

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

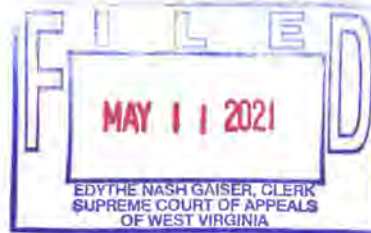
LAWYER DISCIPLINARY BOARD,

Petitioner,

vs.

JUSTIN J. MARCUM,

Respondent.



No. 20-0133

BRIEF OF THE LAWYER DISCIPLINARY BOARD

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TABLE OF CONTENTS

| | |
|--|-----|
| TABLE OF AUTHORITIES | iii |
| I. STATEMENT OF THE CASE | 1 |
| A. NATURE OF PROCEEDINGS AND RECOMMENDATION OF THE HEARING PANEL SUBCOMMITTEE | 1 |
| B. FINDINGS OF FACT | |
| C. CONCLUSIONS OF LAW | 44 |
| II. SUMMARY OF ARGUMENT | 47 |
| III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION | 48 |
| IV. ARGUMENT | 48 |
| A. STANDARD OF PROOF | 48 |
| B. ANALYSIS OF SANCTION UNDER RULE 3.16 OF THE RULES OF LAWYER DISCIPLINARY PROCEDURE | 49 |
| 1. Respondent violated duties to his clients, to the public, to the legal system or to the legal profession. | 50 |
| 2. Respondent acted intentionally and knowingly. | 51 |
| 3. The amount of real injury is great. | 52 |
| 4. Respondent had one aggravating factor. | 53 |
| 5. Respondent had seven mitigating factors. | 53 |
| C. SANCTION | 53 |
| V. CONCLUSION | 60 |

TABLE OF AUTHORITIES

Cases:

| | |
|--|------------|
| <u>Ceauga Cty. Bar Assn. v. Snyder</u> 136 Ohio St.3d 320 (Ohio 2013) | 59 |
| <u>Committee on Legal Ethics v. Blair</u> 174 W.Va. 494, 327 S.E.2d 671 (1984) | 49 |
| <u>Committee on Legal Ethics v. Karl</u> 192 W.Va. 23, 449 S.E.2d 277 (1994) | 49 |
| <u>Committee on Legal Ethics v. McCorkle</u> 192 W.Va. 286, 452 S.E.2d 377 (1994) | 48, 49, 55 |
| <u>Committee on Legal Ethics v. Morton</u> 186 W.Va. 43, 410 S.E.2d 279 (1991) | 53 |
| <u>Committee on Legal Ethics v. Roark</u> 181 W.Va. 260, 382 S.E.2d 313 (1989) | 54 |
| <u>Committee on Legal Ethics v. Tatterson</u> 173 W.Va. 613, 319 S.E.2d 381 (1984) | 53 |
| <u>Committee on Legal Ethics v. Tatterson (Tatterson II)</u> 177 W.Va. 356, 352 S.E.2d 107 (1986) | 25 |
| <u>Committee on Legal Ethics v. Walker</u> 178 W.Va. 150, 358 S.E.2d 234 (1987) | 54 |
| <u>Committee on Legal Ethics v. White</u> 189 W.Va. 135, 428 S.E.2d 556 (1993) | 54, 55 |
| <u>Daily Gazette v. Committee on Legal Ethics</u> 174 W.Va. 359, 326 S.E.2d 705 (1984) | 54 |
| <u>Disciplinary Counsel v. Hoppel</u> 950 N.E.2d 171, 176 (Ohio 2011) | 56 |
| <u>In re Benkie</u> 892 N.D.2d 1237 (Indiana 2008) | 59 |

| | |
|--|------------|
| <u>In re Disciplinary Proceedings Against Whiting</u> 265 Wis.2d 407 (Wisconsin 2003) | 59 |
| <u>In re Huelskamp</u> 740 N.E.2d 846 (Indiana 2000) | 59 |
| <u>In re Meek</u> 289 P.3d 95 (Kansas 2012) | 57 |
| <u>In re Nixon</u> 49 A.3d 1193 (Delaware 2012) | 57 |
| <u>In re Thornsburg</u> No. 13-0828 (WV 10/21/13)(<i>unreported</i>) | 52 |
| <u>Judicial Disciplinary Counsel v. Thornsburg</u> No. 13-1047 (WV 10/21/13)(<i>unreported</i>) | 52 |
| <u>Lawyer Disciplinary Board v. Corey</u> No. 20-0258 (WV 4/15/21) (<i>unreported</i>) | 60 |
| <u>Lawyer Disciplinary Board v. Friend</u> 200 W.Va. 368, 489 S.E.2d 750 (1997) | 54 |
| <u>Lawyer Disciplinary Board v. Hardison</u> 205 W.Va. 344, 518 S.E.2d 101 (1999) | 54 |
| <u>Lawyer Disciplinary Board v. Keenan</u> 208 W.Va. 645, 542 S.E.2d 466 (2000) | 54 |
| <u>Lawyer Disciplinary Board v. McGraw</u> 194 W.Va. 788, 461 S.E.2d 850 (1995) | 48 |
| <u>Lawyer Disciplinary Board v. Sidiropolis</u> 241 W.Va. 777, 828 S.E.2d 839 (2019) | 54, 55, 56 |
| <u>Lawyer Disciplinary Board v. Taylor</u> 192 W.Va. 139, 451 S.E.2d 440 (1994) | 48 |
| <u>Office of Disciplinary Counsel v. Jordan</u> 204 W.Va. 495, 513 S.E.2d. 722 (1998) | 49, 50 |

