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

LAWYER DISCIPLINARY BOARD,

Petitioner,

**DO NOT REMOVE
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v.

No. 20-0252

JOSHUA C. CAIN,

Respondent.

BRIEF OF THE LAWYER DISCIPLINARY BOARD

Rachael L. Fletcher Cipoletti [Bar No. 8806]
Chief Lawyer Disciplinary Counsel
rfcipoletti@wvdc.org
Renée N. Frymyer [Bar No. 9253]
Lawyer Disciplinary Counsel
rfrymyer@wvdc.org
Office of Lawyer Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304
(304) 558-7999
(304) 558-4015 – *facsimile*

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I. STATEMENT OF THE CASE

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

This is a lawyer disciplinary proceeding against Joshua C. Cain (“Respondent”), arising as the result of a Statement of Charges issued against him and filed with the Supreme Court of Appeals of West Virginia on or about March 19, 2020. The Clerk of the Supreme Court of Appeals served the Statement of Charges upon Respondent by certified mail on or about March 23, 2020. On or about April 13, 2020, Sean T. Logue, Esquire, entered his Notice of Appearance on behalf of Respondent in the proceeding.

On April 15, 2020, a telephonic conference was held to set pre-hearing and hearing dates in the matter. Because Respondent indicated that he intended to present mitigation evidence regarding his emotional and mental health at the hearing, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board (“HPS”) extended the time period set forth in Rule 3.4 of the Rules of Disciplinary Procedure for good cause shown and the matter was continued so that Respondent may complete a mental health evaluation and potential treatment with respect thereto. After previously receiving an extension of time for filing from Lawyer Disciplinary Counsel, Respondent, by counsel, filed his Answer to the Statement of Charges on or about June 21, 2020.

Telephonic conferences were held between the HPS and the parties on June 15, 2020, September 8, 2020, and November 6, 2020, respectively. Continuances were granted by the HPS so that a West Virginia Judicial and Lawyer Assistance Program (“WVJLAP”) monitoring agreement of Respondent could be developed and finalized, and to allow stipulations to be completed by the parties. Thereafter, this matter proceeded to a virtual hearing via the Microsoft Teams format on December 9, 2020. The HPS was comprised of Stephen M. Mathias, Esquire, Chairperson; Elizabeth Layne Diehl, Esquire; and Charlotte Norris, Layperson. Renée N.

Frymyer, Lawyer Disciplinary Counsel, appeared on behalf of the Office of Lawyer Disciplinary Counsel (“ODC”). Mr. Logue appeared on behalf of Respondent, who also appeared. The HPS heard testimony from: Amber L. Hanna, Esquire; Samuel E. White, Esquire; Carrie L. Scott; Terry McDiffitt; and Respondent. In addition, ODC Exhibits 1-27 and Respondent’s Exhibit 1 were admitted into evidence. Joint Exhibit 1 was also admitted into evidence, which consisted of the stipulations of the parties regarding findings of fact, conclusions of law, and authenticity of records.

On or about February 26, 2021, the parties filed joint proposed findings of fact, conclusions of law and recommended sanctions with the HPS. On or about April 19, 2021, the HPS issued its decision in this matter and filed with the Supreme Court of Appeals its Report of the Hearing Panel Subcommittee (“Report”). The HPS found that the evidence established that Respondent had violated Rule 3.3(a)(1), Rule 1.5(a), and Rule 8.4(c) and (d) of the Rules of Professional Conduct. The HPS also stated that it agreed with the recommended sanctions of the parties except that based on the case law, the nature of the violations, and the intent of Respondent in committing the violations, the HPS believed that a suspension of Respondent’s law license for a period of 180 days was more appropriate than the jointly recommended suspension of 90 days. Therefore, the HPS recommended the following sanctions:

- A. That Respondent’s law license be immediately suspended for a period of 180 days, and that he be ordered to fully comply with the mandates of Rule 3.28¹ of the Rules of Lawyer Disciplinary Procedure upon suspension, and Rule 3.31² of the Rules of Lawyer Disciplinary Procedure upon reinstatement.

