer provided by the insurance company in written discovery filed in the civil action.

56. Robert H. Davis, Jr., is a lawyer practicing in Pennsylvania, who previously was employed as an Assistant Disciplinary Counsel in Georgia, the Chief Disciplinary Counsel in West Virginia, and Deputy Chief Counsel in Pennsylvania. Hrg. Trans.

221-223. Without objection, Mr. Davis was recognized as an expert witness in lawyer ethics. Hrg. Trans. 223. Mr. Davis reviewed the documents in connection with Count II only. Hrg. Trans. 224. Based upon his review of the facts, Mr. Davis expressed the following opinions stated to a reasonable degree of professional certainty: 1) The contingency fee charged by Respondent was not excessive or inappropriate under Rule 1.5. He distinguished the present facts from the situation presented in the Tatterson case, where a life insurance policy was at issue and the amount to be paid was a definite sum of money. There was nothing inappropriate charging a contingency fee in this type of case. Gauging the reasonableness of a contingency fee is not based upon the actual hours spent on the case, but is based upon a lot of factors, including the risk taken by the lawyer, the chance that no money may be recovered, and the skill of the lawyer, among other considerations. A one-third contingency fee is appropriate in this kind of case and actually Respondent reduced his fee; 2) There was no conflict of interest with Respondent representing Ms. Cline and Mr. Dotson, particularly since they already had reached an agreement to split the mobile home proceeds before they met with Respondent and their interests were not adverse; and 3) The evidence was that Mr. Dotson, not Respondent, is the person who contacted Ms. Cline about being represented by Respondent. Mr. Davis stated it was perfectly reasonable for Ms. Cline and Mr. Dotson, who had equal interests in the mobile home, to obtain the same lawyer to represent them to obtain the insurance proceeds. Hrg. Trans. 225-232, 236-240.

57. Respondent testified that the civil action filed by Ms. Cline had been settled prior to the hearing. Hrg. Trans. 243; Respondent 9, Bates 27. Respondent explained in any contingency fee case, there is the risk of no recovery or of the case requiring a lot more work and expense, including the hiring of expert witnesses. In this case, after he provided the insurance company with the Kelly Blue Book values and the tax tickets and further finding there was no subrogation or other liens on the mobile home, Respondent successfully was able to negotiate a prompt settlement that his clients agreed to and that was consistent with their wishes because prior to retaining Respondent, the insurance company had not settled their claim. Hrg. Trans. 256. In this case, Respondent followed his usual practice charging a contingency fee and having a written fee agreement signed with Ms. Cline and Mr. Dotson at the beginning of the representation. Because the interests of Ms. Cline and Mr. Dotson were the same, Respondent never perceived there to be any conflict in representing both of them in their mutual pursuit of the insurance proceeds for the mobile home they owned equally. To ensure there was no problem, Respondent had Ms. Cline and Mr. Dotson sign a settlement sheet, which outlined specifically the complete distribution of the insurance settlement and further included a paragraph that if there was any conflict between Ms. Cline and Mr. Dotson, any such conflict was waived by them in writing. Finally, Respondent noted the record was undisputed that Mr. Dotson is the person who called Ms. Cline, not Respondent, and Respondent denied every lying to the ODC about any of the matters raised in this case. Hrg. Trans. 297-300.

**COUNT III – I.D. No. 18-06-059**

**ALLEGATIONS CONTAINED IN STATEMENT OF CHARGES**

58. On February 16, 2018, Complainant Bert W. Gibson, a City of Williamson police officer, filed an ethics complaint against Respondent alleging that Respondent had made false allegations against him, and then attempted to solicit business from the same. ODC 42, Bates 1128-1144. Mr. Gibson included copies of several Facebook posts made by Respondent which specifically named Mr. Gibson or alluded to his actions. ODC 42, Bates 1131-1144. The posts stated as follows:
- A. Drug dealers everywhere and the City of Williamson is allowing BERT GIBSON to intentionally harass people. He is killing our tourism from the trails as a lot of trail riders won't come back to Williamson because of him. To beat it all, I'm told he's getting \$50.00 for every tow he makes. This is pitiful and I'm calling on the City Council and everyone to do something with him. BERT needs to go!!! ODC 42, Bates 1131.
  - B. Guess their new lawyer will be flooded with lawsuits time this stuff is over with Bert. Maybe we need the Feds to watch Bert and see if his cash deal [sic] are real. ODC 42, Bates 1133.
  - C. I want everyone to know, we will start fighting his tickets. Come see me at Marcum Law Office. ODC 42, Bates 1135.
  - D. Then, Bert tried to tow my dad. Dad stopped at a store and unloaded some heavy boxes from his truck for a store and pulled out. Stopped for maybe 5 minutes. He told Dad he would also be towed and said a bunch of cuss words

to Dad. It's alright for Bert to park his cruiser, leave it running, waste gas, while he parks in the middle of the road for long periods of time. Probably to get free food. He said about 20 cuss words to my dad, including GD and MF. This is absolute pitiful and uncalled for. ODC 42, Bates 1137.

E. Let him do it. I'm ready for anyone who gets harassed by him. I don't care to file suit against him if y'all want. ODC 42, Bates 1139.

F. Bert is adding to the demise. It makes my jobs hard as a legislator. When we discuss companies, they want to know about the roads, drug free workers, and sometimes even ask about things like what Bert is doing. He's truly an embarrassment to the badge. ODC 42, Bates 1141.

G. Bert should be arresting drug dealers and fighting real crime instead of being public nuisance #1. He's a joke!!!

H. Today, he pulled another friend over for expired licenses on his car. Friend had the sticker but didn't have it put on yet. Bert proceeded to tow him too.

I. Drug dealers everywhere and the City of Williamson is allowing BERT GIBSON to intentionally harass people. He's killing our tourism from the trails as a lot of trail riders won't come back to Williamson because of him.

ODC 42, Bates 1143-1144.

59. On March 13, 2018, Respondent filed a response. Respondent stated that, two or three years ago, Mr. Gibson had sued an ATV rider for illegally driving and causing Mr. Gibson to wreck. ODC 44, Bates 1147. At that time, Mr. Gibson was a policeman for the City of Williamson. Id. Respondent said he represented the



defendant and, after discovery was conducted, Mr. Gibson agreed to dismiss the matter. Id. Respondent said that when he met Mr. Gibson in the area thereafter, Mr. Gibson would cuss at him, and make snide or unprofessional comments directed towards him. Id. Respondent said that Mr. Gibson also verbally attacked his father when he was unloading boxes for a small store. Id. Respondent said that several individuals who came to the area to ride the trails complained about the poor treatment they received from Mr. Gibson. ODC 44, Bates 1148. Respondent said he discussed these complaints with the Chief of Police, who advised that he would address the problem. Id. Respondent said that, thereafter, he removed his Facebook post regarding Mr. Gibson. Id.