| | |
|--|--------|
| <u>Office of Lawyer Disciplinary Counsel v. Sparks</u> No. 13-1009 (WV 10/11/13)(<i>unreported</i>) | 52 |
| <u>Matter of Anonymous</u> 630 N.E.2d 212 (Indiana 1994) | 58 |
| <u>Matter of Skozen</u> 660 N.E.2d 1377 (Indiana 1996) | 59 |
| <u>People v. Jones</u> 422 P.3d 1093 (Colorado 2018) | 59 |
| <u>People v. Madrid</u> 967 P.2d 627 (Colorado 1998) | 56, 57 |
| <u>People v. Stevens</u> 866 P.2d 1378 (Colorado 1994) | 57 |
| <u>Roark v. Lawyer Disciplinary Board</u> 207 W.Va. 181, 495 S.E.2d 552 (1997) | 48 |
| <u>State v. Edward Charles L.</u> 183 W.Va. 641, 645 n. 1, 398 S.E.2d 123, 127 n.1 (1990) | 3 |

West Virginia Statutes and Rules:

| | | |
|-----------------------|---------------|-----------|
| R. of Appellate Proc. | Rule 19 | 48 |
| R. of Appellate Proc. | Rule 40(e)(1) | 3 |
| R. Law Disc. Proc. | Rule 3.7 | 48 |
| R. Law Disc. Proc. | Rule 3.11 | 48 |
| R. Law Disc. Proc. | Rule 3.13 | 48 |
| R. Law Disc. Proc. | Rule 3.15 | 2, 53, 61 |
| R. Law Disc. Proc. | Rule 3.16 | 49 |
| R. Law Disc. Proc. | Rule 3.28 | 2, 61 |

| | | |
|-------------------------|--------------|---------------|
| R. Professional Conduct | Rule 1.5 | 25 |
| R. Professional Conduct | Rule 1.5(a) | 45 |
| R. Professional Conduct | Rule 1.5(b) | 47 |
| R. Professional Conduct | Rule 1.7 | 21 |
| R. Professional Conduct | Rule 1.7(a) | 2, 44, 45, 46 |
| R. Professional Conduct | Rule 1.9(a) | 44 |
| R. Professional Conduct | Rule 1.18(c) | 44 |
| R. Professional Conduct | Rule 4.4(a) | 46 |
| R. Professional Conduct | Rule 7.2(c) | 2, 46 |
| R. Professional Conduct | Rule 7.3(a) | 44, 45 |
| R. Professional Conduct | Rule 7.3(c) | 2, 46 |
| R. Professional Conduct | Rule 8.1(a) | 44, 45, 47 |
| R. Professional Conduct | Rule 8.3 | 30 |
| R. Professional Conduct | Rule 8.4(b) | 2, 46 |
| R. Professional Conduct | Rule 8.4(c) | 44, 45, 47 |
| R. Professional Conduct | Rule 8.4(d) | 2, 44, 45, 47 |
| W.Va. Code | § 60A-4-401 | 51 |

I. STATEMENT OF THE CASE

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

Formal charges were filed against Justin J. Marcum (hereinafter “Respondent”) with the Clerk of the Supreme Court of Appeals of West Virginia (hereinafter “Supreme Court”) on or about February 21, 2020, and served upon Respondent via certified mail by the Supreme Court Clerk on February 24, 2020. Lawyer 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. Respondent 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 (hereinafter “HPS”) 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 HPS 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 1-74,¹ Respondent’s Exhibits 1-13 and Joint Exhibits J1 and J2² were admitted into evidence.

¹ 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.

