

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

LAWYER DISCIPLINARY BOARD,

Petitioner,

vs.

No. 20-0233

GREGORY H. SCHILLACE,

Respondent.



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BRIEF OF THE OFFICE OF LAWYER DISCIPLINARY COUNSEL

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## **I. STATEMENT OF THE CASE**

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

Gregory H. Schillace (hereinafter “Respondent”) is a lawyer who was admitted to The West Virginia State Bar on November 7, 1990. Respondent is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. Formal charges were filed against Respondent with the Clerk of the Supreme Court of Appeals on or about March 16, 2020, and served upon Respondent via certified mail by the Clerk on March 19, 2020. Chief Lawyer Disciplinary Counsel filed her mandatory discovery on or about May 21, 2020. Respondent filed his Answer to the Statement of Charges on or about April 16, 2020. On or about June 22, 2020, Respondent filed a “Motion to Continue.” Chief Disciplinary Counsel did not object and the motion was granted. Respondent provided his mandatory discovery on July 24, 2020, with a supplement filed on March 1, 2021. On or about September 17, 2020, Respondent filed a “Motion to Permit Witness, Robert Edmundson, to Testify by Video Conference.” On or about September 24, 2020, Respondent filed a “Motion to Continue” and Respondent’s Objection to Replacement of Panel Member Elizabeth Layne Diehl.” On or about September 28, 2020, Chief Disciplinary Counsel filed her “Response to Respondent’s Motion to Continue and Respondent’s Objection to Replacement of Panel Member Elizabeth Layne Diehl.” On or about October 1, 2020, Respondent’s “Motion to Continue” was granted and “Respondent’s Objection to Replacement of Panel Member Elizabeth Layne Diehl” was denied.

On or about October 14, 2020, Respondent filed a “Motion to Continue” and on or about October 20, 2020, Respondent filed an “Amended Motion to Continue,” which was granted. On

or about February 17, 2021, Chief Disciplinary Counsel filed a “Motion to Continue,” which was granted.

Thereafter, this matter proceeded to hearing in Bridgeport, West Virginia, on November 24-25, 2020, and on March 2, 2021. The Hearing Panel Subcommittee (hereinafter “HPS”) was comprised of Timothy E. Haught, Esquire, Chairperson, Gail Henderson Staples, Esquire, and Rachel Scudiere, Layperson. Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel, appeared on behalf of the Office of Lawyer Disciplinary Counsel. Timothy J. Manchin appeared on behalf of Respondent, who also appeared. The Hearing Panel Subcommittee heard testimony from Joelle Spagnuolo-Loretta; James Loretta; Pamela Logar; the Honorable James A. Matish; Jennifer Staud; Carol Louise Shahan; Ruth Dukich; Jean C. Cogger; the Honorable Michael J. Alois; Carl Hadsell; Dr. Robert Edmundson; Dr. Kelly Nelson; and Respondent. In addition, ODC Exhibits 1-62; Respondent’s Exhibits 1-4 and Joint Exhibit 1, Party Admissions, were admitted into evidence.

On or about January 31, 2022, the HPS issued its recommended decision and filed its “Report of the Hearing Panel Subcommittee” (hereinafter “Report”) with the Supreme Court. The HPS found that the evidence established that Respondent committed five (5) violations of Rule 1.1[competence]; six (6) violations of Rule 1.2(a) [failure to abide by client’s objectives]; six (6) violations of Rule 1.3 [diligence]; six (6) violations of Rule 1.4 [communication]; two (2) violations of Rule 1.5 [fees]; two (2) violations of 1.5(b) [failure to reduce scope and basis of fee to writing]; one (1) violation of 1.5(c) [failure to reduce contingency fee agreement to writing]; two (2) violations of Rule 1.15(d) [safekeeping property]; two (2) violations of Rule 1.16(d) [declining or terminating representation] five (5) violations of Rule 3.2 [failure to expedite

litigation]; five (5) violations of Rule 3.4 [fairness to opposing party and counsel]; one (1) violation of Rule 3.4(d) [fairness to opposing counsel and opposing party]; five (5) violations of Rule 8.4(c) [dishonesty, fraud, deceit or misrepresentation]; and five (5) violations of Rule 8.4(d) [prejudice to the administration of justice] of the Rules of Professional Conduct (hereinafter “RPC”).

The HPS recommended that Respondent’s law license be suspended for a period of two (2) years, and recommended that the entirety of the suspension be stayed while Respondent instead serves a period of three (3) years of probation and supervised practice. They further opined that Respondent be ordered to maintain professional liability insurance in the amount of One Million Dollars (\$1,000,000.00) per claim and in the aggregate and provide proof of the same upon request of the Office of Disciplinary Counsel. Respondent should be ordered to continue in the therapy regime, but be ordered to undergo an independent psychological evaluation to determine his compliance with this therapy regimen at his expense and at the request of the Office of Disciplinary Counsel. Respondent should undergo an audit of his law office to determine if he is compliant with the prior directives of the retained office consultant, and be ordered to implement any and all additional necessary changes in his law office management procedures to ensure that the pattern of misconduct is less likely to occur. Finally, the HPS recommended that Respondent be ordered to pay the costs of the disciplinary proceedings.

On or about March 4, 2022, the Office of Lawyer Disciplinary Counsel filed its objection to the Hearing Panel Subcommittee’s recommendation. Respondent filed his consent to the recommendation on the same date.

## **B. HEARING PANEL SUBCOMMITTEE'S FINDINGS OF FACT AND RULE VIOLATIONS**

### **1. Complaint of James P. Loretta and Joelle M. Loretta**

The Loretas retained Respondent to represent them in a civil suit filed in the Circuit Court of Harrison County, West Virginia (Civil Action No. 16-C-202) against a contractor who constructed their home. [ODC Exhibit 1 at 2] At no time did Respondent reduce the scope of his representation or the terms of his representation to writing. [Transcript at 9] Ms. Loretta further testified that they did not pay a retainer fee and had no written fee agreement, but understood from Respondent that he would represent them on a contingency fee basis wherein he would recover 40% if they were to prevail. [Transcript 9-11]

On or about October 14, 2016, defendants, by and through counsel, filed an Answer to the Loretas' June 7, 2016 civil complaint, and filed a counter claim against the Loretas. [ODC Exhibit 9 at 506] Ms. Loretta testified that Respondent did not advise them or provide them with a copy of the Answer or the counter-claim filed against them. [Transcript at 12] Ms. Loretta testified that her communication with Respondent was "not to be desired" as they would often call or email him, and most times Respondent was not available to speak to them. She testified that she was "going on good faith" that Respondent was meeting the mandates of the Court. Respondent did not often return or take telephone calls from Mr. or Ms. Loretta, and when he did he indicated he was involved with another case and couldn't talk, but there was "nothing .. we needed to know... everything was fine." [Transcript at 13-15] The docket sheet reflects that no answer was filed on behalf of the Loretas, and after discovery commenced and Respondent failed to answer interrogatories, the first motion to compel was filed by defense counsel on or about March 3, 2017. [ODC Exhibit 9 at 506]

Ms. Loretta testified that she was not aware that the Court had entered an order directing Respondent to comply with the deadlines. [Transcript at 15-16] The docket sheet reflects that a certificate of service for responses to defendant's discovery request was filed by Respondent on or about July 31, 2017. [ODC Exhibit 9 at 507] On or about September 29, 2017, defense counsel filed another motion to compel and sought sanctions. [ODC Exhibit 9 at 507] Ms. Loretta testified that they were not informed of this motion or the defendants' intent to seek sanctions. [Transcript at 16] Respondent did not file any responsive pleading to the motion, and the Court entered an Order on or about November 15, 2017, granting defense counsel's motion to compel and ordered sanctions, in the form of attorney fees and costs to be awarded to the defendants. [ODC Exhibit 9 at 507] Ms. Loretta testified that Respondent did not inform her that the Court entered a sanctions order for his failures. [Transcript at 16]

On or about November 30, 2017, defense counsel filed a second motion seeking sanctions and requested dismissal of the case due to Respondent's repeated and systematic failure to comply with the Court's Orders and applicable West Virginia Rules of Civil Procedure. The Court ordered Respondent to file a response to the same by December 13, 2017. [ODC Exhibit 9 at 507] Respondent did not file any responsive pleading and by Order entered January 12, 2018, the Court dismissed the Loretas' claim with prejudice against the defendants. [ODC Exhibit 9 at 507] Ms. Loretta testified that Respondent did not advise her that the Court entered an Order that dismissed her civil case. Ms. Loretta stated at this time she was repeatedly asking Respondent for updates about their case, and Respondent failed to return any of the calls or otherwise respond. [Transcript at 18-19]

By motion filed January 31, 2018, as Respondent had not filed an Answer to the counter claim, defense counsel sought default judgment. The Court entered an Order directing Respondent to file an Answer and a response to the motion by February 13, 2018. [ODC Exhibit 9 at 421-422] On or about February 13, 2018, Respondent filed a motion to amend the Court's January 12, 2018 Order and a response to the motion for default judgment. [ODC Exhibit 9 at 447-448] By Order entered February 15, 2018, the Court denied Respondent's motion to amend the Order. [ODC Exhibit 9 at 643-650] By Order entered March 1, 2018, the Court granted default judgment in the counter-claim against the Loretas and ordered the trial date of the week of April 9, 2018, to be on the issue of damages. The Order noted a final pre-trial conference was set for March 12, 2018. [ODC Exhibit 9 Bates 609-614]

Ms. Loretta was completely unaware that her case had been dismissed or that default judgment had been granted against them, but as Respondent had failed to communicate with them for several months, they demanded to meet with Respondent in advance of the March 12, 2018, pre-trial conference to prepare for the same. [Transcript at 20] On or about March 10, 2018, Respondent met with Mr. and Ms. Loretta and revealed that their case had been dismissed due to Respondent not complying with deadlines. [Admitted] [ODC Exhibit 1 at 2] Ms. Loretta testified that Respondent admitted he had done nothing in their case and, for the first time, informed Mr. and Mrs. Loretta that the defendants had filed a counter-claim against them. Ms. Loretta said Respondent told them they were "in a world of hurt." [Transcript at 21] Ms. Loretta further testified that Respondent told them he had malpractice insurance and he would "make sure my insurance takes care of you." She said she refused to leave until Respondent reduced that to writing and she said Respondent agreed. [Transcript at 22]

The handwritten, signed and dated March 10, 2018, two-page letter states:



The undersigned acknowledges and agrees that the undersigned is responsible for the status of the litigation involving McDonald Construction. The Loretas provided all information necessary or requested, therefore, the actions of the court are the full responsibility of the undersigned.

The undersigned has advised that he has professional liability insurance to cover matters such as this and that the undersigned will place his insurance carrier on notice.