60. Respondent said that he had witnessed Mr. Gibson pull over his legal assistant's husband, Scott Pack, for an expired inspection sticker, and heard him make disparaging remarks. Id. Respondent provided an Affidavit signed by Mr. Pack wherein he states that Mr. Gibson has cussed and made derogatory comments to him, and personally harassed him because his wife works for Respondent. ODC 44, Bates 1152-1153.
61. Respondent said that he had concerns about the effect of Mr. Gibson's actions on the local economy, which was why he put the post on Facebook. ODC 44, Bates 1149. Respondent said he did not make any false allegations against Mr. Gibson, nor was he soliciting business. Id. Respondent said he only stated facts of what was occurring, and his opinion thereof. Id. Respondent said it was a broad post

advertising his office and his willingness to represent people in the City Council hearings. Id.

62. On February 7, 2019, Respondent filed additional correspondence and indicated he had no additional facts or information regarding Mr. Gibson's ethics complaint. ODC 47, Bates 1157.

63. At his sworn statement on March 8, 2019, Respondent stated that his Facebook posts could be construed as advertising but said he did not directly solicit any business. ODC 17, Bates 254-258.

#### **EVIDENCE ADMITTED AT HEARING**

64. Count III alleges Respondent violated various ethics rules in Facebook postings he made regarding Bert Gibson, who now is employed as a Traffic Enforcement Officer for the City of Williamson, but the Facebook posts were directed at Mr. Gibson when he served as a Williamson City Police Officer. Mr. Gibson and Respondent were the witnesses presented at the hearing who provided admissible testimony regarding these charges. For purposes of this charge, Respondent does not dispute that the Facebook posts cited in the NOTICE OF CHARGES were made by him at the time he still was serving in the West Virginia Legislature.

65. Mr. Gibson denied committing the various acts alleged in the Facebook posts. As a result of these posts, Mr. Gibson was investigated by Chief Dotson, who determined there was no merit to the allegations. Several individuals who received tickets from Mr. Gibson told him that they were going to hire Respondent. Hrg. Trans. 178-79.

66. Respondent did not dispute making the Facebook posts and he provided the factual basis for several of them, including a situation involving members of his family being cussed out by Mr. Gibson. Respondent believed under the First Amendment as well because of him being a member of the West Virginia Legislature, he had the right to speak out about an issue impacting his community. Respondent acknowledged that his Facebook posts did not include the name and office address of at least one lawyer or law firm responsible for the content and did not include the words "Advertising Material." Hrg. Trans. 262-265.

#### **COUNT IV – I.D. No. 18-05-378**

##### **ALLEGATIONS CONTAINED IN STATEMENT OF CHARGES**

67. By letter dated July 23, 2018, attorney Robin P. Cisco, Esquire, filed a report regarding Respondent pursuant to Rule 8.3 of the Rules of Professional Conduct. ODC 48, Bates 1170-1173. Ms. Cisco stated that Respondent had withdrawn from representation of Jackie Marcum, and she was appointed to the case. ODC 48, Bates 1170. Ms. Cisco said Jackie Marcum gave her a letter that Respondent had sent to him, which stated that Jackie Marcum had failed to abide by the terms of the fee agreement. *Id.*, ODC 48, Bates 1172-1173. She said her client was confused by the letter because he said he had never signed any forms, contracts, or agreements with or for Respondent.<sup>12</sup> ODC 48, Bates 1170. Ms. Cisco stated that she requested a

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<sup>12</sup> Jackie Marcum reviewed ODC Ex. 56, Bates 1621 during the disciplinary hearing, which was a fee agreement from Respondent, and Jackie Marcum noted that the signature appeared to be his. Hrg. Trans. 49.

complete copy of the client file from Respondent, but when she received the file it did not contain any fee agreement. Id.

68. By letter dated July 25, 2018, Ms. Cisco wrote to supplement her report. She stated:

A. That Jackie Marcum was charged with one count of Delivery of a Controlled Substance, and three counts of Conspiracy to Deliver a Controlled Substance. ODC 49, Bates 1174.

B. That Respondent's name appeared in discovery documents, on what has been deemed a drug ledger; and that Respondent also appeared in surveillance footage that was confiscated from Jackie Marcum's home during his arrest. Id.

C. That Jackie Marcum has been cooperating with law enforcement, and he contends that Respondent was one of his customers. Id.

D. That Respondent did not pursue the proper channels of discovery on behalf of Jackie Marcum, as he was aware that his involvement with Jackie Marcum's criminal enterprise would be exposed. ODC 49, Bates 1174-1175.

E. That Jackie Marcum had pled guilty to the charges at the direction of Respondent, that Respondent had presented Jackie Marcum with the plea deal and advised him that he had to take the deal, as it was the best he could do for him. ODC 49, Bates 1175. Ms. Cisco said that when Jackie Marcum's co-defendant began asking prosecutors to view the footage from the surveillance camera, Respondent asked Jackie Marcum if Respondent was visible on that footage and Jackie Marcum told him yes. Id. When Jackie

Marcum told Respondent that he was on the footage, Respondent filed to withdraw from the case. Id.

F. That, after hearing argument during closed hearings, the judge set aside the guilty plea on July 24, 2018. Id.

69. Ms. Cisco advised Disciplinary Counsel that there was an ongoing criminal investigation of Respondent. Id.

70. On October 19, 2018, Disciplinary Counsel received a certified copy for the case of State v. Jackie Marcum, Case No. 18-F-46 in the Circuit Court of Mingo County, West Virginia. ODC 51, Bates 1195-1319. Some of the documents included in the file were: (1) an “Affidavit: Eligibility for Appointed or Public Defender Counsel” signed by Jackie Marcum on April 25, 2018; ODC 51, Bates 1229; (2) a “Petition to Enter Guilty Plea” signed by Jackie Marcum on June 5, 2018, wherein Respondent had entered that he was “retained” in response to question 1 on page 10; ODC 51, Bates 1238-1253; (3) a “Plea Agreement” signed by Jackie Marcum on June 5, 2018; ODC 51, Bates 1254-1257; (4) Respondent’s “Motion to Withdraw as Attorney of Record” filed on June 14, 2018, citing in the second paragraph that he had “become aware of a possible conflict”; ODC 51, Bates 1258-1259; (5) Respondent’s “Amended Motion to Withdraw as Attorney of Record” filed on June 18, 2018, changing the reason in paragraph 2 to state that “the Defendant failed to pay counsel attorney fees as outlined in the Attorney Client Agreement; ODC 51, Bates 1260-1261; (6) an “Order of Substitution of Counsel” dated June 28, 2018; ODC 51, Bates 1262; (7) the “Defendant’s Motion to Withdraw Guilty Plea” filed



on July 16, 2018, by Robin P. Cisco, Esquire; ODC 51, Bates 1278-1279; (8) a “Petition to Enter Guilty Plea” signed by Jackie Marcum on September 25, 2018, wherein attorney Robin Cisco had entered that she was “appointed” in response to question 1 on page 10; ODC 51, Bates 1301-1316; and (9) a “Plea Agreement” signed by Jackie Marcum on September 25, 2018. ODC 51, Bates 1317-1319.