¹ Rule 3.28 of the Rules of Lawyer Disciplinary Procedure sets forth the duties of disbarred or suspended lawyers.

² As Rule 3.31 of the Rules of Lawyer Disciplinary Procedure applies to the reinstatement process for a lawyer who has been suspended for a period of three months or less, the ODC believes the HPS intended to cite Rule 3.32 of the Rules of Lawyer Disciplinary Procedure here which applies to the reinstatement process of a lawyer whose license to practice law has been or shall be suspended for a period of more than three months.

B. That Respondent be placed on two years of supervised practice by an active attorney in his geographic area in good standing with the West Virginia State Bar and agreed upon by ODC. The goal of the supervised practice will be to improve the quality and effectiveness of Respondent's law practice to the extent that Respondent's sanctioned behavior is not likely to recur.

C. That Respondent remain compliant with the monitoring agreement he entered into with WVJLAP on December 2, 2020, as contained in the record at Exhibit 26.

D. That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Thereafter, on April 23, 2021, the ODC filed its consent to the recommendation of the HPS. On May 4, 2021, Respondent, by his counsel, filed his objection to the recommendation. On May 21, 2021, the Supreme Court of Appeals entered an Order that the matter be briefed by the parties and scheduled it for oral argument under Rule 19 of the Rules of Appellate Procedure.

B. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a lawyer who practices in and around Moundsville, which is located in Marshall County, West Virginia. Respondent was admitted to The West Virginia State Bar on April 26, 2011, after successful passage of the Bar Exam. As such, he is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board [Stipulated³].
2. On November 20, 2018, Dany F. Eddy, Esquire, Executive Director for the Public Defender Services of West Virginia ("PDS") filed an ethics complaint regarding

³ Pursuant to the stipulations contained in Joint Exhibit A, Respondent and Lawyer Disciplinary Counsel agreed that entering into stipulations regarding the facts and conclusions of law relieved either party from having to provide such evidence to support the allegations. However, exhibits that support the respective finding of fact are cited herein.

Respondent with the ODC. During the relevant time period, Respondent was a panel attorney whose invoices for payment were processed by the PDS [Stipulated; Ex.1].

3. In his complaint, Mr. Eddy stated that on or about August 31, 2017, he received an email from the Honorable Jeffrey Cramer, Judge for the Second Judicial Circuit, explaining that Respondent had delivered to him 85 vouchers for payment with a proposed Order Approving Payment of Appointed Counsel Fees and Expenses for each voucher. Most of the vouchers concerned matters for which a final disposition had been made eight to ten months before [Stipulated; Ex.1].
4. A relevant provision within the governing statute states, “[C]laims submitted more than ninety calendar days after the last date of service shall be rejected, unless for good cause, the appointing court authorizes in writing an extension.” W.Va. Code § 29-21-13a(a) [Stipulated].
5. In many of the vouchers, Respondent included a recent “review file” description to cover for the last date of service being well outside of the ninety-day calendar period of time [Stipulated; Ex.1].
6. Judge Cramer’s predecessor, the Honorable Mark A. Karl, returned vouchers to Respondent in 2013 as being excessive billing, and Respondent did not bill for any other matters in Marshall County until Judge Karl left the bench [Stipulated; Ex.1].
7. Judge Cramer noted that he found “numerous issues” in the billing, including but not limited to claiming an unreasonable amount of time opening, reviewing, and closing files, at least one instance of billing for a hearing that there was no evidence of having occurred, billing 1.5 hours of travel time to every Marshall County proceeding, when Respondent resided in Moundsville, and outrageous copying expenses [Stipulated; Ex.1].