The undersigned has requested that the Loretta allow the undersigned to pursue an appeal of the adverse decision. The undersigned believes that the Loretas have a meritorious case and that they should prevail against Mr. McDonald and his company were they permitted a trial on the merits. The undersigned believes that the Loretta's are entitled to recover at least \$170,000.00 from Mr. McDonald and his company.

Gregory H. Schillace  
3/10/2018

[Admitted] [ODC Exhibit 1 at 5-6]

Thereafter, on March 12, 2018, the Loretas appeared for a hearing in their case and learned that not only had the claims they made against the contractor been dismissed, but also learned for the first time that the contractor had filed a counter claim against them exposing them to civil liability and damages. The counter claim was set to go to trial on April 9, 2018. The Loretas requested a continuance so they could find new counsel, but that request was denied. [ODC Exhibit 1 at 2]

Ms. Loretta testified that she told the Court that Respondent did not advise them about the dismissal or the counterclaim and that Respondent was an "absolute disgrace to this profession" and that there was no trust left to allow them to continue the attorney relationship. [Transcript at 26] Respondent orally moved the Court to withdraw as counsel at the hearing and that request was granted. [Admitted] [ODC Exhibit 1 at 2] The Loretas asserted that Respondent again admitted his dishonesty and negligence. Respondent further stated that he would contact his liability

insurance carrier and file an appeal to the dismissal of their case with the Supreme Court of Appeals. [ODC Exhibit 1 at 5-6]

The Loretas filed an ethics complaint and the same was docketed and sent to Respondent via first class mail by letter dated March 21, 2018, requesting a verified response within twenty days of receipt of the complaint. [ODC Exhibit 2 at 8-9] Ms. Loretta testified that she filed the ethics complaint because she was devastated and felt like Respondent's behavior was no way for an attorney to behave and that [ODC] needed to understand what he had not done. [Transcript at 23] Ms. Loretta testified that she was able to retain another lawyer who negotiated the amount they paid to the defendants for damages in the counter-claim which was Twenty Thousand Dollars. [Transcript at 33]

On or about April 6, 2018, counsel for the defendants confirmed to the Court that all matters had been settled and a dismissal order would be forthcoming. [ODC Exhibit 9 at 626-627] In his April 23, 2018 verified response, Respondent admitted that the allegations were accurate as presented. Respondent further stated that on or about March 14, 2018, he filed a Notice of Appeal with the Supreme Court in Complainants' case and that a briefing schedule for the matter had been established. [ODC Exhibit 4 at 23]

On or about March 27, 2018, the Supreme Court entered a scheduling order. Respondent was ordered to perfect the appeal on or before June 15, 2018. [ODC Exhibit 9 at 654-655] The Loretas sent a May 4, 2018 reply to Respondent's April 23 response and stated that they terminated Respondent's representation on March 12, 2018. The Loretas further stated that with less than four weeks to prepare for trial on the counter claim, coupled with Respondent's failure to provide a copy of the client file, that a decision was made to settle the civil case and not pursue any appeal of the adverse decision. [ODC Exhibit 9 at 656] Respondent did not perfect the

appeal. On or about June 22, 2018, the Supreme Court entered an order dismissing the appeal. [Admitted] [ODC Exhibit 9 at 656] By Order entered July 16, 2018, the case in Circuit Court was dismissed. [ODC Exhibit 9 at 626-627]

On or about July 10, 2018, the Loretas, by and through counsel, filed a legal malpractice case against Respondent in the Circuit Court of Harrison County, West Virginia (Civil Action No. 18-C-173). [ODC Exhibit 9 at 629] By Order entered July 31, 2019, the malpractice action was dismissed with prejudice by the Court as the parties advised all matters in controversy had been settled. [Admitted] [ODC Exhibit 9 at 631]

The Hearing Panel found that Respondent's nonfeasance, his failure to advance Complainant's case as required by the rules of procedure governing civil matters, and failure to comply with the Court's scheduling order and required deadlines was in violation of Rule 1.1 of the Rules of Professional Conduct. Respondent failed to diligently pursue the Complainants' case in accordance with the Complainants' stated objectives of the case and the same was in violation of Rule 1.2(a). Respondent also admitted that he failed to diligently pursue Complainants' case in violation of Rule 1.3 of the Rules of Professional Conduct. Respondent failed to respond to multiple requests for information from Complainants and failed to maintain any reasonable communication with his clients, which is necessary for the clients to effectively participate in the representation, all in violation of Rule 1.4 of the Rules of Professional Conduct.

Respondent failed to reduce the scope of representation or the basis or rate of the fee and expenses to writing before or within a reasonable time after commencing the representation in violation of Rule 1.5(b) of the Rules of Professional Conduct. A contingent fee agreement is required to be in a writing signed by the client and shall state the method by which the fee is to be

determined, and Respondent's failure to do so was in violation of Rule 1.5(c) of the Rules of Professional Conduct.

Throughout the litigation, Respondent failed to expedite the litigation consistent with the client's stated objectives and instead engaged in dilatory practices which brought the administration of justice into disrepute in violation of Rule 3.2 of the Rules of Professional Conduct. The procedure of the adversary system contemplates that evidence in a case is to be marshalled competitively by the parties, typically through the use of discovery and compliance with Court ordered deadlines for disclosure. Respondent failed to comply with and/or participate in discovery in this case despite having an obligation to do so.

Respondent also failed to comply with multiple Court orders in this case despite having an obligation to follow the same. Respondent's actions are in violation of Rule 3.4 of the Rules of Professional Conduct. Respondent failed to keep his clients informed throughout the litigation, but also made affirmative false statements to his clients about the status of the case in violation of Rule 8.4(c) and Rule 8.4(d) of the Rules of Professional Conduct.

## **2. Complaint of Pamela G. Logar**

Ms. Logar retained Respondent in or about January 2017, to represent her in an employment matter, which was a civil case pending in the Circuit Court of Monongalia County, West Virginia (Civil Action No. 15-C-689). [Admitted] [ODC Exhibit 10 at 659] By way of relevant background, the case was filed October 26, 2015. By Order entered August 25, 2016, the Court extended certain discovery deadlines and rescheduled the pre-trial conference for January 5, 2017. However, a motion to withdraw was filed by Ms. Logar's attorney Edward R. Kohout and request for a stay of the proceedings was made based upon the Supreme Court's decision to annul his law license which was effective by Supreme Court Order entered on December 15, 2016. [ODC

Exhibit 10 at 665-666] The Court gave Ms. Logar a stay of sixty (60) days to secure new counsel. [ODC Exhibit 10 at 665-666]

A contingency fee agreement dated January 10, 2017, was signed and notarized on February 14, 2017, and the same was returned to Respondent via first class mail. [Admitted] [ODC Exhibit 10 at 662-664] Ms. Logar testified that she repeatedly called Respondent's office and, if she spoke to anyone, she was informed he was out of the office or with a client and couldn't take her call. She further testified that she attempted to contact him via telephone and via text message and that Respondent did not respond. [Transcript at 65] Ms. Logar stated that after hearing nothing from Respondent for several months, she attempted to contact him by telephone on August 14, 2017; August 17, 2017; and October 31, 2017. Respondent did not speak to Ms. Logar on these occasions and did not return her calls. [ODC Exhibit 10 at 659]

On or about December 8, 2017, Ms. Logar received a copy of Defendant's Motion to Dismiss for Plaintiff's Failure to Prosecute. Ms. Logar stated she immediately telephoned Respondent's office and was advised by Respondent's assistant that he was unavailable to speak with her. The assistant did advise Ms. Logar that Respondent was aware of the matter and "would take care of this matter immediately." [Admitted] [ODC Exhibit 10 at 659] On or about December 12, 2017, the Court entered an order directing Respondent to file a response to the motion within ten (10) days. [ODC Exhibit 10 at 670]

Respondent failed to file a response and the lawsuit was dismissed by order entered on January 5, 2018. [ODC Exhibit 10 at 671-672] Ms. Logar testified that when she received a copy of the dismissal order from Respondent, she called him and he told her he would "look into it and have the case re-filed." She further testified that Respondent did not meet with her and did not explain what the Court's order meant to her. [Transcript at 67-68; 79-80] Ms. Logar attempted to

contact Respondent on several more occasions and was not able to speak with him. Ms. Logar advised Respondent's assistant that if she did not hear from him, she would file an ethics complaint. [Admitted] [ODC Exhibit 10 at 659-660]

Ms. Logar spoke with Respondent on February 2, 2018, who advised that he would "handle the situation promptly." Ms. Logar thereafter attempted to contact Respondent via telephone and text message. Respondent responded to some of the text messages but did nothing to have her case reinstated. [Admitted] [ODC Exhibit 10 at 660]

Ms. Logar filed an ethics complaint and the same was docketed and sent to Respondent via first class mail by letter dated May 22, 2018, requesting a verified response within twenty days of receipt of the complaint. [ODC Exhibit 11 at 686-687] After receiving no response, ODC sent a second letter via certified mail dated June 19, 2018, requesting a verified response to the complaint by July 8, 2018. [ODC Exhibit 12 at 717-748] In his July 6, 2018 response, Respondent denied violating the Rules of Professional Conduct. He stated he advised Ms. Logar that the case could be reinstated after the dismissal and that he was prepared to move forward with the same. [ODC Exhibit 13 at 750-752]

Ms. Logar provided additional correspondence dated July 11, 2018, and stated that while she was interested in having her case reinstated, Respondent advised her he would move the Court to reinstate the case on February 9, 2018, but despite this prior assurance had still failed to do so. She further stated that Respondent had done nothing for seven (7) months since the dismissal order was entered. [ODC Exhibit 14 at 756-758] At the time of the hearing, Respondent had taken no remedial action on Ms. Logar's behalf to attempt to reinstate this case. Ms. Logar testified that when she learned that her case was dismissed she was "very disappointed" and she testified she was relieved when Respondent agreed to take steps to have it reinstated. She went to him for help

and she “had faith in him” when he agreed to represent her in the case. And, even when he did not represent her interests and the case was dismissed, because he continued to assure he would take care of it, she still believed he would take the necessary steps to have her case reinstated. She testified she was even more disappointed when he failed. Ms. Logar testified that Respondent has never apologized to her for his conduct. [Transcript at 71-72; 80] Ms. Logar further testified that despite repeatedly asking for the return of her client file via telephone, that as of the date of the hearing, Respondent still had yet to provide her the same. [Transcript at 78-79]

The HPS found that Respondent’s nonfeasance, his failure to advance Ms. Logar’s case as required by the rules of procedure governing civil matters, and failure to comply with the Court’s scheduling order and required deadlines was in violation of Rule 1.1 of the Rules of Professional Conduct. Respondent also failed to diligently pursue the Complainant’s case in accordance with Complainant’s stated objectives of the case and the same was in violation of Rule 1.2(a) and Rule 1.3 of the Rules of Professional Conduct. Respondent failed to respond to multiple requests for information from Complainant and failed to maintain reasonable communication between himself and his client, which is necessary for the client to effectively participate in the representation, all in violation of Rule 1.4 of the Rules of Professional Conduct. Respondent failed to keep his client informed throughout the litigation, but also made affirmative false statements to his client about the status of the case and actions he intended to take on his client’s behalf in violation of Rule 8.4(c) and Rule 8.4(d) of the Rules of Professional Conduct.