71. Disciplinary Counsel took the sworn statement of Jackie Marcum on October 26, 2019. ODC 52, Bates 1320-1345. Jackie Marcum stated as follows:
- A. That he is not related to Respondent but has known him all his life. ODC 52, Bates 1323-1324.
  - B. That Respondent approached him the morning of court after he got indicted and told him he would take care of him. ODC 52, Bates 1325. That he was not surprised when Respondent approached him because he was selling drugs to Respondent, and he figured Respondent would take care of him. Id.
  - C. That Respondent just showed up the morning of court, and that the only thing Respondent said to him was “you take care of me and I’m going to take care of you.” ODC 52, Bates 1325-1326. Jackie Marcum said he knew what that meant and, after court was finished that day, Respondent had him come by his office to bring him his payment, which was Oxycodone pills. ODC 52, Bates 1326. Jackie Marcum said that in addition to supplying pills to Respondent as payment for the legal fees, when Jackie Marcum got out of jail, he was supposed to have a car accident and bring the case to Respondent. ODC 52, Bates 1343-1344.

- D. That on one occasion when Respondent was buying pills, he could only get \$500.00 out of the ATM, but he wanted more than \$500.00 worth of pills. ODC 52, Bates 1326-1327. Jackie Marcum said that when he went to get the rest of his money the next day, Respondent offered him a boxing glove in lieu of the \$100.00 owed. ODC 52, Bates 1327. Jackie Marcum said there was also a football that had Respondent's picture in the case which was also a payment for drugs. ODC 52, Bates 1327-1328. Jackie Marcum said the police recovered these items when they searched his home. ODC 52, Bates 1327.
- E. That Respondent first obtained drugs through a second person, and it was always oxycodone pills. ODC 52, Bates 1338. That Jackie Marcum had been selling drugs to Respondent personally for three or four months when he was indicted. Id.
- F. That Respondent never went over discovery with him, but Respondent did ask if there was any chance that Respondent was on the surveillance video that police had taken from Jackie Marcum's home and garage. ODC 52, Bates 1332. Jackie Marcum said that, as part of the criminal investigation of Respondent, he and Ms. Cisco watched the video and it showed Jackie Marcum laying the pills up on a poker machine, then Respondent reaching up and getting the pills and laying the money up on the machine. ODC 52, Bates 1333-1334.

- G. That based on Respondent's advice, Jackie Marcum accepted a plea agreement for two one to five sentences. ODC 52, Bates 1331. Jackie Marcum said he felt like he had to accept Respondent's advice because Respondent told him that they were going to go after all his kids' homes and everything if he did not take the plea. Id.
- H. That after he accepted the plea agreement he could not communicate with Respondent and had heard that Respondent had left town to go to drug rehabilitation. ODC 52, Bates 1335-1336.
- I. That he believed that it was because his bond was revoked and he could no longer supply Respondent with pills that Respondent sent him a letter saying that he was withdrawing from Jackie Marcum's case because he was not getting paid. ODC 52, Bates 1334, 1337.
72. During Jackie Marcum's sworn statement on October 26, 2018, to clarify information, Ms. Cisco stated that she had originally been appointed to represent Jackie Marcum on April 25, 2018, and had been given a copy of the sealed indictment. ODC 52, Bates 1342. Ms. Cisco said she went over to the jury box where Jackie Marcum was sitting, and he told her that Respondent was going to represent him. Id. Ms. Cisco said she gave the copy of the indictment to Respondent and had no further involvement in the case until she received the order substituting her as counsel in Respondent's place. ODC 52, Bates 1342-1343. Also, after obtaining permission from Jackie Marcum, Ms. Cisco provided a copy of the drug ledger

recovered by the police from Jackie Marcum's home which listed the name "Justin Marcum" thereon. ODC 53, Bates 1346-1347.

73. By letter dated October 29, 2018, Disciplinary Counsel notified Respondent that a complaint had been opened in the name of the ODC (ODC 54, Bates 1348-1349) based upon the following information:

- A. That Respondent had purchased illegal drugs from an individual and then represented that individual on charges involving illegal drugs. ODC 54, Bates 1348.
- B. That Respondent had advised the client to plead guilty to two felony charges but did not review discovery before advising his client to plead guilty. Id.
- C. That the client paid Respondent's fee by providing him with illegal drugs; and, to secure additional fees, Respondent directed his client to have a car accident and have Respondent represent him on that case. Id.

74. By letter dated November 26, 2018, Respondent filed a response to the complaint (ODC 56, Bates 1353-1673), stating as follows:

- A. Respondent admitted that he suffers a drug dependency problem, and that he is voluntarily participating in the services offered by the West Virginia Judicial and Lawyer Assistance Program (hereinafter "JLAP"). ODC 56, Bates 1353. Respondent said he was admitted to an intensive treatment program in Tennessee on June 9, 2018, and discharged on June 22, 2018. ODC 56, Bates 1356.

- B. Respondent said he just happened to be in the courtroom when Jackie Marcum's case was called, and the judge asked him to handle the arraignment. ODC 56, Bates 1354. He said he met with Jackie Marcum on April 27, 2018, to review discovery. ODC 56, Bates 1354-1355. Respondent said he watched the video of the controlled buys on May 18, 2018, and he called Jackie Marcum to explain what was revealed on the videos. ODC 56, Bates 1355. Respondent said he met with Jackie Marcum on May 22, 2018, to review the proposed plea agreement, and met with him again on May [June] 3, 2018, to review it again. Id. Respondent said Jackie Marcum accepted the plea agreement on June 5, 2018. Id. Respondent said he never advised Jackie Marcum to enter a guilty plea prior to reviewing any of the State's discovery and going over the same with Jackie Marcum. Id. Respondent stated that he also filed various motion to get Jackie Marcum admitted into a drug rehabilitation facility. Id.
- C. Respondent acknowledged that he had a substance abuse problem but denied asking Jackie Marcum to provide him with drugs as part of his legal fee. Id. Respondent also denied advising Jackie Marcum to have a car accident to create funds to pay his legal fee. Id.



75. Respondent provided numerous documents with his November 26, 2018 response (ODC 56, Bates 1358-1673), including an undated fee agreement<sup>13</sup> signed by Jackie Marcum, which set his fee as \$6,000.00. ODC 56, Bates 1621.
76. On December 4, 2018, Ms. Cisco provided a copy of the indictment from the client file provided to her by Respondent, and the name “Robin” was written in the upper right-hand corner of the indictment. ODC 59, Bates 1680-1682. Ms. Cisco had been advised by the Clerk’s Office the morning of court that she was appointed as counsel and was given a copy of the indictment with her first name on it. ODC 59, Bates 1678. Ms. Cisco stated that someone else wrote her name on the indictment. Id.
77. Disciplinary Counsel obtained a copy of the jail’s visitor log, which showed one visit made to Jackie Marcum by Respondent on June 6, 2018. ODC 66, Bates 1718.
78. Disciplinary Counsel obtained a copy of the log for telephone calls between Respondent and Jackie Marcum. ODC 70, Bates 1725-1740. The log reflects seven calls involving Respondent’s office telephone number of (304) 235-1475 as follows:
- A. May 14, 2018 duration of call: 7:00 (ODC 70, Bates 1739)
  - B. May 17, 2018 duration of call: 1:07 (Id.)
  - C. May 24, 2018 duration of call: 0:24 (ODC 70, Bates 1737)
  - D. May 25, 2018 duration of call: 14:27 (Id.)
  - E. May 29, 2018 duration of call: 4:54 (Id.)