8. Upon review of various vouchers Respondent submitted to the courts for work occurring in 2016 and 2017, PDS representatives found that Respondent billed a substantial amount of round-trip travel from a location in Cameron, West Virginia, instead of to and from his Moundsville, Marshall County residence, which is closer to most of the venues involved [Stipulated; Ex.1].
9. The address Respondent used for billing travel is located on the second floor of a Masonic Lodge in Cameron, West Virginia. Upon inspection of that location, an investigator viewed a space not equipped or used as office space. No phones or computer equipment were seen, and the room was reportedly in a state of disrepair. Respondent admitted that this space was mostly used as storage space and not a functional everyday office [Stipulated; Ex.12].
10. Records reflect that Respondent billed 242.4 trips from the Cameron address, taking 527.7 hours. Respondent also claimed a mileage reimbursement for every such trip [Stipulated; Ex.1].
11. Respondent admitted that he claimed miles that were not traveled in his billing [Stipulated].
12. In addition, vouchers included in Mr. Eddy's complaint showed that Respondent, almost exclusively, billed 0.5 hours for waiting in court. Respondent admitted that he did not actually wait in court the time as billed [Stipulated; Ex.1].
13. Respondent also submitted billing for a significant number of hearings as taking 1.0 hour. However, Judge Cramer noted that his hearings in criminal matters rarely last one hour. He said that arraignments are generally three to five minutes at most, pleas between seventeen to twenty minutes almost without exception, Rule 35 hearings three to five

- minutes, etc. Respondent admitted that he billed 1.0 hours for most hearings that did not last an hour [Stipulated; Ex.1].
14. In the vouchers provided by Judge Cramer, Respondent submitted a request for reimbursement of 39,350 copies in 138 cases. Respondent admitted that he billed for an excessive number of copies [Stipulated; Ex.1].
 15. Respondent also submitted billing for 253 hours of time for a “digital backup,” an administrative task that should not be compensable. Respondent admitted that he billed for this task that is not billable [Stipulated; Ex.1].
 16. Respondent also admitted that he overbilled for post-sentencing matters, copying, jail visits, travel to the jail facility, hearings, and duplicate travel as alleged in the Statement of Charges [Stipulated].
 17. Respondent was never compensated, however, by PDS for the billing contained in evidence [Stipulated].
 18. West Virginia Code § 29-21-13a(a) (2008) requires panel counsel for the PDS to “maintain detailed and accurate records of the time expended and expenses incurred on behalf of eligible clients[.]” Subsection (d) of that statute provides that panel counsel “shall be compensated . . . for actual and necessary time expended for services performed and expenses incurred[.]” *Lawyer Disciplinary Board v. Cooke*, 239 W.Va. 40, 49, 799 S.E.2d 117, 126 (2017) [Stipulated].
 19. “West Virginia Code § 29-21-14 [1981], which governs state payment of counsel fees for indigent criminal defendants, envisages a system where each client is proportionately billed according to the time spent actually representing that client; consequently, billing for more hours than are actually worked is duplicative billing that is clearly contrary to

the system envisaged by the legislature.” Syllabus Point 1, *Frasher v. Ferguson*, 177 W.Va. 546, 355 S.E.2d 39 (1987) [Stipulated].

20. Respondent admitted that his conduct had violated Rule 3.3(a)(1), Rule 1.5(a), and Rule 8.4(c) and (d) of the Rules of Professional Conduct [Stipulated].
21. Because Respondent misrepresented his actual and necessary time expended for services performed in filings before the appointed circuit judge and/or appointing tribunal, he has violated Rule 3.3(a)(1) of the Rules of Professional Conduct, which provides:

Rule 3.3. Candor Toward the Tribunal

- (a) A lawyer shall not knowingly:
- (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer[.]
22. Because Respondent engaged in improper and unsubstantiated billing with regard to cases in which he was appointed to represent indigent clients on behalf of the PDS, he has violated Rule 1.5(a) and Rule 8.4(c) and (d) of the Rules of Professional Conduct, which provides:

Rule 1.5. Fees.