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

On or about February 8, 2021, the HPS issued its decision in this matter and filed its “Report of the Hearing Panel Subcommittee” (hereinafter “Report”) with the Supreme Court. The HPS properly found that the evidence established that Respondent violated Rules 1.7(a), 7.2(c), 7.3(c), 8.4(b), and 8.4(d) of the Rules of Professional Conduct (hereinafter “RPC”). The HPS issued the following recommendation as the appropriate sanction:

- 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 Judicial and Lawyer Assistance Program (hereinafter “JLAP”) or to June 28, 2023. *See* Robert C. Albury’s testimony Hrg. Trans. 191. Further, there shall be the immediate suspension of the entire two year suspension if any conditions or requirements of the JLAP contract or other RPC are violated after a petition to the Supreme Court;
- B. That Respondent complete additional nine (9) CLE hours in substance abuse education in addition to the twenty-four (24) hours already required of him by the State Bar, but the additional nine (9) hours must be completed within six (6) months of the Order from the Supreme Court;
- 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; and
- E. Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

B. FINDINGS OF FACT

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

Respondent is married and has two children who were six and eight at the time of the hearing. Hrg. Trans. 284. Respondent grew up in Mingo County, went to Marshall University and West Virginia University for undergrad, and to the Appalachian School of Law. Hrg. Trans. 285-286. He was licensed as a lawyer in West Virginia in 2011, and licensed in Kentucky in 2016. Hrg. Trans. 286. Since about 2012, Respondent has maintained a solo law practice, doing civil and criminal work in state and federal courts. Hrg. Trans. 286-287. Respondent served as a member of the West Virginia House of Delegates and was running for the Senate in 2018 when he decided to focus on his own health and withdrew from the Senate race. Hrg. Trans. 301-03.

COUNT I

I.D. No. 17-03-552

Complaint of Jeffrey S. Simpkins, Esquire

On November 1, 2017, Complainant Jeffrey S. Simpkins, Esquire, filed a complaint alleging that Respondent had made uninitiated contact with his client, K.P.B.,³ on August 8, 2017 for approximately thirty (30) minutes while she was incarcerated in the Southwestern Regional Jail (hereinafter “SWRJ”). ODC 1, Bates 1-33. 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 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

³ 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.

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.

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. 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. 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. 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.

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 filing 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.

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.

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. 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. 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.

Mr. Simpkins filed a reply on November 15, 2017, and provided a second affidavit from K.P.B.'s mother wherein she stated 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.

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 prepared 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. 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.

Disciplinary Counsel took K.P.B.'s sworn statement on February 12, 2019.⁴ 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. 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

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

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.

Disciplinary Counsel took Mary Davis' sworn statement on February 12, 2019.⁵ 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 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

⁵ Ms. Davis did not appear at the disciplinary hearing.

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.

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,⁶ 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 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.

⁶ Billy Brian Haney is one of the Civilian Court Bailiffs listed by Respondent as a client in the October 20, 2017 letter he sent to Mr. Simpkins. ODC1, Bates 27.

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 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. 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.

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. Although K.P.B. had agreed through a Facebook message to the ODC to appear at the hearing, 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 as asserted in Count I.

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.

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.

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.

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.

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.

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.

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
Complaint of Lora L. Cline

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.⁷ 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.

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

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

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 \$44,833.20.⁸ 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.

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 burned 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.⁹ ODC 26, Bates 344-347. Respondent said that Complainant and Mr. Dotson jointly owned the trailer that Complainant was

⁸ 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.

⁹ 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.

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.

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 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.

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.¹⁰ 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, 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 also denied that he said he would tie the matter up in court. ODC 26, Bates 331-332.

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.¹¹ 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

¹⁰ 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.

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

per Complainant's instructions. Id. Respondent also noted that he discounted his fees to make Complainant happy. Id.

On December 27, 2017, Complainant filed a reply. ODC 27, Bates 353-355. Complainant denied hiring Respondent and said that Mr. Dotson hired Respondent. 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.

Complainant denied that Respondent explained the settlement sheet to 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.

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.

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 an unreasonable fee, soliciting a client, conflict of interest, dealing with unrepresented client, and engaging in fraudulent acts. ODC 30, Bates 373-375.

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.

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 do anything or to sign papers. ODC 32, Bates 412. 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.

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.

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. 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. 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. 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.

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.

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.

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.

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. 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.

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.

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.

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 Tatterson¹² 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 Respondent actually 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

¹² Committee on Legal Ethics v. Tatterson (Tatterson II), 177 W.Va. 356, 352 S.E.2d 107 (1986).

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.

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 ever 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
Complaint of Bert W. Gibson

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.

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. 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. 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. 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. 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.

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.

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 that 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
Complaint of ODC

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.¹³ ODC 48, Bates 1170. Ms. Cisco stated that she requested a complete copy of the client file from Respondent, but when she received the file it did not contain any fee agreement. Id.

¹³ 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.

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.

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

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.

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.

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.

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.

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 motions 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.

Respondent provided numerous documents with his November 26, 2018 response (ODC 56, Bates 1358-1673), including an undated fee agreement¹⁴ signed by Jackie Marcum, which set his fee as \$6,000.00. ODC 56, Bates 1621.

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.