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<sup>13</sup> Respondent had stated that he was appointed to the case by the judge when court started. ODC 56, Bates 1354, 1359; ODC 17, Bates 259-260.

F. May 29, 2018 duration of call: 14:06 (Id.)

G. June 7, 2018 duration of call: 2:31 (ODC 70, Bates 1734)

79. Disciplinary Counsel took Respondent's sworn statement on March 8, 2019. ODC 17, Bates 183-292. Respondent admitted to purchasing Oxycodone from Jackie Marcum. ODC 17, Bates 259. As for the representation of Jackie Marcum, Respondent said he was sitting in the corner of the courtroom, and when Jackie Marcum's case was called for arraignment, no attorney was there for him, and actually Jeffrey S. Simpkins, Esquire, approached the podium, but Jackie Marcum said that he could not be his attorney, and Jackie Marcum ended up saying that Respondent could represent him after the judge indicated that she needed to appoint counsel. ODC 17, Bates 259-260. Respondent noted that there was no formal Order of appointment of him representing Jackie Marcum as he recalled Jackie Marcum indicating that he would hire Respondent. ODC 17, Bates 261. Respondent said he had begun using drugs in 2018, which is later than the time frame of the criminal charges for Jackie Marcum. ODC 17, Bates 261-262. Respondent stated he met Jackie Marcum at the jail to discuss the fee. ODC 17, Bates 265. Respondent denied seeing himself on a video taken from Jackie Marcum's home. ODC 17, Bates 272. Respondent said he visited with Jackie Marcum a few times at the jail. ODC 17, Bates 273.
80. Respondent provided information regarding his continuing treatment and participation in JLAP. ODC 22, Bates 312-313; ODC 23, Bates 314-315; ODC 56,

Bates 1624-1673; ODC 57, Bates 1674-1675; ODC 58, Bates 1676-1677; ODC 72, Bates 2061; ODC 73, Bates 2062-2066; ODC 74, Bates 2067-2068.

### **EVIDENCE ADMITTED AT HEARING**

81. Count IV alleges Respondent violated various ethics rules in his representation of Jackie Lee Marcum, II as well as in connection with Respondent's addiction to opioids, for which Respondent is receiving regular counseling, testing, and treatment. Robin P. Cisco, Jackie Marcum, Robert E. Albury, Jr., Louis Dante DiTrapano, Charles Eubanks, and Respondent were the witnesses presented at the hearing who provided admissible testimony regarding these charges.
82. Ms. Cisco is the lawyer appointed to represent Jackie Marcum in the same drug-related criminal case previously resolved by Respondent as Jackie Marcum's counsel. Ms. Cisco had initially been informed that she was going to represent Jackie Marcum after he was indicted and was provided with a copy of his indictment by the Circuit Clerk's office. Hrg. Trans. 9-10. The indictment had her name written on top right of the indictment, and that copy of the indictment with her name written on the top right was included in Respondent's client file for Jackie Marcum when he provided it to Ms. Cisco. Hrg. Trans. 11, 23. When Ms. Cisco approached Jackie Marcum in the courtroom on the day of the arraignment, Jackie Marcum told her that Respondent would be representing him. Hrg. Trans. 12. Ms. Cisco received a call to represent Jackie Marcum at his sentencing hearing, where he was to be sentenced based upon a plea agreement to two counts of conspiracy to deliver a controlled substance. Hrg. Trans. 13-14. She sought and obtained a continuance.

Hrg. Trans. 14-15. After meeting with Jackie Marcum, she learned that a video exists showing Respondent driving up with his House of Delegate license plate on his vehicle picking up something from Jackie Marcum's garage. Hrg. Trans. 17-18. She discovered this information after going through the discovery list with Jackie Marcum. Hrg. Trans. 16-17. She noted that it was not difficult to arrange to watch the video. Hrg. Trans. 26. She was permitted to watch the video, showing Jackie Marcum placing something on top of a poker machine and later seeing Respondent picking something up from that same machine. Hrg. Trans. 18. Based upon this information, Ms. Cisco was able to have Jackie Marcum's guilty plea set aside and eventually Jackie Marcum entered a new plea agreement to one count of delivery of a controlled substance with a recommendation for an alternative sentence. Hrg. Trans. 21-22. Although this plea involved a potential one to fifteen year sentence, as opposed to the earlier deal involving potential one to five year sentences, she believed this was a better deal because it was only one felony, instead of two, and because of the alternative sentencing. Hrg. Trans. 22.

83. Jackie Marcum testified that on several occasions, he sold Oxycodone 30 pills to Respondent after being contacted by him through Facebook. Hrg. Trans. 40-41. He stated Respondent paid in cash, but on one occasion paid by receiving sports memorabilia from Respondent. Id. Jackie Marcum said the surveillance video from his home showed Respondent's pulling up in Jackie Marcum's driveway, and he laid pills up on a poker machine in his garage, and Respondent took the pills and laid money on the poker machine. Hrg. Trans. 45. Jackie Marcum noted that he

never directly handed the pills to Respondent and Respondent never directly handed him the money. Id. Further, Respondent's name was on a drug ledger Jackie Marcum kept regarding people who owed him money. Hrg. Tran. 45-46. Jackie Marcum said Respondent did not go through the discovery with him. Hrg. Trans. 42. Although Jackie Marcum knew that Respondent had obtained some pills from him, that did not concern Jackie Marcum because he thought Respondent would help him more than anybody else. Hrg. Trans. 46-47. Jackie Marcum did identify a written fee agreement with Respondent and stated the signature looked like his own signature. Hrg. Trans. 49. The documents show Jackie Marcum was released on bond on April 25, 2018, but that his home confinement was violated on May 9, 2018, when he was returned to jail. Hrg. Trans. 52. Jackie Marcum had bonded out after his arraignment, but he then violated bond and was incarcerated. Hrg. Trans. 43. While incarcerated, Jackie Marcum stated that he could not pay Respondent with pills. Id. Respondent moved to withdraw for nonpayment while Jackie Marcum was incarcerated on his bond violation. Id. Jackie Marcum agreed that he never paid Respondent the \$6,000 fee in cash included in the written fee agreement he had signed. Hrg. Trans. 54. Jackie Marcum interpreted a conversation with Respondent as meaning that Jackie Marcum would pay Respondent in pills. Hrg. Trans. 39, 55. However, Jackie Marcum could not say how many pills he provided Respondent during the brief time—April 25 through May 9—when he was out of jail, but testified there were times he would give pills to Respondent. Hrg. Trans. 39, 55. In particular, Jackie Marcum remember that as soon as he got out of jail, he was told



to go to Respondent's office and Jackie Marcum brought pills to give to Respondent. Hrg. Trans. 56. Finally, Jackie Marcum agreed that he benefitted by having his initial plea agreement and conviction set aside and being permitted to enter into the second plea agreement. Hrg. Trans. 57-58.