- (a) A lawyer’s fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
- (1) the time and labor required, the novelty and difficulty of the questions involved, and skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services, and

(8) whether the fee is fixed or contingent.

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

* * *

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice[.]

23. Because Respondent knowingly deceived and intentionally made false statements to the Court(s), to PDS, and others with regard to his billing, he has violated Rule 8.4(c) of the Rules of Professional Conduct, which provides:

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

* * *

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

II. SUMMARY OF ARGUMENT

Respondent admittedly committed the serious offense of submitting false vouchers to the Circuit Court and, as a result, attempted to improperly receive unearned monies from the State of West Virginia. After being confronted regarding the improper billing practices, Respondent acknowledged struggles in his law practice and made efforts to make necessary changes to his billing practices and personal life. Respondent also agreed to waive his right to payment for the invoices. Nonetheless, Respondent has committed clear violations of the Rules of Professional Conduct and discipline is required. The findings of fact and conclusions of law made by the HPS in its Report that Respondent violated the duties a lawyer owes to the public, to the legal system, and to the profession, acted in an intentional and knowing manner, caused actual and potential injury, along with finding both mitigating and aggravating factors existing were correct, sound, fully supported by evidence on the whole adjudicatory record, and should not be disturbed. In

ordering a 180-day suspension in addition to other sanctions in this proceeding such as supervision and compliance with a monitoring agreement, this Court will be serving its goals of protecting the public, reassuring the public as to the reliability and integrity of attorneys, and safeguarding its interests in the administration of justice. A strong sanction is also necessary to deter lawyers who may be considering or who are engaging in similar misconduct.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This matter is scheduled for oral argument under Rule 19 of the Rules of Appellate Procedure for September 29, 2021, pursuant to the Order entered by the Supreme Court of Appeals on May 21, 2021.

IV. ARGUMENT

A. STANDARD OF PROOF

The charges against an attorney must be proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. *See also*, Syllabus Point 1, *Lawyer Disciplinary Board v. McGraw*, 194 W. Va. 788, 461 S.E.2d 850 (1995). Substantial deference is to be given to the Lawyer Disciplinary Board's findings of fact unless the findings are not supported by reliable, probative, and substantial evidence on the whole record. *Committee on Legal Ethics v. McCorkle*, 192 W. Va. 286, 452 S.E.2d 377 (1994); *Lawyer Disciplinary Board v. Cunningham*, 195 W. Va. 27, 464 S.E.2d 181 (1995). At the Supreme Court level, "[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board." *Cunningham*, 195 W.Va. at 39, 464 S.E.2d at 189.

"Stipulations or agreements made in open court by the parties in a trial of a case and acted upon are binding and a judgment founded thereon will not be reversed." Syllabus Point 3,

Matter of Starcher, 202 W.Va. 55, 501 S.E.2d 772 (1998) citing Syllabus Point 1, *Butler v. Smith's Transfer Corporation*, 147 W.Va. 402, 128 S.E.2d 32 (1962). “In a disciplinary proceeding against a judge, in which the burden of proof is by clear and convincing evidence, where the parties enter into stipulations of fact, the facts so stipulated will be considered to have been proven as if the party bearing the burden of proof has produced clear and convincing evidence to prove the facts so stipulated.” Syllabus Point 4, *Matter of Starcher*, 202 W.Va. 55, 501 S.E.2d 772 (1998). The Court has also noted that the same rule would apply to pre-trial stipulations. *Id.* at 61, 778.

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. 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).

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

Rule 3.16 of the Rules of Lawyer Disciplinary Procedure provides that when imposing a sanction after a finding of lawyer misconduct, the Court shall consider: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or

potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. *See also* Syllabus Point 4 of *Office of Disciplinary Counsel v. Jordan*, 204 W.Va. 495, 513 S.E.2d. 722 (1998). The record in this matter clearly and convincingly supports that Respondent has transgressed all four factors set forth in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure and *Jordan*.