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. 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.)
- F. May 29, 2018 duration of call: 14:06 (Id.)
- G. June 7, 2018 duration of call: 2:31 (ODC 70, Bates 1734)

¹⁴ 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.

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. 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.

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.

Jackie Marcum testified that on several occasions, he sold 30 milligram Oxycodone 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 remembered 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.

Mr. Albury is the Executive Director of the West Virginia Supreme Court's 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.

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.

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.

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.

C. CONCLUSIONS OF LAW

The HPS made several conclusions of law as to violations of RPC. The conclusions of law were based upon the record presented and are supported by the clear and convincing standard. The HPS found that Respondent had committed misconduct involving multiple rules. The rule violations for each Count were found by the HPS as follows:

Count I: The evidence presented at the disciplinary hearing did not prove the charges against Respondent as 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)¹⁵ of the RPC.

¹⁵ **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

Count II: The evidence presented at the disciplinary hearing did not prove the charges against Respondent as asserted in paragraphs 49, 50, 51, 52, and 53 of the Statement of Charges involving Rules 1.5(a), 1.7(a), 7.3(a), 8.1(a), 8.4(c), and 8.4(d)¹⁶ of the RPC.

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
- (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.

Rule 1.9. Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Rule 1.18. Duties to Prospective Client

...

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

Rule 7.3. Solicitation of Clients

(a) A lawyer – or a lawyer's agent, representative or employee – shall not by in-person, live telephone or real-time electronic contact, directly or indirectly solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

- (1) is a lawyer; or
- (2) has a family, close personal, or prior professional relationship with the lawyer.

Rule 8.1. Bar Admission and Disciplinary Matters.

[I]n connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact;

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

- ...
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
 - (d) engage in conduct that is prejudicial to the administration of justice;

¹⁶ **Rule 1.5 Fees.**

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

See n. 14, *supra*.

Count III: The evidence presented at the disciplinary hearing proved the charges against Respondent as asserted in paragraphs 61 and 62 of the Statement of Charges. Respondent was found to have failed to list himself or his law firm in his Facebook posts in violation of Rule 7.2(c)¹⁷ of the RPC. Respondent also failed to use “Advertising Material” in his Facebook posts in violation of Rule 7.3(c)¹⁸ of the RPC.

The evidence presented at the disciplinary hearing did not prove the charges against Respondent as asserted in paragraph 60 of the Statement of Charges involving Rule 4.4(a)¹⁹ of the RPC.

Count IV: The evidence presented at the disciplinary hearing proved the charges against Respondent as asserted in paragraphs 79, 81, and 82 of the Statement of Charges. Respondent had a conflict in representing Jackie Marcum after he purchased illegal drugs from him in violation of Rule 1.7(a)²⁰ of the RPC. Respondent purchased the illegal drug Oxycodone from Jackie Marcum in violation of Rule 8.4(b)²¹ of the RPC. Respondent worked out a plea offer with Jackie Marcum

¹⁷ **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.

¹⁸ **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).

¹⁹ **Rule 4.4. Respect for Rights of Third Persons**

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violation the legal rights of such a person.

²⁰ See n. 14, *supra*.

²¹ **Rule 8.4. Misconduct**

It is professional misconduct for a lawyer to:

without explaining his own involvement in the purchase of illegal drugs from Jackie Marcum in violation of Rule 8.4(d)²² of the RPC.

The evidence presented at the disciplinary hearing did not prove the charges against Respondent as asserted in paragraph 78 and 80 of the Statement of Charges involving Rules 1.5(b), 8.1(a), and 8.4(c)²³ of the RPC.

II. SUMMARY OF ARGUMENT

The HPS correctly found that Respondent committed several violations of the RPC. The HPS only recommended that Respondent undergo a stayed two year suspension. While the ODC asserts there was no error in the HPS's findings of fact or conclusions of law, the ODC does not agree with the recommendation by the HPS as to the sanction. The ODC asserts that the sanction proposed by the HPS is not adequate considering the clear and convincing evidence against Respondent, and the potential for injury created by the misconduct of Respondent. In ordering such a sanction in this lawyer disciplinary proceeding, this Honorable Court will not be serving its goals of protecting the public, reassuring the public as to the reliability and integrity of attorneys, and safeguarding the

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

²² See n. 14, *supra*.

²³ **Rule 1.5. Fees**

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client in writing.

See n. 14, *supra*.

administration of justice; and not just as punishment to Respondent. *See Lawyer Disciplinary Board v. Taylor*, 192 W.Va. 139, 451 S.E.2d 440 (1994).

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

ODC filed an objection to the recommendation of the HPS pursuant to Rule 3.11 of the Rules of Lawyer Disciplinary Procedure (hereinafter “RLDP”). Thereafter, pursuant to Rule 3.13 of the RLDP and pursuant to Rule 19 of the Rules of the Appellate Procedure, this Honorable Court issued an Order on March 9, 2021, which scheduled this matter for oral argument on September 14, 2021 before this Honorable Court .