Throughout the litigation, Respondent failed to expedite the litigation consistent with Complainant’s stated objectives and instead engaged in dilatory practices which brought the administration of justice into disrepute in violation of Rule 3.2 of the Rules of Professional Conduct. Respondent failed to comply with and/or participate in discovery in this case despite



having an obligation to do so. Respondent also failed to comply with multiple Court orders in this case despite having an obligation to follow the same. Respondent's actions are in violation of Rule 3.4 of the Rules of Professional Conduct.

### **3. Complaint of the Office of Lawyer Disciplinary Counsel**

This complaint was docketed by ODC after receipt and review of a transcript of a hearing and Order entered in a case in the Circuit Court of Harrison County, West Virginia styled 17-C-344-3, Robert Nelson Rector v. Kimberly Kay Ross, et.al. This information was sent to ODC on or about June 7, 2018, by the Honorable James A. Matish, pursuant his judicial reporting obligations. [ODC Exhibit 17 at 950-958]

By way of relevant background, Respondent represented Robert Rector in a domestic relations case styled Robert Nelson Rector v. Kimberly Kay Rector, Civil Action No. 15-D-497-5. Family Court Judge Jackson of Harrison County, West Virginia was the presiding judicial officer. A final order was entered by Family Court Judge Jackson on or about December 21, 2016. The decision was appealed to the Circuit Court of Harrison County on or about January 23, 2017. A petition for contempt seeking to hold Respondent's client in contempt was filed with the Family Court on February 24, 2017, and a supplemental petition was filed April 12, 2017. Family Court Judge Jackson set the contempt petition for hearing to be held May 1, 2017. Respondent argued at the May 1, 2017 hearing that because the case was before the Circuit Court on appeal that the Family Court Judge lacked jurisdiction to hear any contempt petitions. The hearing was continued until the next day, set to commence at 7am on May 2, 2017. On May 1, 2017, the Circuit Court entered an Order staying all proceedings in Family Court. Respondent and his client did not appear for the May 2, 2017 hearing. An Order was entered on May 11, 2017, by the Family Court Judge setting further proceedings for June 14, 2017. On May 30, 2017, Respondent filed a motion to



enforce the stay and request for expedited relief. By Order entered June 2, 2017, the Circuit Court entered an Order granting the motion to enforce the stay. On about August 24, 2017, the parties to the divorce matter entered into a release and settlement which resolved all matters. However, issues arose with the agreement, and former wife filed a petition to enforce the settlement on or about September 21, 2017. On or about November 9, 2017, Respondent filed an objection to the Family Court Judge presiding over the petition to enforce settlement. An Order was entered dismissing the petition on November 27, 2017. However, on November 9, 2017, the Family Court Judge entered an Order seeking to Issue a Rule to Show Cause with respect to Respondent's failure to appear at the May 2, 2017 hearing.

On or about November 3, 2017, Respondent filed a Complaint for Declaratory Relief, Writ of Prohibition and Other Relief (Civil Action No. 17-C-344-3) and Count IV was a writ against the Family Court Judge seeking to prohibit her from hearing the petition seeking the enforcement of the settlement. [ODC Exhibit 25 at 1269]

During a December 5, 2017 hearing before the Circuit Court, Respondent moved for the issuance of a rule to show cause on Count IV (writ of prohibition) against the Family Court Judge. The Court noted that the Family Court Judge had yet to be served with the amended complaint and set the hearing for December 11, 2017. [ODC Exhibit 25 at 1277-1278] A hearing was held on December 11, 2017.

On or about February 20, 2018, Family Court Judge Jackson's counsel filed a motion to dismiss count IV and a petition seeking a writ of prohibition. [ODC Exhibit 25 at 1269] A hearing was held on February 28, 2018. Respondent did not appear at the February 28, 2018 hearing. [Admitted] [ODC Exhibit 25 at 1281-1283] On or about March 2, 2018, the Court issued a Rule to Show Cause why Respondent should not be held in contempt of court for his failure to prepare

an Order from the December 11, 2017 hearing, for his failure to properly serve the Family Court Judge with the amended complaint and his failure to appear at the duly noticed February 28, 2018 hearing. [ODC Exhibit 25 at 1281-1283]

A hearing was held on March 30, 2018, regarding a Rule to Show Cause that by the terms of the Order was issued against Respondent to show cause why he should not be held in contempt because he had not prepared an Order from the December 11, 2017 hearing; he had not served Family Court Judge Jackson with the amended complaint pursuant to the Court's Order; and he failed to appear for a hearing scheduled for February 28, 2018.

During the hearing, the Court recalled that it had previously warned Respondent that it would impose a monetary sanction and outlined Respondent's similar conduct since January 1, 2018, in seven additional cases pending before the Court. [ODC Exhibit 17 at 908-958]

The Court ordered a transcript of the hearing to be prepared and forwarded to ODC. The Court sanctioned Respondent and ordered him to deposit the sum of \$5,000.00 with the Circuit Court of Harrison County, West Virginia, on or before April 6, 2018. [ODC Exhibit 17 at 953-954] Respondent did not pay the court ordered sanction, and instead, on or about April 6, 2018, Respondent filed a Motion to Rulings of the Court Announced during March 30, 2018 Hearing. Respondent requested that the directives of the Court announced during the March 30, 2018 hearing as directed to counsel for the plaintiff be amended, altered or held in abeyance for further consideration. It is noted that Respondent accused the Court of violating Rule 2.6 of the Rules of Lawyer Disciplinary Procedure during the March 30, 2018 hearing. [ODC Exhibit 17 at 960-963]

An ethics complaint was docketed and sent to Respondent via first class mail by letter dated June 28, 2018, requesting a verified response within twenty days of receipt of the complaint. [ODC Exhibit 18 at 966-967] After receiving no response, ODC sent a second letter via certified mail

dated July 24, 2018, requesting a verified response to the complaint by August 5, 2018. [ODC Exhibit 19 at 1034-1036]

In his August 6, 2018 verified response to the complaint, Respondent stated he represented his client, Mr. Rector, in several civil and domestic matters. Respondent asserted that he competently represented his client at all times. Respondent noted that he filed a duly served motion to alter the Court's ruling, and indicated the Court had taken no action on the motion. [ODC Exhibit 20 1104-1105 and 1108] Respondent asserted that the Court was beyond its authority to fine him the \$5,000.00. Respondent further noted that Judge Matish refused to schedule any hearings in the Rector matter until Respondent paid the sanctions. Respondent stated "it is the intention of the respondent to deposit said funds so that the matter may proceed to conclusion. The respondent will address this issue following the conclusion of the matter for Mr. Rector." [ODC Exhibit 20 at 1111]

On or about July 22, 2019, the Court provided a transcript of a hearing in the Rector matter held on June 27, 2019. [ODC Exhibit 21 at 1113-1126] Despite the Court's Order and his representation to ODC in his verified response, Respondent had not paid the \$5,000.00 sanction. [Admitted] Respondent requested a stay of the matter, which was denied. The Court further ordered Respondent to pay the \$5,000.00 sanction by the close of business and further ordered that failure to do so would result in a \$50.00 penalty for each business day for the following thirty days. The Court stated that should Respondent fail to pay the fine after thirty days, the final remaining count in the case against Family Court Judge Jackson would be dismissed with prejudice. The Court further expressed concern and dismay over Respondent's actions. [ODC Exhibit 21 at 1120-1121]

By letter dated July 25, 2019, ODC sent the transcript to Respondent and requested a verified response to the same within ten (10) days of receipt of the same. [ODC Exhibit 23 at 1141-1142] Respondent filed an additional response dated August 3, 2019, and stated that following the June 27, 2019 hearing, he filed a Motion to Alter/Amend Rulings of the Court Announced During June 27, 2019 Hearing; and Motion to Stay to Permit Filing of Petition for *Writ* of Prohibition. He noted the Court had taken no action on the motions. Respondent further stated he intended to file an appeal or writ of prohibition with the Supreme Court in the matter. Respondent further noted that this correspondence “will modify” his August 6, 2018 response [to ODC] as the \$5,000.00 was not paid to the Circuit Court. [ODC Exhibit 23 at 1141-1142]

On or about August 16, 2019, Judge Matish provided a copy of a transcript of a hearing held on August 14, 2019. During this hearing, Respondent advised that he had still not paid the \$5,000.00 fine. Judge Matish subsequently ordered that the fine, along with an additional \$1,500.00 representing the \$50.00 per day civil contempt penalty, be reduced to a judgment against Respondent. The Court made a judicial finding that the writ of prohibition filed by Respondent was frivolous. He further dismissed Count IV against Family Court Judge Jackson. Finally, the Court ordered attorney fees be assessed. [ODC Exhibit 24 at 1152-1153]

A Final Order was entered by the Court on or about October 16, 2019. [ODC Exhibit 25 at 1370-1374] On or about November 18, 2019, Respondent filed an appeal in this matter with the Supreme Court of Appeals of West Virginia. [ODC Exhibit 25 at 1362-1375] The Supreme Court issued a scheduling order and required the appeal to be perfected by February 18, 2020. Respondent filed the appeal brief with the Court on February 18, 2020. At the time of the evidentiary hearing, the matter was pending before the Supreme Court. [ODC Exhibit 25 at 1376-1377]

The Supreme Court issued an Opinion in this matter on June 10, 2021, which affirmed, in part, and reversed, in part and remanded the matter with directions. The Supreme Court's 3-2 Opinion reversed the monetary sanction finding that Respondent was entitled to a jury trial on the sanction because it was a contempt sanction and was not levied against Respondent pursuant to the Court's inherent authority to control its proceedings. The Court upheld the Circuit Court's decision which dismissed Respondent's *writ* of prohibition which sought to prevent the family court from proceeding in contempt against him. Rector v. Ross, 245 W.Va. 352, 859 S.E.2d 295 (2021).

Based on this Court's decision in Rector, the HPS found that the evidence was insufficient evidence of a repeated failure by Respondent to comply with Rule 1.1 and Rule 8.4(d) of the Rules of Professional Conduct. The HPS further found that there was insufficient evidence to conclude that the statements of Respondent to the Court at the June 27, 2019 hearing about why the contempt sanctions had not been paid to the Circuit Court of Harrison County, West Virginia were in violation of his duty of candor to the Court in violation of Rule 3.3(a)(1), Rule 8.4(c); and 8.4(d) of the Rules of Professional Conduct.