84. Mr. Albury is the Executive Director of the West Virginia Supreme Court's Judicial and Lawyer Assistance Program (JLAP). Hrg. Trans. 186. After Respondent's family persuaded Respondent to seek treatment and help at the Cumberland Heights facility in Nashville, Tennessee, where Mr. Albury formerly worked, it was recommended that Respondent contact JLAP and engage in its monitoring program. Hrg. Trans. 188. Respondent began by voluntarily entering into a two-year monitoring program agreement, which involves regular alcohol and drug testing, verification of regular attendance at a 12-step AA or NA meeting, and participation in a lawyer recovery support group. Hrg. Trans. 189. A peer monitor was assigned to Respondent to mentor him and to assist with his ongoing recovery. *Id.* Throughout this process, JLAP maintains a record of his compliance with the clinical requirements. Hrg. Trans. 189. Respondent was diagnosed at Cumberland Heights with chemical dependencies, specifically benzodiazepines, tranquilizers like Valium and Xanax, and opiates. Hrg. Trans. 190. Respondent entered the first JLAP program on June 29, 2018. *Id.* Respondent now has agreed to a five-year monitoring program with JLAP, which Mr. Albury explained increases the long-term success rate of the individual involved in the program. Hrg. Trans. 191. Respondent has abided by all conditions required under this program and has never

tested positive for any alcohol or drug use. Hrg. Trans. 192-193. Mr. Albury recommended that any discipline issued here should include Respondent continuing to be monitored by JLAP. Hrg. Trans. 193-194. Mr. Albury further stated he has seen a huge change in Respondent, that Respondent has helped other lawyers, and that he was very comfortable advocating on Respondent's behalf because Respondent has a documented history of rehabilitation and no longer poses a threat to any client or the public. Hrg. Trans. 199.

85. Mr. DiTrapano testified that he practices law in the firm of Caldwell, Luce DiTrapano in Charleston and, based upon his own personal experiences with drug addiction and JLAP, that he was appointed to serve as a mentor to Respondent. Hrg. Trans. 203—204. As his mentor, Mr. DiTrapano texts or speaks with Respondent daily as well as attending JLAP meetings once a week and face-to-face meetings once a month. Hrg. Trans. 206-207. He stated Respondent is doing a phenomenal job with his recovery and dealing with the stress of this ethics matter. Id. Through this mentorship program, Mr. DiTrapano has watched Respondent grow emotionally and spiritually to become a better husband and father, and to become a better lawyer. Hrg. Trans. 207-208. When the Hearing Panel considers what discipline to impose, he believed a suspension that is held in abeyance while Respondent proves himself through monitoring by JLAP should be considered to ensure that Respondent remains drug-free and provides an incentive for him to continue working on his rehabilitation. Hrg. Trans. 209-210.

86. Charles Eubanks has participated in AA programs for 28 years, has attended AA meetings with Respondent on a regular basis, and serves as Respondent's sponsor. Hrg. Trans. 216-217. Respondent began attending AA meetings in October, 2018. Id. Mr. Eubanks explained that AA saved his life, and he has observed Respondent successfully going through this program. Hrg. Trans. 218-219.
87. Respondent testified that on one occasion, he purchased Oxycontin from Jackie Marcum. Hrg. Trans. 266. Respondent acknowledged giving Jackie Marcum some sports memorabilia but denied giving these items to Jackie Marcum in payment for drugs. Id. Respondent stated he was in the courtroom on the day Jackie Marcum was arraigned, and when his case was called, Mr. Simpkins approached the podium to represent Jackie Marcum and Jackie Marcum explained that Mr. Simpkins could not represent him because Mr. Simpkins represented another person involved in his case. Hrg. Trans. 266-267. Respondent said that at that time, Jackie Marcum said, "No, Justin will do it." Hrg. Trans. 267. Respondent expressed during his testimony that he did not want to represent Jackie Marcum, but he went ahead and did it anyway. Id. Respondent stated he began using illegal drugs in December of 2017, or January of 2018. Hrg. Trans. 269. He continued to do so for about six months. Id. Respondent had a prescription and said he bought pills off Jackie Marcum on one occasion. Id. When Respondent represented Jackie Marcum and reviewed the discovery, including the videos of the controlled buys, Respondent asserted the video referenced by Ms. Cisco showing Respondent was not included in discovery. Hrg. Trans. 269-270. Respondent denied ever asking Jackie Marcum if there was a

video showing Respondent making a purchase. Hrg. Trans. 273. While Respondent does not dispute purchasing Oxycontin from Jackie Marcum on one occasion prior to Jackie Marcum being indicted, Respondent has never seen a video of that event. Id. Respondent agrees in retrospect that he should have told Jackie Marcum that he could not represent him in his case and Respondent acknowledges he was wrong for failing to do so. Hrg. Trans. 273-274. Jackie Marcum entered his first guilty plea on June 5, 2018, and on June 7, 2018, Respondent's family persuaded him to check into a drug rehabilitation program. Hrg. Trans. 274. Respondent denied seeing the document that allegedly was a drug ledger maintained by Jackie Marcum that included Respondent's name. Hrg. Trans. 277. For years, Respondent had been prescribed Klonopin for anxiety and worry, and was also prescribed pain pills. Id. Respondent agreed that he engaged in illegal activity in buying pills from Jackie Marcum, and he did so while he was a licensed attorney and serving in the West Virginia House of Delegates. Hrg. Trans. 278. Respondent said his addiction issues affected his ability to practice law. Hrg. Trans. 278-279. When Respondent was twenty years old, he was assaulted with a hammer, which caused him to be hospitalized. Hrg. Trans. 279. Respondent admitted he had a conflict of interest when he represented Jackie Marcum because previously, he had purchased pills from him. Hrg. Trans. 307. Respondent denied ever asking Jackie Marcum to pay him for his legal services with pills. Hrg. Trans. 306-307. Respondent denied that the trial court appointed him to represent Jackie Marcum, but rather it was Jackie Marcum who spoke up at the arraignment and stated that Respondent would

represent him. Hrg. Trans. 268-269, 280-281, 307-308. Finally, Respondent explained that during a family camping trip in Tennessee around June 7, 2018, his family forced him to face the truth that he needed to be committed for drug rehabilitation. Hrg. Trans. 308-309. Once Respondent got into the drug rehabilitation program and committed to JLAP, he recognized his drug addiction and wanted to do what he could to overcome this disease. Hrg. Trans. 309-313.

### **III. CONCLUSIONS OF LAW**

There are several conclusions of law as to violations of the Rules of Professional Conduct. The conclusions of law were based upon the record presented and are supported by the clear and convincing standard. Respondent has committed misconduct involving several rules. The rule violations for each Count are as follows:

Count I: Both Disciplinary Counsel and Respondent agree that the evidence presented at the disciplinary hearing did not prove the charges asserted in paragraphs 21, 22, 23, 24, 25, and 26 of the Statement of Charges involving Rules 1.7(a), 1.9(a), 1.18(c), 7.3(a), 8.1(a), 8.4(c), and 8.4(d) of the RPC against Respondent.