IV. ARGUMENT

A. STANDARD OF PROOF

The charges against an attorney must be proven by clear and convincing evidence pursuant to Rule 3.7 of the RLDP. Syl. pt. 1, *Lawyer Disciplinary Board v. McGraw*, 194 W. Va. 788, 461 S.E.2d 850 (1995). Substantial deference is to be given to the Lawyer Disciplinary Board’s findings of fact unless the findings are not supported by reliable, probative, and substantial evidence on the whole record. *Id.* at Syl. pt. 2. At the Supreme Court level, “[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the [Board].” *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 290, 452 S.E.2d 377, 381 (1994).

In lawyer disciplinary matters, a *de novo* standard of review applies to questions of law, questions of application of the law to the facts, and questions of appropriate sanction to be imposed. Syl. Pt. 1, *Roark v. Lawyer Disciplinary Board*, 207 W. Va. 181, 495 S.E.2d 552 (1997); *McCorkle*, at Syl. pt. 3. The Supreme Court gives respectful consideration to the Lawyer Disciplinary Board’s

recommendations as to questions of law and the appropriate sanction, while ultimately exercising its own independent judgment. McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381. The Supreme Court is the final arbiter of formal legal ethics charges and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law. Syl. pt. 3, Committee on Legal Ethics v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984); Syl. pt. 7, Committee on Legal Ethics v. Karl, 192 W.Va. 23, 449 S.E.2d 277 (1994).

The evidence presented in this case satisfies the clear and convincing standard. The ODC asserts that the HPS's findings of fact in its Report are correct, sound, fully supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the HPS and, thus, should not be disturbed. However, respectful consideration of the HPS's recommendation concerning questions of law and the appropriate sanction should lead this Honorable Court to issue a different and harsher sanction than the recommendation of the HPS for a stayed two year suspension due to Respondent's violations of the RPC.

B. ANALYSIS OF SANCTION UNDER RULE 3.16 OF THE RULES OF LAWYER DISCIPLINARY PROCEDURE

Syllabus Point 4 of Office of Lawyer Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998), holds that Rule 3.16 of the RLDP provides as follows:

In imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court [West Virginia Supreme Court of Appeals] or Board [Lawyer Disciplinary Board] shall consider the following factors: (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.

A review of the extensive record in this matter indicates that Respondent has transgressed all four factors set forth in Jordan.

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

There are basic duties that attorneys owe to not only their clients, but also to the public, the legal system, and the legal profession. The duties to clients are the most important, but the duties to others also must be looked at when evaluating attorney misconduct. The public expects the highest degree of integrity and honesty from attorneys. As officers of the court, the court system depends on attorneys to follow the rules and procedures and not to interfere with the administration of justice. Included in this is the expectation that attorneys will also not engage in illegal or unlawful conduct, and follow the law. In determining the nature of the ethical duty violation, the standards assume that the most important ethical duties are those owed to a client. Clients expect and depend on an attorney to handle their cases not only within the ethical bounds, but in ways that protect the client's interests. The HPS found that the facts set forth in this case were established by clear and convincing evidence, and that Respondent violated his duties owed to his clients, the general public, the legal system, and the legal profession.

The HPS properly found that the conflict of interests created by Respondent in representing Jackie Marcum in his criminal case was a violation of duties owed to clients. The conflict of interest was from Respondent purchasing illegal drugs from Jackie Marcum, then representing him on charges for selling drugs. It was clear that Respondent was not focused on his representation of Jackie Marcum, especially after he withdrew from representing Jackie Marcum when it came out that Respondent was visible on video taken from Jackie Marcum's home. Thereafter, Jackie Marcum was

able to withdraw his initial guilty plea and obtain a new plea offer that included a recommendation of probation. Hrg. Trans. 57-58.

Respondent's illegal conduct violated the duties owed to the general public, as properly found by the HPS. It is a criminal act in West Virginia to possess a controlled substance, which is in violation of W.Va. Code § 60A-4-401. Respondent began using illegal drugs in late 2017 or early 2018, and he admitted to purchasing Oxycontin from Jackie Marcum. Hrg. Trans. 266, 269. Respondent proceeded to buy illegal drugs from Jackie Marcum for six months. Hrg. Trans. 269. This all occurred while Respondent was a licensed attorney and while he was serving in the West Virginia House of Delegates for Mingo County.

The HPS properly found the duties to the legal system were violated by the effect of his actions on the administration of justice. Jackie Marcum faced the potential of time in prison with his initial plea agreement, and therefore the administration of justice was affected due to Respondent's improper involvement in the case. Jackie Marcum's new counsel did obtain a new plea agreement which resulted in Jackie Marcum being sentenced to probation, which was not the position he was in when he was represented by Respondent.