#### **4. Complaint of Jennifer D. Staud**

Ms. Staud retained Respondent to represent her in a civil matter regarding her company, JS, LLC, wherein the company was sued for breach of contract by Barilla Equipment Sales on or about May 2, 2014, in the Circuit Court of Marion County, West Virginia (Civil Action No. 14-C-135). Ms. Staud and her husband, through JS, LLC, had purchased restaurant equipment from Barilla Equipment in April of 2011. Complainant stated Barilla was given a check in the amount of \$29,500.00 on or about April 18, 2011. The balance of the agreement was not paid by the Stauds as the equipment was not timely ordered and the Stauds' restaurant was delayed by two months.

The equipment company sued the Stauds for breach of contract. Ms. Staud stated she retained Respondent to represent her in the suit and also to file a counterclaim on their behalf as she alleged the equipment was not delivered in working order. [ODC Exhibit 27 at 1408]

Ms. Staud testified that Respondent did not reduce the scope of his representation or the terms of his representation to writing. [Transcript at 159] Respondent filed a timely answer to the civil complaint, but failed to assert any related claims against Barilla. [ODC Exhibit 35 at 1944] Without seeking leave of the Court as required by the Rules of Civil Procedure, on or about November 25, 2014, Respondent filed a counter-claim against Barilla. [ODC Exhibit 35 at 1944] Ms. Staud believed that Respondent had filed an appropriate counter-claim per their discussions and his representations to her. [Transcript 162]

Ms. Staud stated in her complaint that an order was entered directing the parties to attend mediation. At the mediation, it was agreed that Ms. Staud would make certain payments to Barilla Equipment, and that they would in turn make certain repairs. Ms. Staud stated that Barilla did not make the repairs as agreed, and she did not make any further payments. The terms of the mediation were not reduced to writing. [ODC Exhibit 35 at 1979-1982] On or about April 8, 2016, a hearing was held on Barilla's motion to enforce the terms of the settlement. The Court entered an Order on April 19, 2016, denying the motion as the terms of the mediation were not timely reduced to writing and as the such the agreement was unenforceable. [ODC Exhibit 35 at 1979-1982]

On or about July 13, 2016, the Court issued a scheduling order for critical dates for discovery and trial. [ODC Exhibit 35 at 1983-1985] The Order further stated "[u]nless ordered by the Court, the above dates are final. No additional evidence as a result of deviations from the above will be admissible at trial." The Court again ordered the case to mediation by January 10, 2017. [ODC Exhibit 35 at 1985] Ms. Staud testified that she was not provided with a copy of the Order

and was not advised by Respondent of any of the relevant deadlines. [Transcript at 168] Despite the Court's scheduling order, Respondent failed to serve any written discovery request upon Barilla and failed to take any depositions during discovery as required by the July 2016 Order. [ODC Exhibit 35 at 1945] Respondent failed to seek leave of the Court to properly file the counterclaim and ensure the motion was heard in a timely manner as required by the July 2016 Order. [ODC Exhibit 35 at 1989]

Respondent failed to respond to Barilla's November 14, 2016 notice seeking the depositions of company representatives. Respondent failed to advise Ms. Staud that he refused to cooperate in the scheduling of her and/or her husband's depositions. [ODC Exhibit 35 at 1945] On or about November 15, 2016, counsel for Barilla filed a motion to strike Respondent's counterclaim for failure to comply with the July 2016 Order. [ODC Exhibit 27 at 1415] Respondent failed to respond to Barilla's November 23, 2016 interrogatories and requests for documents. [ODC Exhibit 27 at 1415]

Respondent failed to disclose fact witnesses and expert witnesses as required by the July 2016 Order. [ODC Exhibit 35 at 1990] Respondent failed to file any pretrial motions, failed to submit trial exhibits and failed to submit jury trial instructions as required by the July 2016 Order. [ODC Exhibit 27 at 1415-1420] On or about December 22, 2016, an offer of settlement was made to Respondent, but was not conveyed to Ms. Staud until such time the offer expired. [ODC Exhibit 27 at 1430] Ms. Staud testified that at no time did Respondent request any information from them or ask them to make themselves available for a deposition. [Transcript at 169-170]

On or about December 30, 2016, counsel for Barilla filed a motion with the Court seeking to exclude any witness testimony at the trial as Respondent had failed to comply with witness disclosures and discovery deadlines as set forth in the July 2016 Order. [ODC Exhibit 27 at 1423]



Ms. Staud testified that she was never provided with a copy of this motion or otherwise told that it had been filed with the Court. [Transcript at 171] Respondent failed to attend the February 10, 2017 docket call as set forth in the July 2016 Order. [ODC Exhibit 35 at 1947] Counsel for Barilla filed a February 23, 2017 motion in *limine* to preclude Respondent from calling witnesses or entering exhibits based upon his failure to comply with the Court's July 2016 Order. Respondent filed no objection in response to this motion. [ODC Exhibit 27 at 1417]

On or about March 8, 2017, counsel for Barilla made a motion for summary judgment arguing no genuine issue of material fact existed to warrant a trial. He argued that Respondent failed to respond to discovery requests filed on or about November 23, 2016, and as such, provided no evidence contradicting the allegations in the complaint. [ODC Exhibit 27 at 1431-1437] The case proceeded to trial as scheduled on March 22, 2017. [ODC Exhibit 27 at 1439-1441]

It was only at trial, did Ms. Staud learn that the counterclaim was dismissed because Respondent did not seek leave from the Court to file the same. [Transcript at 176] Respondent subsequently called Ms. Staud's husband to testify, despite his earlier agreement. Following his testimony, Ms. Staud was called to testify, but was not allowed to take the stand as an objection was sustained by the Court. She then learned that only one representative was permitted to testify because of Respondent's failure to comply with witness disclosures. [ODC Exhibit 27 at 1409] On March 23, 2017, the jury awarded a verdict in favor of Barilla and awarded damages in the amount of \$31,500.00. Judgment was entered against Ms. Staud on or about April 14, 2017. [ODC Exhibit 27 at 1439-1441] Ms. Staud testified that Respondent advised that he would file an appeal. [ODC Exhibit 27 at 1409] [Transcript at 178]

On or about April 24, 2017, Respondent filed a motion for judgment as a matter of law or in the alternative a motion for a new trial. [ODC Exhibit 35 at 1989-1991] By Order entered



October 19, 2017, the Court denied Respondent's motion for a new trial. [ODC Exhibit 35 at 1989-1991] Ms. Staud attempted to reach Respondent via telephone and text message regarding the status of the appeal, but he refused to return her telephone calls. [ODC Exhibit 27 at 1410] Ms. Staud testified that at this point "communication really broke down." [Transcript at 179] Ms. Staud testified that she only learned that the Court had denied Respondent's motion for a new trial because she ultimately went to the Clerk's office and asked for the docket sheet. [Transcript at 180]

Ms. Staud testified that she then learned that Respondent did not file an appeal of the decision and the appeal period had expired. [Transcript at 183] In January 2018, Respondent advised her that he elected not to file an appeal in the matter due to the expense of obtaining the trial transcripts. He advised her that he believed it was best to file a new lawsuit in the neighboring circuit so as to avoid the case going back before the same Circuit Court judge. [ODC Exhibit 27 at 1410] [Transcript at 181-182]

Ms. Staud filed an ethics complaint and the same was docketed and sent to Respondent via first class mail by letter dated August 31, 2018, requesting a verified response within twenty days of receipt of the complaint. [ODC Exhibit 28 at 1553-1554] After receiving no response, ODC sent a second letter via certified mail dated October 1, 2018, requesting a verified response to the complaint by October 22, 2018. [ODC Exhibit 29 at 1701-1702] With regard to the case with Barilla Equipment, Respondent stated that when he initially filed the counter claim, there had been no objection. He further stated the same was dismissed without prejudice, and Respondent advised Ms. Staud the best course of action would be to file a separate suit against Barilla, but Ms. Staud did not wish to proceed with the same. Respondent stated in his reply that "the Court refused to consider the motion of Barilla to exclude witnesses" so he believed Ms. Staud would be permitted

to testify, but did not believe her testimony would have made a difference at trial. [ODC Exhibit 30 at 1852]

Ms. Staud testified that she believed that Respondent lied to her to “cover up what he didn’t do.” She further testified that Respondent made excuses and “pointed fingers at the judge.” She stated that Respondent never apologized for his actions in her case. [Transcript at 186]

On or about October 10, 2019, the Stauds, by and through counsel, filed a legal malpractice case against Respondent in the Circuit Court of Marion County, West Virginia (Civil Action No. 19-C-201). [Admitted] [ODC Exhibit 35 at 1943-1957] The malpractice matter was still pending before the Court when the Statement of Charges was filed with the Supreme Court. [Admitted] The malpractice matter was still pending at the evidentiary hearing. [Transcript at 185] The malpractice action was settled by the parties on or about April 23, 2021, for Ninety Thousand Dollars, and the case was dismissed by the Court.

The HPS found that Respondent’s nonfeasance, his failure to advance Ms. Staud’s case as required by the rules of procedure governing civil matters, and failure to comply with the Court’s scheduling order and required deadlines was in violation of Rule 1.1 of the Rules of Professional Conduct. Respondent failed to diligently pursue Ms. Staud’s case in accordance with Ms. Staud’s stated objectives of the case and the same was in violation of Rule 1.2(a) and Rule 1.3 of the Rules of Professional Conduct. Respondent failed to respond to multiple requests for information from Ms. Staud and failed to maintain reasonable communication between himself and his client, which is necessary for the client to effectively participate in the representation, all in violation of Rule 1.4 of the Rules of Professional Conduct. Respondent failed to keep his client informed throughout the litigation, but also made affirmative false statements to his client about the status of the case

and actions he intended to take on his client's behalf in violation of Rule 8.4(c) and Rule 8.4(d) of the Rules of Professional Conduct.

Throughout the litigation, Respondent failed to expedite the litigation consistent with the client's stated objectives and instead engaged in dilatory practices which brought the administration of justice into disrepute in violation of Rule 3.2 of the Rules of Professional Conduct. Respondent failed to comply with multiple Court orders in this case despite having an obligation to follow the same in violation of Rule 3.4 of the Rules of Professional Conduct. Respondent failed to comply with and/or participate in discovery in Ms. Staud's case despite having an obligation to do so, in violation of Rule 3.4(d) of the Rules of Professional Conduct.