Count II: Both Disciplinary Counsel and Respondent agree that the evidence presented at the disciplinary hearing did not prove the charges asserted in paragraphs 50, 51, and 52 of the Statement of Charges involving Rules 1.7(a), 7.3(a), 8.1(a), and 8.4(c) RPC against Respondent.

Disciplinary Counsel reserved the right to argue that the charges involving the unreasonable fee for Respondent asserted in paragraphs 49 and 53, involving 1.5(a) and



8.4(d).<sup>14</sup> (See Office of Lawyer Disciplinary Counsel's Proposed Findings of Fact and Conclusions of Law Regarding Paragraph 49. 53 and 80.) Respondent reserved the right to argue against any finding involving paragraphs 49 and 53.

The Hearing Panel Subcommittee finds that the fee was not an unreasonable fee as alleged in paragraphs 49 and 53. The fee agreement was in writing and Disciplinary Counsel failed to meet its burden of proof on the issue. Contingency fees such as the one at issue in this case are common in West Virginia and are an important mechanism in providing access to justice for clients who cannot otherwise afford to hire an attorney. They involve the significant assumption of risk on the part of the attorney who at in undertaking cases must consider the possibility of a substantial loss of time and income in the case in the event that he or she makes no recovery in the case. Under these facts we do not find that the fee is in anyway unreasonable.

Count III: Both Disciplinary Counsel and Respondent agree that the charges were proven as asserted in paragraphs 61, and 62 of the Statement of Charges involving the following:

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<sup>14</sup> **Rule 1.5 Fees.**

(a) A lawyer shall not make an arrangement for, charge, or collect an unreasonable fee . . .

**Rule 8.4. Misconduct**

(d) engage in conduct that is prejudicial to the administration of justice;

Respondent failed to list himself or his law firm in his Facebook posts in violation of Rule 7.2(c)<sup>16</sup> of the RPC. And Respondent failed to use “Advertising Material” in his Facebook posts in violation of Rule 7.3(c)<sup>17</sup> of the RPC.

Both Disciplinary Counsel and Respondent agree that the evidence presented at the disciplinary hearing did not prove the charges asserted in paragraph 60 of the Statement of Charges involving Rule 4.4(a) of the RPC against Respondent.

Count IV: Both Disciplinary Counsel and Respondent agree that the evidence presented at the disciplinary hearing did not prove the charge asserted in paragraph 78 of the Statement of Charges involving Rule 1.5(b) of the RPC.

Both Disciplinary Counsel and Respondent agree that the charges were proven as asserted in paragraphs 79, 81, and 82 of the Statement of Charges involving the following rules:

Respondent had a conflict in representing Jackie Marcum after he purchased illegal drugs from him in violation of Rule 1.7(a)<sup>18</sup> of the RPC. Respondent purchased the illegal

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<sup>16</sup> **Rule 7.2. Advertising**

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

<sup>17</sup> **Rule 7.3. Solicitation of Clients**

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words “Advertising Material” on the outside envelope and at the beginning and ending of any recorded, if any, or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

<sup>18</sup> **Rule 1.7. Conflict of Interest; Current Clients**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

drug Oxycodone from Jackie Marcum in violation of Rule 8.4(b)<sup>20</sup> of the RPC. Respondent worked out a plea offer with Jackie Marcum without explaining his own involvement in the purchase of illegal drugs from Jackie Marcum in violation of Rule 8.4(d)<sup>21</sup> of the RPC.

The Hearing Panel Subcommittee does not find that sufficient evidence was submitted at the hearing to prove that right to argue false information was provided by the Respondent to the ODC in the investigation of the Jackie Marcum case as alleged in paragraph 80 of the Statement of Charges. The Hearing Panel Subcommittee finds that the testimony presented on this was contradictory and that the testimony of the witness Jackie Marcum was not credible or sufficient to make that finding.

#### IV. DISCUSSION

The Supreme Court of Appeals of West Virginia has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but also to protect the public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard its interests in the administration of justice. Lawyer Disciplinary Board v. Taylor, 192 W.Va. 139, 451 S.E.2d 440 (1994). Factors to be considered in imposing appropriate sanctions are found in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure. These

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(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

<sup>20</sup> **Rule 8.4. Misconduct**

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

<sup>21</sup> **Rule 8.4. Misconduct**

(d) engage in conduct that is prejudicial to the administration of justice;

factors consist of: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. *See also*, Syl. Pt. 4, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998).

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

In determining the nature of the ethical duty violated, the standards assume that the most important ethical duties are those obligations which a lawyer owes to clients. The duty of loyalty includes the duties to avoid conflicts of interest and to charge a reasonable fee. In addition to duties owed to clients, the lawyer also owes duties to the general public. Members of the public are entitled to expect lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty, or interference with the administration of justice. Lawyers also owe duties to the legal system. Lawyers are officers of the court and must abide by the rules of substance and procedure which shape the administration of justice. Lawyers must always operate within the bounds of the law and cannot engage in any other illegal or improper conduct. Finally, lawyers owe duties to the legal profession. Unlike the obligations mentioned above, these duties are not inherent in the relationship between the lawyer and the community. These duties do not concern the lawyer's basic responsibilities in representing clients, serving as an officer of the court, or maintaining the public trust, but include other duties relating to the profession. These rules concern restrictions on advertising and

recommending employment; and maintaining the integrity of the profession. The evidence in this case establishes by clear and convincing proof that Respondent violated his duties owed to his clients, general public, legal system, and legal profession.

Respondent violated his duties to his clients by failing to avoid conflict of interests by representing Jackie Marcum in his criminal case, the individual from whom he purchased illegal drugs. By being a part of the illegal activity for which his client was charged, Respondent's own interest conflicted with his duties to his client. The testimony presented at the hearing from Jackie Marcum was that he benefitted from the representation of the attorney, Robin Cisco, Esquire, when she obtained a plea offer that included the recommendation of probation. Hrg. Trans. 57-58. This was after Respondent withdrew from representing Jackie Marcum.

Respondent violated his duties to the general public by committing illegal conduct. Respondent admitted to purchasing Oxycontin from Jackie Marcum. Hrg. Trans. 266. Respondent said he started using illegal drugs in December of 2017 or January of 2018. Hrg. Trans. 269. He continued to do so for six months. Hrg. Trans. 269. Respondent had committed the criminal act of possession of a controlled substance in violation of W.Va. Code § 60A-4-401. All of this occurred while Respondent was licensed to practice law, and in fact, occurred while he was representing Mingo County in the West Virginia House of Delegates.

Respondent violated his duties to the legal system by affecting the administration of justice. The case involving Jackie Marcum had the potential for justice to be harmed by Respondent's conflict of interest in the plea agreement he obtained for Jackie Marcum, but Jackie Marcum was able to obtain a plea offer with a lesser recommendation from the State.