And lastly, the HPS properly found that the advertisements for Respondent's legal services affected the legal profession. There are requirements in the RPC for lawyers to follow when they offer their legal services, and Respondent failed to follow those rules when he offered his legal services on Facebook.

2. Respondent acted intentionally and knowingly.

The HPS found that Respondent acted intentionally and knowingly. Acting intentionally is when a lawyer acts with the conscious objective or purpose to accomplish a particular result. Acting

with knowledge is when the lawyer acts with conscious awareness of the nature or attendant circumstances of his conduct, but without the conscious objective or purpose to accomplish a particular result. Respondent knew of his conflict of interest when he decided to represent Jackie Marcum for selling illegal drugs after Respondent had brought illegal drugs from Jackie Marcum. This misconduct was intentional and knowing. Buying illegal drugs was also an intentional act by Respondent, as he had to have knowledge as an attorney of the illegal nature of the misconduct. Offering his legal services on Facebook without including the proper disclaimers as required by the rules was found to be intentional by the HPS as well.

3. The amount of real injury is great.

In its report, the HPS found the amount of real injury to be great. Respondent's new attorney testified that she was able to obtain a plea with a lesser penalty for Jackie Marcum, and a lesser recommendation for sentencing. Hrg. Trans. 15, 22. There was also injury based on Respondent being shown on video buying illegal drugs from a drug dealer; but, more importantly, Respondent was unable to properly represent Jackie Marcum since he was involved in the same criminal activity with his client. It must be mentioned that the legal community where Respondent practiced had already suffered from damage after a judge and prosecutor were disciplined for their misconduct,²⁴ and clearly, Respondent's misconduct only added to the legal community's ill repute. Hrg. Trans.

²⁴ The elected prosecutor consented to voluntary disbarment in Office of Lawyer Disciplinary Counsel v. Sparks, No. 13-1009 (WV 10/11/13)(unreported) and an elected judge consented to voluntary disbarment in Judicial Disciplinary Counsel v. Thornsberry, No. 13-1047 (WV 10/21/13)(unreported). The judge in Thornsberry had been suspended from the bench pending an investigation involving criminal offenses and, as part of his guilty plea in his federal criminal proceeding involving charges for violation of a person's constitutional rights, the judge agreed to resign his judgeship. *See In re Thornsberry*, No. 13-0828 (WV 10/21/13)(unreported).

25. Further, Respondent's position in the West Virginia legislature when he committed the misconduct and illegal activity certainly added to the injury.

4. Respondent had one aggravating factor.

The HPS found evidence of one aggravating factor in this matter, which was Respondent's illegal conduct.

5. Respondent had seven mitigating factors.

The HPS found Respondent provided evidence of seven mitigating factors in this case. Those were: 1) absence of dishonest or selfish motives;²⁵ 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.

C. SANCTION

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

The RPC state the minimum level of conduct below which no lawyer can fall without being subject to the disciplinary action. Syl. Pt. 3, *in part*, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), *cited in* Committee on Legal Ethics v. Morton, 186 W.Va. 43, 45, 410 S.E.2d 279, 281 (1991). The principle purpose of attorney disciplinary proceedings is to

²⁵ Disciplinary Counsel asserts that Respondent's representation of Jackie Marcum was for a selfish and dishonest purpose, which was to hide his own illegal activity and he should not be credited with this mitigating factor. Further, Respondent's misconduct involving the improper advertising was for a selfish motive as he was offering his legal services.

safeguard the public's interest in the administration of justice. Syl. Pt. 3, Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Syl. Pt. 2, Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999).

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

A review of the record clearly indicates that while the HPS properly considered the evidence, the HPS did not make an appropriate recommendation to this Court as to the sanction. Both ODC and Respondent agreed to the sanction of a two year suspension, with the suspension being stayed after Respondent served six months of suspension. The agreement for the sanction between ODC and Respondent was based, in part, on the recent case of Lawyer Disciplinary Board v. Sidiropolis, 241 W.Va. 777, 828 S.E.2d 839 (2019). The misconduct in Sidiropolis involved the attorney being found with ten bricks of heroin after becoming addicted to heroin. Id. The heroin addiction was a result of a prior opioid pain medication addiction that came about after an automobile accident. Id. After he was arrested, the attorney sought treatment for his heroin addiction through the federal drug court program and was up front with ODC about his arrest. Id. The sanction from this Court in that

case was a two year suspension, but the attorney only had to serve sixty days of the suspension. Id. This Court noted that while the attorney's misconduct in Sidiropolis was serious and becoming a common problem, the attorney's work to overcome his addiction and remain sober was recognized in order to obtain the proper sanction. Id. at 788, 850. Additionally, there are several other cases from West Virginia that involved illegal drug use and resulted in a suspension for the attorney as noted by the HPS. *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).