**5. Complaint of Ruth A. Dukich and Carol L. Shahan**

On or about August 15, 2016, a partition lawsuit was filed in Monongalia County, West Virginia, and named Ms. Dukich and Ms. Shahan as defendants. [ODC Exhibit 50 at 2501] [Transcript at 196] On or about October 18, 2016, retained Respondent to represent them in a property dispute with other family members regarding land they had all inherited from their grandparents. Ms. Dukich and Ms. Shahan paid Respondent Three Thousand Dollars (\$3,000.00) as an advance retainer to represent their interests in the case. [Admitted] [ODC Exhibit 42 at 2380-2382] Complainant Shahan testified that the property in question was her grandparents farm and she (and her two sisters, one of which was deceased) inherited her father's share of the 146 acres property. She testified that she and her family went there when she was a child for family dinners and family reunions. She testified that her son, who at the time of the hearing was 48 years old, hunted on the property since he was two years old with her now deceased father. [Transcript at 194-195]

Respondent filed a Notice of Appearance in the case on or about October 19, 2016. [ODC Exhibit 50 at 2542-2544] Complainant Shahan testified that in the beginning she felt like the communication with Respondent was okay, despite not knowing what to expect not having had an attorney before. [Transcript at 203] The Circuit Court set a scheduling conference/status conference in the partition suit for December 12, 2016. [ODC Exhibit 50 at 2501] Complainant Shahan testified they were advised by Respondent they did not need to appear for this status conference but, Complainant stated she opted to attend the hearing. [Transcript at 202-204]

Respondent did not attend the hearing. Instead, Respondent's associate, Attorney Theresa Post, appeared at the December 12, 2016, status conference. The Court noted at the December 12, 2016, status conference that Respondent had not filed an Answer or participated in discovery. [ODC Exhibit 50 at 2545-2548] Ms. Shahan testified that prior to that date she was not aware that Respondent had not filed an Answer or otherwise participate in the case. [Transcript at 205]

On or about December 27, 2016, the Court entered an Order directing Respondent to file an Answer and discovery responses within twenty (20) days of entry of the Order. [ODC Exhibit 50 at 2545-2548] However, Respondent did not file an Answer or otherwise participate in discovery as ordered by the Court. [ODC Exhibit 50 at 2549-2553] Respondent did not provide a copy of the Order to Ms. Dukich and Ms. Shahan, or otherwise advise his clients that no Answer had been filed on their behalf and that discovery responses had not been timely filed. [Admitted]

On or about January 23, 2017, the plaintiffs in the partition suit filed a Motion to Appoint Commissioners and Adopt Factual Matters. [ODC Exhibit 50 at 2549-2553] Respondent did not respond to the pleading filed by the plaintiffs. Respondent did not provide a copy of the Motion to Ms. Dukich and Ms. Shahan. [ODC Exhibit 50 at 2501-2503] Ms. Shahan testified that she did not

know about the motion. [Transcript at 208-209] By Order entered January 30, 2017, the Court entered an Order which granted the Plaintiffs' January 23, 2017 motion, and specifically ruled:

(13) In light of Defendants' failure to answer or otherwise respond to the First Discovery Requests for in excess of four (4) months, the Commissioners shall not accept, consider, or entertain any evidence of any kind or nature from Defendants with respect to the following or allow any appraiser, engineer, or surveyor engaged, hired or retained by Defendants to testify at the Commissioner Hearing:

- (a) That the interests of a defendant shall be injured or prejudiced by a sale of the Property.
- (b) That a defendant resides on the Property.
- (c) That a defendant has entered upon, used, and /or visited the Property during the previous thirty-six (36) calendar months.
- (d) The names, addresses or telephone numbers of any persons that any defendant knows or believes have entered upon, used, and/or visited the Property during the previous thirty-six (36) calendar months.
- (e) The name, address, or telephone number of any appraiser that any defendant has contacted, engaged, hired, and/or spoken with concerning the Property.
- (f) Any appraisal of the Property in any defendant's possession or control.
- (g) The name, address, or telephone number of any engineer or surveyor that any defendant has contacted, engaged, hired, and/or spoken with concerning the Property.
- (h) A photocopy of any map or plat of the Property in the defendant's possession or control.
- (i) Any cancelled check, receipt, or other document evidencing that any defendant has paid all or any part of any property taxes assessed on the Property during the previous ten (10) calendar years.
- (j) The names, addresses, or telephone numbers of any persons that any defendant has communicated with, contacted, and/or spoken with concerning financing the purchase of the Property or any interest in the Property.

[ODC Exhibit 50 at 2554-2560]

Respondent did not provide a copy of the January 30, 2017 Order to his clients or otherwise attempt to explain the Court's adverse ruling. [Admitted] Ms. Shahan testified that Respondent never advised her he had any concerns about the case, but repeatedly assured her he would "take

care of it” or that he would “handle it.” [Transcript at 212] By letter dated February 4, 2017, Ms. Dukich and Ms. Shahan requested a status update regarding their case. Respondent did not respond. [ODC Exhibit 42 at 2271]

On or about June 14, 2017, a Commissioner’s hearing was held and Respondent failed to argue or present any evidence. [ODC Exhibit 50 at 2502] Throughout this time, Ms. Dukich and Ms. Shahan continued to attempt to contact Respondent via telephone on multiple occasions regarding the status of their case, but were unsuccessful as Respondent failed to return telephone calls. [ODC Exhibit 42 at 2260] On or about June 22, 2018, the Partition Commissioners filed a Report of Findings of Fact and Recommendations of Partition Commissioners. [ODC Exhibit 50 at 2626-2641] Respondent did not provide a copy of the June 22, 2018 Report to his clients. [Admitted] On or about July 16, 2018, plaintiffs’ counsel in the partition suit filed a motion to confirm the Partition Commissioners Report. [ODC Exhibit 50 at 2662-2664]

On or about July 23, 2018, the Court entered an Order granting the plaintiffs’ motion to confirm the Report and recommendations of the Partition Commissioners. [ODC Exhibit 50 at 2682-2697] Respondent did not provide a copy of the July 23, 2018 Order to Ms. Dukich and Ms. Shahan. [Admitted] By Order entered August 21, 2018, the matter was dismissed from the Court’s docket. [ODC Exhibit 50 at 2698] Respondent did not provide a copy of the August 21, 2018 dismissal Order to Complainants. [Admitted]

On or about September 4, 2018, Ms. Dukich and Ms. Shahan attempted to pay the property taxes on the property to another family member who was an opposing party to the suit as they had done in the past. The family member advised that the suit had been settled and to stay off the property. The sisters again attempted to contact Respondent. He again did not return their call. As Respondent had not provided any of the motions or the final order, this was the first time that Ms.



Dukich and Ms. Shahan learned that an Order had been entered partitioning the interests and dividing the property. [ODC Exhibit 42 at 2556] [Transcript at 215]

Ms. Shahan was panicked and attempted to contact Respondent via text message. Respondent responded and via text on September 5, 2018, he stated he would “..look at it” and by text dated September 7, 2018, he stated he was “...working on it. I am in a deposition most of today. But, I am addressing it.” [ODC Exhibit 42 at 2261] Ms. Dukich and Ms. Shahan then sent Respondent a letter dated October 9, 2018, requesting a return call. Respondent did not reply. [ODC Exhibit 42 at 2264] The sisters sent a final letter dated October 28, 2018, and requested a copy of their client file. Respondent did not respond. [ODC Exhibit 42 at 2268]

Ms. Dukich and Ms. Shahan filed an ethics complaint and the same was docketed and sent to Respondent via first class mail by letter dated December 26, 2018, requesting a verified response within twenty days of receipt of the complaint. [ODC Exhibit 43 at 2272-2273] Complainant testified that she filed the complaint because “she didn’t understand why he did what he did” and hoped perhaps the situation involving the property could be corrected. [Transcript at 223] By letter dated January 3, 2019, Ms. Dukich and Ms. Shahan, by and through counsel, again requested a copy of the client file. Ms. Dukich and Ms. Shahan’ counsel also requested Respondent to notify his malpractice carrier. [Admitted] [ODC Exhibit 50 at 2712]

After receiving no response, ODC sent a second letter via certified mail dated January 25, 2019, requesting a verified response to the complaint by February 5, 2019. [ODC Exhibit 44 at 2292-2293] Respondent filed a response dated February 4, 2019, and stated that Ms. Dukich and Ms. Shahan were misleading in their statements to him regarding the use of the property in question. He further stated that Ms. Dukich and Ms. Shahan were minority owners of the property and they did not wish to purchase the interest of the majority owners, making their position

difficult. Respondent denied violating the Rules of Professional Conduct in his representation of the sisters. [ODC Exhibit 45 at 2313-2316]

On or about March 7, 2019, Ms. Dukich and Ms. Shahan, by and through counsel, filed a civil suit in the Circuit Court of Harrison County, West Virginia (Civil Action No. 19-C-63) against Respondent alleging legal malpractice in the partition suit. [ODC Exhibit 50 at 2700; 2704-2711] A settlement was reached in the malpractice matter for One Hundred and Fifty Thousand Dollars and the same has been dismissed. [Admitted]

Complainant Shahan testified that the attorney they met with and hired after Respondent finally explained what happened in the partition case. Complainant testified that despite the malpractice case proceeds, they were still unable to utilize the property because there in no right of way to access the property. She testified that she was very sad and depressed by her experience with Respondent. She testified that it was devastating to look into her kids faces and tell them what happened to their access to the family property. [Transcript at 227-230]

The HPS found that Respondent's nonfeasance, his failure to advance the sisters' case as required by the rules of procedure governing civil matters, and failure to comply with the Court's scheduling order and required deadlines was in violation of Rule 1.1 of the Rules of Professional Conduct. Respondent failed to diligently pursue their case in accordance with their stated objectives in violation of Rule 1.2(a) and 1.3 of the Rules of Professional Conduct. Respondent failed to respond to multiple requests for information from his clients and failed to maintain reasonable communication between himself and his clients, which is necessary for the client to effectively participate in the representation, all in violation of Rule 1.4 of the Rules of Professional Conduct.



Throughout the litigation, Respondent failed to expedite the litigation consistent with his clients' stated objectives and instead engaged in dilatory practices which brought the administration of justice into disrepute in violation of Rule 3.2 of the Rules of Professional Conduct. [Admitted] The procedure of the adversary system contemplates that evidence in a case is to be marshalled competitively by the parties, typically through the use of discovery and compliance with Court ordered deadlines for disclosure. Respondent failed to comply with and/or participate in discovery and also failed to comply with multiple court orders in the case despite having an obligation to follow the same in violation of Rule 3.4 of the Rules of Professional Conduct. [Admitted] Respondent not only failed to keep his clients informed throughout the litigation, but also made affirmative false statements to his clients about the status of the case and actions he intended to take on his clients' behalf in violation of Rule 8.4(c) and Rule 8.4(d) of the Rules of Professional Conduct.

The HPS also found that Respondent failed to timely return the client file at the termination of the representation despite their requests, in violation of Rule 1.16(d) of the Rules of Professional Conduct. Finally, the HPS found that Respondent accepted an advance retainer fee and agreed to perform certain legal services, but failed to complete the same, and subsequently failed to return the unearned fee and/or provide an accounting of the advance retainer in violation of Rules 1.5, 1.15(d), 1.16(d), and 8.4(c) of the Rules of Professional Conduct.