The legal profession was affected by Respondent's failure to properly advertise his legal services. The Facebook posts by Respondent about Mr. Gibson did not follow the requirements of the Rules to identify the posts as advertisements. However, the Hearing Panel finds this violation to be an unintentional violation and a minor one and if alone should have only resulted in an admonishment or reprimand. The Hearing Panel Subcommittee also finds that the statements made regarding Mr. Gibson would only be a violation of the Rules if they were proven to be false and are otherwise protected by the First Amendment. Mr. Gibson's remedy is not an ethics complaint but a suit for defamation.

**B. Respondent acted intentionally and knowingly regarding Jackie Marcum.**

The most culpable mental state is that of intent when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his conduct, both without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. Respondent acted intentionally and with knowledge in this matter. Respondent's representation of Jackie Marcum was intentional.

**C. The amount of real injury is great.**

The extent of the injury is defined by the type of duty violated and the extent of actual or potential harm. Injury is harm to a client, the public, the legal system, or the legal profession which results from a lawyer's misconduct. The level of injury can range from

“serious” injury to “little or no” injury. A reference to “injury” alone indicates any level of injury greater than “little or no” injury. “Potential injury” is the harm to a client, the public, the legal system or legal profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct.

The new attorney for Jackie Marcum, Ms. Cisco, testified that he had entered a guilty plea to two counts of conspiracy to deliver a controlled substance while represented by Respondent, and the recommendation from the State was incarceration. Hrg. Tran. 15. However, she was able to get a new plea offer for Jackie Marcum, wherein he plead to one count of delivery and a recommendation of alternative sentencing for home confinement and probation. Hrg. Tran. 22. So, while Jackie Marcum plead to a charge that carried more time with Ms. Cisco, the recommendation of the State was for an alternative sentencing. Hrg. Trans. 22.

Ms. Cisco also testified that seeing an attorney buy illegal drugs “was shocking to [her], but [she] was mostly concerned about [her] client at that point. . . [She] didn’t know if [Jackie Marcum] had gotten proper representation at that point where [Respondent] had been involved in his business.” Hrg. Trans. 19. Ms. Cisco noted that previous issues within the legal community in Mingo County involved the removal of a judge from the bench and the disbarment of the prosecutor just a few years ago, and this additional misconduct by Respondent was another stain on the legal community. Hrg. Trans. 25. Even more alarming to Ms. Cisco was the fact that Respondent was an elected representative of his county for the House of Delegates and his involvement in criminal activity. Hrg. Trans. 25-26.

**D. The existence of any aggravating factors.**

Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Court to examine when considering the imposition of sanctions. Elaborating on this rule, the Scott Court held “that aggravating factors in a lawyer disciplinary proceeding ‘are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.’” Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E.2d 550, 557 (2003) *quoting ABA Model Standards for Imposing Lawyer Sanctions*, 9.21 (1992). Respondent and ODC agree that the aggravating factors present in this case is illegal conduct.

**E. The existence of mitigating factors.**

In addition to adopting aggravating factors in Scott, the Scott court also adopted mitigating factors in a lawyer disciplinary proceedings and stated that mitigating factors “are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.” Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E.2d 550, 557 (2003) *quoting ABA Model Standards for Imposing Lawyer Sanctions*, 9.31 (1992). It should be clear that mitigating factors were not envisioned to insulate a violating lawyer from discipline. Respondent and ODC agree the following mitigating facts are present in this case 1) absence of prior disciplinary record, 2) inexperience in the practice of law, 3) chemical dependency based upon testimony concerning his involvement with JLAP, and 4) interim rehabilitation from his chemical dependency.

The Hearing Panel Subcommittee finds the following mitigating factors of 1) absence of dishonest or selfish motives; 2) personal or emotional problems; 3) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; 4) character or reputation; 5) physical or mental disability or impairment; 6) delay in disciplinary

proceedings; and 7) remorse in his additional pleading. The Hearing Panel Subcommittee finds from the testimony presented that the Respondent has made substantial efforts to rehabilitate himself and has fully cooperated with JLAP, in fact, his progress has been exemplary.

## V. SANCTION

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syllabus Pt. 3, *in part*, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), *cited in* Committee on Legal Ethics v. Morton, 186 W.Va. 43, 45, 410 S.E.2d 279, 281 (1991). In addition, discipline must serve as both instruction on the standards for ethical conduct and as a deterrent against similar misconduct to other attorneys. In Syllabus Point 3 of Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987), the Court stated:

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

Moreover, a principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999).

The evidence establishes by clear and convincing proof that Respondent has violated the RPC by advertising improperly, representing a client when he had a conflict



of interest, and committing an illegal act. While Disciplinary Counsel and Respondent agree to the sanction for Respondent, the Hearing Panel disagrees. The sanction is based in part on the recent case of Lawyer Disciplinary Board v. Sidiropolis, 241 W.Va. 777, 828 S.E.2d 839 (2019). In Sidiropolis, the attorney was suspended for two years, and only had to serve sixty days, after he was found with ten bricks of heroin. Id. The attorney related that he had become addicted to opioid pain medications after an automobile accident, and that transition to heroin. Id. The attorney self-reported his arrest and underwent the federal drug court program which he successfully completed. Id. The Sidiropolis court stated that

[t]he conduct underlying these disciplinary proceedings [was] quite serious and reflects how addiction issues . . . are becoming all too common in our State and our Nation. However, this proceeding offers encouragement that recovery is possible with the proper assistance. Thus, while Mr. Sidiropolis' criminal conduct cannot be ignored, we find it appropriate in this instance to, in determining the proper sanction, recognize his hard-earned recovery and his dedication to his own sobriety . . .

Id. at 788, 850. The West Virginia Supreme Court has also upheld two-year suspensions in other cases involving the use of illegal drugs. *See, Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994) (attorney was suspension for two years after he used cocaine and crack cocaine, engaged in improper solicitation, and testified falsely before the Hearing Panel) and Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993) (attorney was suspended for two years after entering a guilty plea to possession of cocaine, marijuana, and Percocet).

A review of cases from other states show different sanctions when an attorney has used drugs involving a client. In a 2011 Ohio case, Disciplinary Counsel v. Hoppel, 950 N.E.2d 171, 176 (Ohio 2011), an attorney was sanctioned with a two year suspension after



misappropriating client funds to support a drug habit after the court expressed interest in supporting rehabilitation even in case of “egregious misconduct, . . .” Id. In Colorado, there are two cases dealing with the use of drugs. In a 1998 case, an attorney was sanctioned with a three year suspension for misconduct including conviction of possession of one ounce of cocaine while noting that lawyer accepted cocaine in lieu of legal fees, thus misconduct had a direct connection with the practice of law in People v. Madrid, 967 P.2d 627 (Colorado 1998). Also, a deputy district attorney in Colorado was suspended for one year and one day suspension after purchasing \$25 worth of crack cocaine. People v. Stevens, 866 P.2d 1378 (Colorado 1994). Delaware has a case wherein the attorney was suspended for two years after large quantities of marijuana and Ecstasy were found in his home, and he plead guilty to two misdemeanor counts of possession and one count of possession of drug paraphernalia. In re Nixon, 49 A.3d 1193 (Delaware 2012). And lastly, In re Meek, 289 P.3d 95 (Kansas 2012), involved a Kansas attorney who received a forty-month suspension, stayed by probation after serving one year of suspension for unlawful receipt of prescription pain medication from client.