In the Sidiropolis, McCorkle, and White cases, a client was not directly affected. To be more specific, both Sidiropolis and this case involved an attorney who purchased illegal drugs, and had successful and documented recovery from their addictions. However, in this case, Respondent took steps to make sure he represented Jackie Marcum, his drug dealer, in the criminal case involving the selling of the drugs. Jackie Marcum's testimony was that Respondent came up to him prior to Jackie Marcum's arraignment, and said that he would "take care of" Jackie Marcum. Hrg. Trans. 38-39. Ms. Cisco testified that she was prepared to represent Jackie Marcum as she had been appointed and received a copy of Jackie Marcum's indictment, but when she approached Jackie Marcum, he informed her that Respondent was going to represent him. Hrg. Trans. 11-12. Respondent asserted he was asked to represent Jackie Marcum, but both Jackie Marcum and Ms. Cisco's testimony refute that assertion. Hrg. Trans. 11-12, 38-39, 266-267. The only reason to then volunteer to represent Jackie Marcum was an effort to ensure that Respondent's criminal activity was covered up, and

therefore, Respondent was selfishly focused on his own personal interest in the matter, and was not working towards the best interest of Jackie Marcum. Another issue is Jackie Marcum's testimony that he paid Respondent in pills, which meant Jackie Marcum continued to commit illegal conduct with the knowledge of Respondent. Hrg. Trans. 39-40. In Sidiropolis, the attorney was arrested with the heroin, but the illegal drug use was not in any way connected to a client.

Another issue present in the case was when Respondent quit representing Jackie Marcum only after Jackie Marcum entered a guilty plea to several felony offenses. Jackie Marcum testified that Respondent sent a letter saying he was no longer representing him and Jackie Marcum thought it was a joke. Hrg. Trans. 43-44. When Ms. Cisco became Jackie Marcum's counsel again after Respondent withdrew, she immediately felt there was an issue with Respondent representing the drug dealer he bought drugs from, and she sought to withdraw the guilty plea, which allowed her to work to obtain a new plea offer for Jackie Marcum. This new plea offer was obtained without any personal interest of the attorney affecting the case.

As stated in the HPS report, other states have suspended attorneys for illegal drug use when misconduct involved a client. Misappropriating client funds to support a drug habit resulted in a two year suspension in a 2011 Ohio case, Disciplinary Counsel v. Hoppel, 950 N.E.2d 171, 176 (Ohio 2011). The Hoppel Court even referenced that rehabilitation should be supported when "egregious misconduct" is present in a disciplinary case. Id. The Hoppel case also involved the testimony of the Ohio Lawyers Assistance Program about the attorney's sobriety for at least a year by the time of the hearing in the disciplinary case. Disciplinary Counsel v. Hoppel, 950 N.E.2d at 174 (Ohio 2011). Accepting cocaine for payment of legal fees in a case where an attorney was convicted for possession of cocaine resulted in a three year suspension. People v. Madrid, 967 P.2d 627 (Colorado 1998). The

Madrid Court noted that the misconduct had a direct connection to the practice of law. Id. at 628. A stayed suspension of forty months after serving one year of suspension was found to be the proper sanction for an attorney who accepting prescription medication from a client. In re Meek, 289 P.3d 95 (Kansas 2012). Additionally, an attorney who was convicted of possession of marijuana and Ecstasy was suspended for two years. In re Nixon, 49 A.3d 1193 (Delaware 2012). There was also was a case where an one year suspension was found to be the proper sanction for a deputy district attorney who purchased crack cocaine. People v. Stevens, 866 P.2d 1378 (Colorado 1994).

It is clear from the previous cases in West Virginia and other states that the proper sanction in this case is a suspension. The HPS did recommend a two year suspension, but then stayed the entire suspension. Respondent not only had a drug addiction, but he also involved his client in his misconduct because he represented his own drug dealer. Respondent even questioned Jackie Marcum about whether Respondent would be seen on any video taken during the arrest, and Jackie Marcum indicated that he was unsure if Respondent would be seen. Hrg. Trans. 45. Respondent's questioning of Jackie Marcum about whether he was on the video shows that he knew of the conflict in representing Jackie Marcum. Respondent did not even seek to review all of the discovery, including the surveillance video that was listed on the discovery list, prior to working out a plea agreement for Jackie Marcum. Hrg. Trans. 42. Failure to review all of the evidence is not properly representing the client, and is certainly a failure to achieve justice in the case. Jackie Marcum did review a surveillance video with Ms. Cisco after she was reappointed to his case, and it clearly showed Respondent going to Jackie Marcum's home in his vehicle with the House of Delegates license plate, and purchasing drugs. Hrg. Trans. 44-45, 17-18. The discovery in Jackie Marcum's case also included a "drug list" of people who owed money to Jackie Marcum for illegal drugs, and