## **6. Complaint of Jean C. Cogar**

In or about September 2018, Ms. Cogar retained Respondent regarding a real estate matter and paid him a \$3,500.00 retainer fee. [ODC Exhibit 36 at 2209] The agreement to provide legal services was not reduced to writing. [Transcript at 257-258] On or about December 11, 2018, Ms. Cogar, at the direction of Respondent, had a survey performed on the property by Green

Engineering. [ODC Exhibit 36 at 2209] Ms. Cogar testified that she was surprised to learn that Green Engineering billed her \$2,775.00 directly for the report. Ms. Cogar stated she paid Green Engineering \$500.00 for the survey as she contacted another surveyor to determine the amount the report would cost. [Transcript at 262; 264] Ms. Cogar provided a copy of the report to Respondent. [Transcript at 265]

On or about January 8, 2019, after several attempts to set an appointment to review the report with Respondent, he replied and stated that he would contact her the following week to arrange for a follow up. [ODC Exhibit 36 at 2209] Ms. Cogar stated in her complaint that at this time she was under the impression that he had filed suit against the adjacent property owners and Ash Industries. Ms. Cogar stated she was concerned about the statute of limitations, but Respondent assured her that there was nothing to be worried about. [ODC Exhibit 36 at 2209]

Over the next several months, Ms. Cogar testified that she and/or her assistant contacted Respondent's law office on several occasions requesting an update regarding the status of the case. However, Respondent was not responsive to these repeated requests for information. [Transcript at 266-267] On or about April 12, 2019, Ms. Cogar contacted the Clerk's Office and learned that Respondent had not filed any civil suit on her behalf. Ms. Cogar testified that she called the Clerk because she had not heard anything responsive from Respondent's office despite multiple requests. [ODC Exhibit 36 at 2210] [Transcript at 265]

On or about April 17, 2019, Ms. Cogar sent Respondent a letter terminating his services. She requested her retainer fee, itemized statement of services, and her file to be returned. Respondent then contacted Ms. Cogar and set up a meeting with her and her assistant. [ODC Exhibit 36 at 2209-2210] [Admitted] When Ms. Cogar met with Respondent, she stated that he began asking the same questions about the case as he had in the initial meeting. Respondent

promised Ms. Cogar that he would file suit on her behalf the following Monday, April 29, 2019. [ODC Exhibit 36 at 2206]

However, on May 1, 2019, Respondent again requested to meet with Ms. Cogar and once again promised to file suit this time no later than May 6, 2019. [ODC Exhibit 36 at 2212] Ms. Cogar's assistant attempted to confirm that the case had been filed by telephone call to Respondent's office on or about May 8, 2019, but Respondent did not return the call. [ODC Exhibit 36 at 2213] On or about May 10, 2019, Ms. Cogar went to the Clerk's office and confirmed that no civil action had been filed on her behalf. [ODC Exhibit 36 at 2213] [Transcript at 270] After Respondent failed to file suit and on or about May 11, 2019, she sent him another letter requesting her file and the return of retainer fee. Ms. Cogar's assistant further called his office and was able to speak with Respondent. He agreed to mail Ms. Cogar's file, however, Respondent did not return the file and did not respond to any further communications. [ODC Exhibit 36 at 2212-2214]

Ms. Cogar filed an ethics complaint and the same was docketed and sent to Respondent via first class mail by letter dated June 26, 2019, requesting a verified response within twenty days of receipt of the complaint. [ODC Exhibit 37 at 2215-2216] After receiving no response, ODC sent a second letter via certified mail dated July 25, 2019, requesting a verified response to the complaint by August 7, 2019. [ODC Exhibit 38 at 2227-2228] In his August 3, 2019 response, Respondent denied violating the Rules of Professional Conduct. He stated that he met with Ms. Cogar and her assistant and conducted research regarding the matter. He further arranged for a civil engineer to determine the cause of the water issue in Ms. Cogar's home and to determine the cost of the repair prior to filing suit. Respondent said he subsequently met with Ms. Cogar, who stated she could no longer pay his hourly fee and he agreed to do future work on a contingency basis. Respondent said that prior to a new fee agreement being drafted, Ms. Cogar terminated his

services. Respondent stated he returned her file on or about June 17, 2019. [ODC Exhibit 39 at 2240-2245]

At the evidentiary hearing, Ms. Cogar testified that at no time did Respondent tell her that he could no longer pursue her case. Ms. Cogar testified that Respondent misrepresented to her that he could pursue her case and that she wished he would have told her that “I can’t do this now, find another lawyer.” [Transcript at 275-276] Ms. Cogar also testified that despite repeated requests for the return of certain thumb drives and financial records with sensitive, confidential information that she provided to Respondent, he has failed to return the same. [Transcript at 290-292]

The HPS found that Respondent failed to diligently pursue Ms. Cogar’s case in accordance with the client’s stated objectives of the case in violation of Rule 1.2(a) and Rule 1.3 of the Rules of Professional Conduct. Respondent failed to respond to multiple requests for information from the client and failed to maintain any reasonable communication between the lawyer and the client which is necessary for the client to effectively participate in the representation, all in violation of Rule 1.4 of the Rules of Professional Conduct. Respondent failed to keep his client informed and also made affirmative false statements to his client about the status of the case and actions he intended to take on his client’s behalf in violation of Rule 8.4(c) and Rule 8.4(d) of the Rules of Professional Conduct.

The HPS found that Respondent failed to reduce the scope and basis or rate of pay of the representation to writing in violation of Rule 1.5(b) of the Rules of Professional Conduct. Respondent also accepted an advance retainer fee and agreed to perform certain legal services on behalf of Ms. Cogar, but failed to complete the same in violation of Rule 1.5(b) of the Rules of Professional Conduct. Respondent then subsequently failed to return the unearned fee and/or provide an accounting of the advance retainer, in violation of Rules 1.5, 1.15(d), 1.16(d), and 8.4(c)

of the Rules of Professional Conduct. Finally, Respondent's failure to timely return the client file at the termination of the representation despite Ms. Cogar's request violated violation of Rule 1.16(d) of the Rules of Professional Conduct.

## **7. Complaint of James P. Moyle**

Mr. Moyle retained Respondent on or about February 2, 2016, to represent him in a civil action, an employment matter, involving Patton Building Services, Inc., Steve Davis, and Joe Neville. The parties signed a contingency agreement dated February 2, 2016. [Admitted] [ODC Exhibit 51 at 2910 and ODC Exhibit 55 at 3376-3379] On or about April 15, 2016, Respondent filed a civil action on Mr. Moyle's behalf in the Circuit Court of Harrison County, West Virginia (Civil Action No. 16-C-141-3). [ODC Exhibit 55 at 3376-3379] On or about August 23, 2016, the case was transferred to the Circuit Court of Monongalia County, West Virginia (Civil Action No. 16-C-444). [ODC Exhibit 55, Exhibit Log for 16-C-444] On or about January 30, 2017, the Court entered a scheduling Order. [ODC Exhibit 55 at 3461-3464]

Despite the January 30, 2017 Order, Respondent failed to timely disclose any fact witnesses on or before February 28, 2017. [ODC Exhibit 55, Exhibit Log for 16-C-444] Despite the January 30, 2017 Order, Respondent failed to timely disclose any expert witnesses on or about May 5, 2017. [ODC Exhibit 55, Exhibit Log for 16-C-444]

On or about May 8, 2017, the defendants, by and through counsel, served discovery requests on Respondent. [ODC Exhibit 55, Exhibit Log for 16-C-444, entry no. 23-24] On or about May 9, 2017, the defendants, by and through counsel, sent Respondent a request for signed authorizations for medical and employment related records, and requested Mr. Moyle's deposition. [ODC Exhibit 55 at 3534-3541] Respondent did not inform Mr. Moyle of either the May 8<sup>th</sup> or May 9<sup>th</sup> requests from defense counsel. Respondent failed to file a responsive pleading to the May

8, 2017 request for discovery, and failed to otherwise request an extension of time to respond to the same. [ODC Exhibit 55, Exhibit Log for 16-C-444]

On or about July 5, 2017, defense counsel called Respondent's law office and left a telephone message and on the same date sent an e-mail both inquiring about the lack of response to the previously filed discovery requests for information. [ODC Exhibit 55 at 3542] Respondent did not respond to either of the July 5<sup>th</sup> attempts to communicate with defense counsel.

On or about August 2, 2017, defense counsel again telephoned Respondent's law office and left a message about the lack of response to the previously filed discovery requests. [ODC Exhibit 55 at 3514] On the same date, defense counsel e-mailed Respondent a copy of a letter that was also faxed to Respondent's law office and sent via United States Mail to Respondent's law office inquiring about the lack of response to the previously filed discovery requests. The letter set forth the deadlines for discovery as ordered by the Court in the January 2017 Order and expressed defense counsel's belief that Respondent failed to comply with any of the disclosure deadlines. [ODC Exhibit 55 at 3543-3545]

Respondent did not respond to any of the August 2, 2017, attempts to communicate with defense counsel. On or about August 7, 2017, defense counsel filed a motion for sanctions, or in the alternative a motion to compel the discovery and continue the trial. [ODC Exhibit 55 at 3513-3519] Respondent did not inform or otherwise provide Mr. Moyle with the motion for sanctions. [Admitted] Respondent failed to file a responsive pleading to the motion for sanctions, and failed to otherwise request an extension of time to respond to the same. [ODC Exhibit 55, Exhibit Log for 16-C-444] Pursuant to the January 2017 scheduling Order, Mr. Moyle was to attend an August 28, 2017 pre-trial conference, however, Respondent failed to advise Mr. Moyle of the same. Mr. Moyle did not appear. [ODC Exhibit 55 at 3546-3549]



Respondent appeared at the August 28, 2017 pre-trial conference and hearing on defense counsel's motion for sanctions. [ODC Exhibit 55 at 3675-3680] By Order entered September 5, 2017, as Respondent admitted that he failed to participate in discovery, or otherwise advance the case on Mr. Moyle's behalf, the Court dismissed the case for failure to prosecute. [ODC Exhibit 55 at 3675-3680] Respondent did not inform Mr. Moyle of the Court's dismissal order and did not send a copy of the dismissal order to Mr. Moyle. [Admitted]

Mr. Moyle stated from the outset of the representation that Respondent advised Mr. Moyle he had a "solid" case. Mr. Moyle stated he heard nothing else from Respondent. He said he attempted to contact Respondent on numerous occasions and never received a response. In or about March 2019, Mr. Moyle contacted another attorney and he learned for the first time the case had been dismissed. [ODC Exhibit 51 at 2909-2909B]

Mr. Moyle filed an ethics complaint and the same was docketed and sent to Respondent via first class mail by letter dated June 26, 2019, requesting a verified response within twenty days of receipt of the complaint. [ODC Exhibit 52 at 2912-2913] After receiving no response, ODC sent a second letter via certified mail dated July 25, 2019, requesting a verified response to the complaint by August 7, 2019. [ODC Exhibit 53 at 2917-2918] On August 1, 2019, Mr. Moyle, by and through counsel, filed a civil complaint in the Circuit Court of Harrison County, West Virginia, (Civil Action No. 19-C-205) alleging malpractice. [ODC Exhibit 55 at 2944-2952]

Respondent filed an August 3, 2019 response and stated he filed Mr. Moyle's case on April 16, 2015. The case was ultimately transferred to the Circuit Court of Monongalia County, West Virginia. Respondent stated that Mr. Moyle had been kept informed about the case and the case became too difficult to litigate because of issues related to deliberate intent. Respondent stated that Mr. Moyle had made a claim against him and the same had been forwarded to his carrier.