The other misconduct committed by Respondent, which includes improper advertising, failing to avoid a conflict of interest, committing illegal conduct, and affecting the administration of justice further support that Respondent should be suspended for two years, with a stay after serving six months. When looking at other cases dealing with various misconduct by attorneys, those cases support a suspension of Respondent. *See* Lawyer Disciplinary Board v. Keenan, 189 W.Va. 37, 427 S.E.2d 471 (1993) (indefinite suspension for failure to provide competent representation, failure to act with reasonable

diligence, failure to communicate effectively with his clients, and failure to return unearned fees); Committee on Legal Ethics v. Karl, 192 W.Va. 23, 449 S.E.2d 277 (1994) (three month suspension for failure to act with reasonable diligence, failure to communicate effectively with clients, and failure to respond to the disciplinary authorities repeated requests for information); Lawyer Disciplinary Board v. Burgess, No. 23030 (WV 4/25/96) (unreported) (two year suspension with one year suspension deferred while respondent undergoes a one-year period of supervision following reinstatement for violations of Rules of Professional Conduct 1.1, 1.3, 1.4 (a) and (b), 1.16(a)(3), 1.16(d); 8.1(b); and 8.4 (c) and (d)); Lawyer Disciplinary Board v. Holmstrand, No. 22523 (WV 5/30/96) (unreported) (one year suspension and psychiatric evaluation ordered for multiple violations of Rules of Professional Conduct 1.3, 1.4(a), 3.3(a)(1)(4) and 8.4(c) and (d)); Lawyer Disciplinary Board v. Farber, No. 32598 (WV 1/6/06) (unreported) (indefinite suspension and a psychological counseling ordered to determine fitness to practice law for violating Rules of Professional Conduct 1.1, 1.3, 1.4, and 8.1(b), including failure to appear at the disciplinary hearing); Lawyer Disciplinary Board v. Morgan, 228 W.Va. 114, 717 S.E.2d 898 (2011) (one year suspension for pattern of failing to communicate with clients and failing to respond to ODC along with failure to handle client matters with diligence in multiple matters); Lawyer Disciplinary Board v. Phalen, No. 11-1746 (WV 11/14/12) (unreported) (one year suspension for multiple offenses of diligence, communication, failure to provide refunds, failure to respond to ODC, and failure to provide itemizations); and Lawyer Disciplinary Board v. Rossi, 234 W.Va. 675, 769 S.E.2d 464 (2015) (three year suspension for multiple offenses of diligence, communication, failure to properly

terminate representation, failure to expedite litigation, engaging in dishonest, deceitful or misrepresentation, engaging in conduct that is prejudicial to the administration of justice, and failure to respond ODC).

For the public to have confidence in our disciplinary and legal systems, lawyers who engage in the type of conduct exhibited by Respondent must be removed from the practice of law for some period of time. A license to practice law is a revokable privilege and when such privilege is abused, the privilege should be revoked. Such sanction is also necessary to deter other lawyers from engaging in similar conduct and to restore the faith of the victims in this case and of the general public in the integrity of the legal profession.

However, the testimony regarding rehabilitation and the efforts made in overcoming the circumstances which led to the violations in this case by Respondent are significant, particularly the progress that the Respondent has made through JLAP. The Hearing Panel finds that the testimony and recommendations of Robert Albury on this issue to be compelling and that the mitigating circumstances in this particular case justify the deferral of the two year suspension as set forth below. The hearing panel finds little utility in this case in imposing 6 months of the suspension given the progress made by the Respondent with JLAP.

## **VI. RECOMMENDED SANCTIONS**

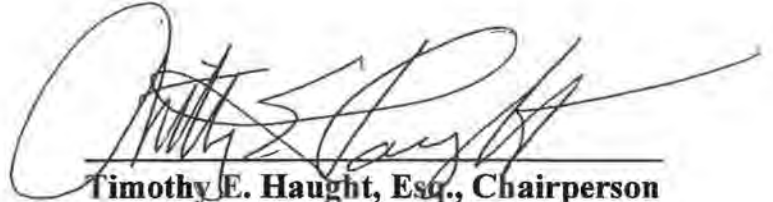
Rule 3.15 of the Rules of Lawyer Disciplinary Procedure provides that the following sanctions may be imposed in a disciplinary proceeding: (1) probation; (2) restitution; (3) limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand;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

principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999).

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

- A. That Respondent's law license be suspended for a period of two years, however, the suspension shall be stayed and the Respondent placed on supervised probation for the remaining period of Respondent's contract with JLAP or to June 28, 2023. See Robert C. Albury testimony Hrg. Trans. 191. Further, there shall be the immediate imposition of the entire two year suspension if any conditions or requirements of the JLAP contract or other Rules of Professional Conduct are violated after a petition to the Supreme Court;
- B. That Respondent complete additional 9 CLE hours in ethics and/or substance abuse education in addition to the 24 hours already required of him by the State Bar, but the additional 9 hours must be completed within six months of this order;
- C. That Respondent comply with the terms and conditions of his JLAP contract;
- D. That Respondent must comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure, if and when applicable;
- E. Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

The Hearing Panel Subcommittee hereby recommends that the Supreme Court of Appeals of West Virginia adopt the recommendations as set forth above.



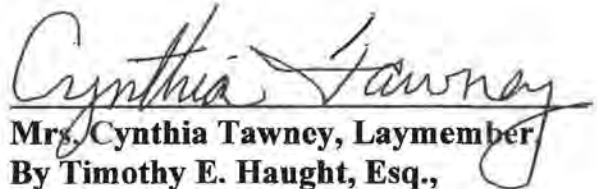
**Timothy E. Haught, Esq., Chairperson**  
Hearing Panel Subcommittee

Date: February 1, 2021



**Rhonda L. Harsh, Esq., by Timothy E. Haught, Esq., Chairperson**  
Hearing Panel Subcommittee

Date: February 1, 2021



**Mrs. Cynthia Tawney, Laymember**  
**By Timothy E. Haught, Esq.,**  
**Chairperson**

Hearing Panel Subcommittee

Date: \_\_\_\_\_



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**CERTIFICATE OF SERVICE**


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This is to certify that I, Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 8<sup>th</sup> day of February, 2021, served a true copy of the foregoing **"REPORT OF THE HEARING PANEL SUBCOMMITTEE"** upon Lonnie C. Simmons, Esquire, counsel for Respondent Justin J. Marcum, by mailing the same via United States Mail, with sufficient postage, to the following address:

Lonnie C. Simmons, Esquire  
Post Office Box 1631  
Charleston, West Virginia 25326

**Notice to Respondent:** for the purpose of filing a consent or objection hereto, pursuant to Rule 3.11 of the Rules of Lawyer Disciplinary Procedure, either party shall have thirty (30) days from today's date to file the same.

  
\_\_\_\_\_  
Jessica H. Donahue Rhodes