Respondent's name was on the drug list. ODC Ex. 53, Bates 1346-1347, Hrg. Trans. 45-46. The video is further supported by Respondent's own admission that he purchased drugs from Jackie Marcum. Hrg. Trans. 266. This type of misconduct must have an actual suspension from the practice of law. This is not an incident involving just addiction, but also involves an attorney putting his own interest over the interest of a client, and protection of the public cannot be met when an attorney is only given a stayed suspension for the sanction. Respondent's misconduct clearly had a direct connection to the practice of law. The HPS put a lot of emphasis on the rehabilitation of Respondent and his work with JLAP when they made the recommendation for a stayed two year suspension. Respondent's rehabilitation is commendable and something he should be proud of, but the disciplinary process is meant to protect the public and there needs to be an example to other attorneys that such misconduct when directly connected to the practice of law will result in a suspension. In this case, Respondent put his interests ahead of his client, and such significant misconduct should not be ignored. The agreed recommendation between Respondent and ODC further included an automatic reinstatement after the six months, and Respondent can easily return back to the practice of law after serving the six month suspension.

Further, Respondent engaged in additional misconduct beyond the use of illegal drugs and representing his drug dealer. Respondent did not include his name or "Advertising Material" when he offered legal services in his Facebook posts. While such an issue by itself may not rise to the level requiring a sanction of a suspension, but when considered in connection with Respondent's drug addiction and representing his drug dealer, it further supports a suspension for Respondent. There have been several cases across the country dealing with the failure to list "Advertising Material" in offering legal services that resulted in a disciplinary sanction. *See Matter of Anonymous*, 630 N.E.2d

212 (Indiana 1994) (attorney was privately reprimanded after failing to label letters to prospective clients with “Advertising Material”); Matter of Skozen, 660 N.E.2d 1377 (Indiana 1996) (attorney was publicly reprimanded after failing to label letters sent to a beneficiary of will as “Advertising Material,” and with failing to submit the letters to the Disciplinary Commission and giving false information about the letters.); In re Huelskamp, 740 N.E.2d 846 (Indiana 2000) (attorney was publicly reprimanded after failing to use “Advertising Material” at the top of the first page of mailings along with using misleading information in the mailings.); In re Disciplinary Proceedings Against Whiting, 265 Wis.2d 407 (Wisconsin 2003) (attorney was publicly reprimanded in a reciprocal proceeding from Illinois where the attorney failed to label a letter as “Advertising Material” along with soliciting someone not in the position to exercise professional judgment and committing misconduct being disrepute to the legal profession and legal system); In re Benkie, 892 N.D.2d 1237 (Indiana 2008) (attorney was publicly reprimanded after failing to use “Advertising Material” when using brochures to solicit business along with creating an unjustified expectation and past successes in the brochures.); Ceauga Cty. Bar Assn. v. Snyder, 136 Ohio St.3d 320 (Ohio 2013) (attorney was publicly reprimand after failing to use “Advertising Material” in a written communication along with sharing fees with another firm); and People v. Jones, 422 P.3d 1093 (Colorado 2018) (attorney was suspended for one year and one day after failing to identify communications as “Advertising Material” along with making false or misleading communications in addition to six aggravating factors). Most cases involving the failure of a lawyer to properly identify a communication as “Advertising Material” resulted in a reprimand, but in this case, Respondent not only committed misconduct regarding such communication, but he also engaged in other serious misconduct.

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.

V. CONCLUSION

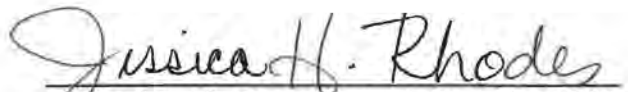
For the reasons set forth above, Disciplinary Counsel requests that this Honorable Court adopt the following sanctions:

- A. That Respondent's law license be suspended for a period of two years; a stay of the two year suspension after six months having been served for imposition of a period of supervised probation for the remaining period of Respondent's contract with JLAP; automatic reinstatement at the end of the six month suspension;²⁶ and immediate imposition of the remaining one and a half 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 an additional nine CLE hours in 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 during his six-month suspension;
- C. That Respondent comply with the terms and conditions of his JLAP contract;

²⁶ This Court recently ordered an attorney to be automatically reinstated after serving six (6) months of a suspension, and the rest of the suspension stayed. Lawyer Disciplinary Board v. Corey, No. 20-0258 (WV 4/15/21) (unreported).

- D. That Respondent must comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure; and
- E. That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel


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CERTIFICATE OF SERVICE

This is to certify that I, Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 11th day of May, 2021, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" 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
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Charleston, West Virginia 25326

And upon the Hearing Panel Subcommittee at the following addresses:

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