Respondent further denied any violations of the Rules of Professional Conduct. [ODC Exhibit 54 at 2922-2926] By Order entered February 14, 2020, the Court entered an Order dismissing the malpractice claim with prejudice and stated that all matters in controversy had been settled by the parties. ODC Exhibit 55 at 3371-3372]

The HPS found that Respondent's nonfeasance, his failure to advance Mr. Moyle's case as required by the rules of procedure governing civil matters, and failure to comply with the Court's scheduling order and required deadlines were in violation of Rule 1.1 of the Rules of Professional Conduct. Respondent failed to diligently pursue the Mr. Moyle's case in accordance with his stated objectives of the case and the same is in violation of Rule 1.2(a) and Rule 1.3 of the Rules of Professional Conduct. Respondent failed to respond to multiple requests for information from Mr. Moyle and failed to maintain reasonable communication between himself and his client, which is necessary for the client to effectively participate in the representation, all in violation of Rule 1.4 of the Rules of Professional Conduct. Throughout the litigation, Respondent failed to expedite the litigation consistent with Mr. Moyle's stated objectives and instead engaged in dilatory practices which brought the administration of justice into disrepute in violation of Rule 3.2 of the Rules of Professional Conduct. Respondent failed to comply with and/or participate in discovery and failed to comply with multiple court orders despite having an obligation to do so, all in violation of Rule 3.4 of the Rules of Professional Conduct.

## **II. SUMMARY OF ARGUMENT**

The HPS found that the evidence established by clear and convincing evidence that Respondent, an attorney with substantial experience, committed fifty-three violations of the Rules of Professional Conduct. Respondent knowingly violated his duties to his clients, the legal system, and the legal profession, and his actions caused significant injury to his clients, the legal system,

and the legal profession and the suspension of his license to practice law is warranted. When this Court weighs the nature of the misconduct, the cumulative weight of the violations, and the harm flowing from the conduct and the aggravating and mitigating factors, it is evident that a term of suspension best serves the stated goals of the disciplinary system.

### **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to Rule 19 of the Rules of Appellate Procedure, this Honorable Court's Order set this matter for oral argument to take place during the September 2022 Term of Court.

### **IV. ARGUMENT**

#### **A. STANDARD OF PROOF**

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. Roark v. Lawyer Disciplinary Board, 207 W. Va. 181, 495 S.E.2d 552 (1997); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994). The Supreme Court of Appeals 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. 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. McCorkle, *Id.*; Lawyer Disciplinary Board v. Cunningham, 195 W. Va. 27, 464 S.E.2d 181 (1995).

The Supreme Court of Appeals is the final arbiter of formal legal ethic charges and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys'

licenses to practice law. Syl. Pt. 3, Committee on Legal Ethics v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984); Syl. Pt. 7, Committee on Legal Ethics v. Karl, 192 W.Va. 23, 449 S.E.2d 277 (1994).

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

Rule 3.16 of the Rules of Lawyer Disciplinary Procedure states when imposing sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court or 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.

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

In determining the nature of the ethical duty violated, the standards assume that the most important ethical duties are those obligations which a lawyer owes to clients. In addition to duties owed to clients, the lawyer also owes duties to the general public. Members of the public are entitled to expect lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty or interference with the administration of justice.

Lawyers also owe duties to the legal system. Lawyers are officers of the court, and must abide by the rules of substance and procedure which shape the administration of justice. Lawyers must always operate within the bounds of the law, and cannot engage in any other illegal or improper conduct. Finally, lawyers owe duties to the legal profession. Unlike the obligations mentioned above, these duties are not inherent in the relationship between the lawyer and the community. These duties do not concern the lawyer's basic responsibilities in representing clients,

serving as an officer of the court, or maintaining the public trust, but include other duties relating to the profession.

Respondent's pattern and course of misconduct breached his duties to his clients, the legal system, and to the profession.

## **2. Respondent acted knowingly, not negligently.**

The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his conduct, both without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. ABA Model Standards for Imposing Lawyer Sanctions, Definitions (1992).

The HPS erred in its conclusion that Respondent acted negligently, as there is no evidence to establish that he failed to understand or appreciate the risk associated with his conduct. The HPS conflates the existence of his mental health issue with whether the repeated conduct was intentional or knowing. There was no evidence to establish that Respondent's mental health impacted his cognitive state that would cause a failure to understand the resultant effect of his inactions. Indeed, at best, Respondent's conduct was knowing and when the conduct is knowing the presumptive sanction for this course of repeated misconduct is suspension.

## **3. The amount of actual or potential injury caused by the lawyer's misconduct.**

Injury is harm to a client, the public, the legal system, or the legal profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no"

injury. A reference to “injury” alone indicates any level of injury greater than “little or no” injury. “Potential injury” is the harm to a client, the public, the legal system or legal profession that is reasonably foreseeable at the time of the lawyer’s misconduct and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct. ABA Model Standards for Imposing Lawyer Sanctions, Definitions (1992).

The same misconduct can result in a finding of actual and potential harm. As evidenced by the testimony of Respondent’s clients, Respondent’s conduct caused real, significant financial damage, but also caused his clients significant anxiety, worry and aggravation. Additionally, Respondent’s misconduct caused tremendous damage to the legal system and to the reputation of the legal profession as his actions have shaken his clients’ faith in lawyers and the legal system.

With due respect to the HPS, there is absolutely no dispute that Respondent’s conduct caused serious injury to each of the affected clients. There is absolutely no dispute that Respondent’s course of conduct caused serious injury to the legal system as his inactions in cases caused the system to issue order after order to compel Respondent to participate in the most basic manner. Ultimately, the Courts were forced to dismiss his client’s cases, not on the merits, but because of Respondent’s refusal to engage in the practice of law. The HPS conflates the existence of mitigating factors with the evaluation of whether serious injury occurred as a result of Respondent’s conduct.

#### **4. Mitigating Factors.**

A significant part of determining the appropriate sanction in a disciplinary matter, is the examination of the existence of the factors that *may* mitigate or *may* aggravate any sanction recommended by this HPS, and ultimately imposed by the Supreme Court of Appeals. The Scott Court adopted mitigating factors in disciplinary proceedings and stated that mitigating factors “are

any considerations or factors that may justify a reduction in the degree of discipline to be imposed.” Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E.2d 550, 557 (2003) *quoting* *ABA Model Standards for Imposing Lawyer Sanctions*, 9.31 (1992).<sup>1</sup> It should be clear that mitigating factors were not envisioned to insulate a violating lawyer from discipline.

The mitigating factors present in this case are Respondent’s mental health issues and his treatment of the same and the remedial measures Respondent put in place in his law practice. In a lawyer disciplinary proceeding, a mental disability is considered mitigating when: (1) there is medical evidence that the attorney is affected by a mental disability; (2) the mental disability caused the misconduct; (3) the attorney’s recovery from the mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely. Lawyer Disciplinary Board v. Dues, 218 W. Va. 104, 105, 624 S.E.2d 125, 126 (2005).

United States Magistrate for Northern District of West Virginia Judge Michael Aloï<sup>2</sup> testified he received a call from Robert Albury, Executive Director of WV JLAP, expressing concerns about Respondent. Judge Aloï testified that, upon receiving the call, because of his relationship with Respondent, he offered to meet with Respondent in his capacity as a volunteer

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<sup>1</sup> The Scott Court held that mitigating factors which may be considered in determining the appropriate sanction to be imposed against a lawyer for violating the Rules of Professional Conduct include: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses.

<sup>2</sup> Pursuant to the Code of Judicial Conduct, a subpoena was issued for Judge Aloï’s appearance.



for JLAP.<sup>3</sup> Judge Aloï called Respondent in or about February or March of 2018 and invited him to come and talk with him in his capacity as a JLAP member. Judge Aloï testified that when they initially met he observed that Respondent was “carrying sort of the weight of the world on a number of levels.” Judge Aloï testified that Respondent had expressed remorse about his misconduct and stated that Respondent acknowledged to him that dealing with these issues has been a good thing because it got his attention. Judge Aloï testified that he believed that Respondent has identified the issues, has gotten the help he needs, and has a commitment to continue in the right direction. [Transcript Day 2 at 6-44]

Respondent’s treating therapist, Robert K. Edmundson, and his primary physician, Dr. Kelly Nelson, testified at the evidentiary hearing about Respondent’s mental and physical health and his treatment for various maladies. [Respondent Exhibit 4] Robert Edmundson started seeing Respondent as counseling patient on or about July 23, 2018, and he has seen him continuously. [Respondent Exhibit 3] Edmundson diagnosed Respondent with an adjustment disorder with features of depression and anxiety. Adjustment disorder is a stress-related mental condition<sup>4</sup> Edmundson testified that Respondent’s condition was marked with unresolved grief and depression, coupled with chronic pain caused by a worsening physical condition. Edmundson

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<sup>3</sup> Respondent waived privilege and confidentiality to allow Judge Aloï to testify about his interactions with Respondent as a JLAP volunteer.

<sup>4</sup> The Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5) defines Adjustment Disorder as the presence of emotional or behavioral symptoms in response to an identifiable stressor/s, which occurred within three months of the beginning of the stressor/s. In addition, one or both of the following criteria must exist: 1. distress that’s out of proportion with the expected reactions to the stressor; and/or 2. symptoms must be clinically significant and cause severe distress and impairment in functioning. In addition, the following criteria must be present: 1. the distress and impairment are related to the stressor and not because of an intensification of existing mental health disorders. 2. the reaction isn’t part of normal bereavement; and 3. when the stressor is removed or the individual has begun to adjust and cope, the symptoms subside within six months.



testified that he works with Respondent to develop coping mechanisms for stressors in his life and his law practice. It was his testimony that Respondent's inability to deal with stressors caused him to become cynical, irritable, emotionally detached, and he "developed the capacity to avoid and became less productive." Edmundson opined that through therapy Respondent has gained more of a sense of awareness of the impact that stress has on his life and his law practice and that he has made and is making necessary adjustments. Edmundson testified that Respondent's prognosis was "very, very good." [Transcript Day 2 at 106-165]

Dr. Kelly Nelson, Respondent's friend and doctor, testified about Respondent's chronic pain condition that he treats primarily by way of prescription pain medication, specifically hydrocodone. Dr. Nelson stated that he checks with the Board of Pharmacy database and Respondent is not getting the prescription from anyone else, and he gets it "very rarely." Dr. Nelson also testified that Respondent's behavior noticeably changed from 2015-2017 and he noted in their social interactions he noticed that Respondent was distant, and wasn't the same "social, interactive, joyful Greg." Dr. Nelson opined that, at that time, Respondent was suffering from adjustment disorder and likely depression. Dr. Nelson testified that as a result of these concerns, he prescribed an anti-depressant that Respondent ultimately stopped taking because he did not tolerate it well. Dr. Nelson testified that Respondent began seeing a therapist and that his work has made a significant difference in Respondent. [Transcript Day 2 at 166-184]

The evidence establishes that Respondent has a mental condition that, when untreated, could impair and/or impact his ability to practice law. The HPS determined that the condition was a substantial cause of the misconduct. However, the evidence fails to establish it is the sole cause

of the misconduct, but it is more likely a contributing cause and should be given the appropriate weight. In the commentary for Rule 9.32, the ABA has suggested the following weight categories:

If the offense is proven to be attributable solely to a [mental] disability ..., it should be given the *greatest weight*. If it is principally responsible for the offense, it should be given *very great weight*; and if it is a substantial contributing cause of the offense, it should be given *great weight*. In all other cases in which the [mental] disability ... is considered as mitigating, it should be given *little weight*.

ABA/BNA Lawyers' Manual on Professional Conduct, at 01:840 (2005) Lawyer Disciplinary Board v. Dues, 218 W. Va. 104, 112, 624 S.E.2d 125, 133 (2005). As such, based on the HPS determination that it was a "substantial cause" it should be given "great weight." Respondent's treating therapist indicated that if Respondent continued with his course of treatment that his prognosis was good and, as such, the recurrence of the pattern of misconduct attributable to his impairment would be unlikely.

Additionally, in or about May of 2019, Respondent retained the services of Carl Hadsell who is a consultant for the Center for Entrepreneurial Studies and Development. Mr. Hadsell testified that after he was retained, he worked with Respondent and his office staff to improve the operation of his law practice. Mr. Hadsell testified that he worked with Respondent on incorporating the better use of technology, time management, scheduling and meeting deadlines, the appropriate delegation of tasks, client selection, and other areas of law office management. Mr. Hadsell testified that while Respondent is somewhat resistant, Respondent has implemented many of his suggestions into his practice and he agreed that there have been improvements to the operation and function of his law practice. [Hearing Transcript Day 2 at 44-102]

## 5. Aggravating Factors.

Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Court to examine when considering the imposition of sanctions. Elaborating on this rule, the Scott Court held “that aggravating factors in a lawyer disciplinary proceeding ‘are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.’” Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E. 2d 550, 557 (2003) *quoting* ABA Model Standards for Imposing Lawyer Sanctions, 9.21 (1992). Pursuant to the Standards for Imposing Lawyer Sanctions, there are several factors which aggravate the sanction to be imposed, including: 1. prior disciplinary offenses (2015 Investigative Panel Admonishment); 2. selfish motive in making false or misleading statements made to clients for self-protection; 3. a pattern of misconduct; 4. multiple offenses; and 5. substantial experience in the practice of law.

## V. SANCTION

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

In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective

deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.

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

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

The American Bar Association has recognized that suspension is generally appropriate when (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or (b) a lawyer engages in a pattern of neglect causes injury or potential injury to a client; and when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. *See ABA Standards for Imposing Lawyer Sanctions*, 4.42. Additionally, the ABA has recognized that suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury. *See ABA Standards for Imposing Lawyer Sanctions*, 4.62. Finally, the ABA has recognized that suspension is generally appropriate when a lawyer knows he is violating a court order or rule and causes injury or potential injury to a client or causes interference with a legal proceeding. *See ABA Standards for Imposing Lawyer Sanctions*, 6.22.

The purpose of lawyer discipline is to protect the public and the administration of justice from lawyers who do not properly discharge their professional duties to clients, the legal system,

and the legal profession. Discipline is imposed not to punish, but to safeguard the administration of justice, protect the public, the courts, the profession, and deter future misconduct. This Court must weigh the nature of the conduct, the cumulative weight of the violations, and the harm flowing from the conduct and the aggravating and mitigating factors and then determine what discipline serves the public's interest.

This Court strives for consistency and, as such, while each case is decided on its own merits and factors, it relies on prior decisions to arrive at an appropriate sanction. “There is no “magic formula” for this Court to determine how to weigh the host of mitigating and aggravating circumstances to arrive at an appropriate sanction; each case presents different circumstances that must be weighed against the nature and gravity of the lawyer’s misconduct.” Lawyer Disciplinary Board v. Sirk, 240 W. Va. 274, 282, 810 S.E.2d 276, 284 (2018). Cases in West Virginia concerning such misconduct have resulted in the suspension of an attorney’s license to practice law. See Lawyer Disciplinary Board v. Morgan, 228 W.Va. 114, 717 S.E.2d 898 (2011) (one year suspension for violation of Rules 1.3, 1.4, 8.1(b), 8.4(d), and other violations); Lawyer Disciplinary Board v. Aleshire, 230 W. Va. 70, 736 S.E.2d 70 (2012) (three year suspension for violations of 1.2; 1.3; 1.4; 1.5; 8.1(b); 8.4(b); 8.4(c) and 8.4(d)); Lawyer Disciplinary Board v. Phalen, No. 11-1746 (W.Va. 11/14/12) (*unreported*) (one year suspension for violation of Rules 1.3, 1.4, and other violations); Lawyer Disciplinary Board v. Sullivan, 230 W.Va. 460, 740 S.E.2d 55 (2013) (suspension for thirty days and two years supervised practice for violation of Rules 1.3, 1.4, and another violation); Lawyer Disciplinary Board v. Rossi, 234 W.Va. 675, 769 S.E.2d 464 (2015) (three year suspension for violation of Rules 1.3, 1.4, 8.1(b) and 8.4(d) and other violations); Lawyer Disciplinary Board v. Hart, 235 W. Va. 523, 775 S.E.2d 75 (2015) (three year suspension for a pattern of violations of Rule 1.3; 1.4; 1.5; and 1.15); Lawyer Disciplinary Board

v. Sturm, 237 W.Va. 115, 785 S.E.2d 821 (2016) (suspension for ninety days and two years supervised practice for violation of Rules 1.3, 1.4, 8.1(b), 8.4(d), and other violations); Lawyer Disciplinary Board v. Palmer, 238 W.Va. 688, 798 S.E.2d 610 (2017) (suspension for thirty days and six months probation and supervised practice for violation of Rules 1.3, 1.4, 3.2, and 8.4(d)); and Lawyer Disciplinary Board v. Davis, No. 18-0640 (W.Va. 6/10/19) (*unreported*) (suspension for thirty days, additional CLE hours, and two years of probation with supervised practice for Rule 1.4 and 8.1(b)).

Suspension should be imposed when a lawyer such as Respondent knowingly fails to perform services for which he was retained and engaged in a pattern of neglect which results in harm to clients. Suspension should be imposed when lawyers such as Respondent fail to advance cases as required by the rules of procedure governing civil matters, fail to comply with the Court's scheduling orders, and instead engage in dilatory practices which bring the administration of justice into disrepute and further burden the Court system. Indeed, lawyers, like Respondent, who not only neglect client matters causing stress and anxiety to the clients, but also mislead those clients or otherwise fail to keep them informed about the status of their cases should face longer periods of suspension. Respondent knowingly violated his duties to his clients, the legal system, and the legal profession, and his actions caused significant injury to his clients, the legal system, and the legal profession and the suspension of his license to practice law is warranted.

For the public to have confidence in our disciplinary and legal systems, we must hold ourselves accountable. The Sirk Court noted:

that an important factor that weighs heavily in our decision is our duty to maintain the integrity of the State Bar. In other words, "[u]nless we keep clean our own house ... we cannot expect the public to have confidence in ... our system of justice." In re Goldman, 179 Mont. 526, 588 P.2d 964, 985 (1978) (Harrison, J., dissenting)). "Society allows the legal profession the privilege of self-regulation. Thus, it is of

the utmost importance that the public have confidence in the profession's ability to discipline itself—lest the privilege be withdrawn.” Disciplinary Matter Involving Buckalew, 731 P.2d 48, 55 (Alaska 1986).

Lawyer Disciplinary Board v. Sirk, 240 W. Va. 274, 283, 810 S.E.2d 276, 285 (2018).

The HPS while recognizing the severity of Respondent's course of conduct and its impact on his clients and the Courts, reasoned that there would be “little utility” in suspending Respondent's license. However, while demonstrating compassion to Respondent, the HPS recommendation that Respondent, an experienced lawyer who committed fifty-three violations of the Rules of Professional Conduct, be placed on probation falls woefully short of the stated goals of the disciplinary system. Respondent's defiance of Court rules and Court orders in the cases at bar, not only resulted in harm to his clients but caused substantial disruption in our Courts. Such open and repeated defiance of the courts' authority, if allowed in our legal system, would destroy it. Our failure to hold ourselves accountable for acts and/or omissions which causes harm to our clients and the legal system, not only fails to protect the public and restore public confidence in the Bar, it does nothing to encourage our fellow bar members to seek help at the earliest possible moment for conditions that may cause impairment.

For the reasons set forth above, the ODC recommends the following sanctions:

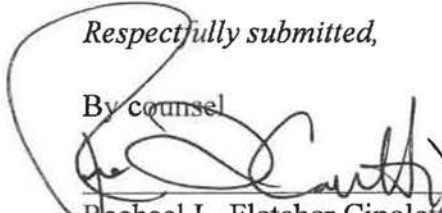
- A. That Respondent's law license be suspended for a period of two (2) years;
- B. That Respondent must comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure;
- C. That Respondent should continue in the therapy regimen per his therapist, and prior to petitioning for reinstatement Respondent should undergo an independent psychological evaluation to determine his compliance with his therapy regimen and to determine if he is otherwise fit to return to the practice of law;



- D. That because the pattern of misconduct is based in some part to Respondent's law office management, prior to petitioning for reinstatement, Respondent should undergo an audit of his law office to determine if he is compliant with the prior directives of the retained office consultant, and be ordered to implement any and all additional necessary changes in his law office management procedures to ensure that the pattern of misconduct is less likely to occur;
- E. That, if reinstated, Respondent be ordered to maintain professional liability insurance in the amount of One Million Dollars (\$1,000,000.00) per claim and in the aggregate and provide proof of the same upon request of the Office of Disciplinary Counsel; and
- F. 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,*

By counsel



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**CERTIFICATE OF SERVICE**

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This is to certify that I, Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 21<sup>st</sup> day of April, 2022, served a true copy of the foregoing "**Brief of the Office of Lawyer Disciplinary Counsel**" upon Timothy M. Manchin, counsel for Respondent Gregory H. Schillace, by mailing the same via United States Mail with sufficient postage, to the following address:

Timothy A. Manchin, Esquire  
1543 Fairmont Avenue, Suite 203  
Fairmont, West Virginia 26554



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Rachael L. Fletcher Cipoletti