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

The parties stipulated, and the HPS correctly found that the evidence in this case establishes by clear and convincing proof that Respondent has violated duties owed to his clients, to the public, to the legal system and to the legal profession. The public expects lawyers to exhibit the highest standards, integrity and honesty, and lawyers have a duty to act in such a manner as to maintain the integrity of the Bar and the profession. Moreover, as an officer of the Court and legal system, a lawyer's conduct should always conform to the requirements of the law and abide by the rules of procedure which govern the administration of justice in our State. Respondent admittedly fell short of these duties when he engaged in improper and false billing of his court-appointed cases. This is conduct contrary to what is required by the applicable statute, which speaks clearly in terms of the required accuracy and detail, and contrary to the affirmation that Respondent provided with the submission of his itemized statement of legal services in which he verified the accuracy of such.

2. Respondent acted intentionally and knowingly.

"Intent" as defined by the American Bar Association is the conscious objective or purpose to accomplish a particular result, whereas "knowledge" as defined by the American Bar Association is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Annotated ABA*

Standards for Imposing Lawyer Sanctions, Definitions (2015). Respondent stipulated, and the evidence supports the finding of the HPS, that Respondent acted in an intentional and knowing manner in the underlying matter.

3. Respondent's misconduct has caused actual injuries.

Based upon the stipulations and the record of this case, it was clear to the HPS that actual injuries resulted from Respondent's misconduct. Respondent admitted that because of his conduct, the PDS was forced to divert resources to investigate Respondent's improper billing. Respondent also stipulated that problems due to lawyer overbilling have thwarted the efforts of the PDS to obtain a pay increase in the hourly wage of publicly compensated lawyers who are appointed to represent indigent clients for years, and that there is also a substantial impact on the legal profession generated by lawyer overbilling. Respondent further stipulated that his noncompliance with these rules as exhibited in the record is clearly detrimental to the legal system and legal profession, and that his conduct brought the legal system and legal profession into disrepute. However, the HPS found there was no evidence that any of Respondent's clients were harmed in these matters and that no restitution was owed to PDS as a result of Respondent's misconduct, as the vouchers at issue were never ultimately processed for payment.

4. There are multiple mitigating factors present.

"Mitigating factors in a lawyer disciplinary proceeding are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Syllabus Point 2, *Lawyer Disciplinary Board v. Scott*, 213 W.Va. 209, 579 S.E.2d 550 (2003) quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.31 (1992). In this case, the HPS properly found that the following mitigating factors in this case are: (1) inexperience in the practice of law; (2) personal or emotional problems; (3) full and free disclosure to disciplinary board; and (4) remorse.

At the hearing, Respondent testified as to his diagnosis of having a major depressive disorder and an anxiety disorder and provided a neuropsych evaluation taken in May of 2019 supporting these findings [Exhibit 27]. The HPS noted that Respondent is diagnosed with following conditions: depression, anxiety, hypotestosterone, chronic back, joint, and chest pain, diabetes mellitus, hypertension, narcolepsy, obstructive sleep apnea, morbid obesity, hyperflexible joints with arthralgia, gastroesophageal reflux disease, hypercholesterolemia, and vertigo. Respondent discussed these issues as well as his current medications at the hearing [Hrg. Tr. pp. 27, 31-32]. Respondent testified as to being overwhelmed at the time his billing problems occurred [Hrg. Tr. pp. 22-23]. Respondent stated that he believes he is a better attorney now because of the help he is receiving, and that he is not at risk or danger to his clients as far as being able to provide competent representation [Hrg. Tr. pp. 27-29]. The HPS found no evidence that Respondent is or was suffering from a substance abuse issue. Respondent also testified that he currently follows the PDS guidelines with regard to his billing and indicated a willingness to bill properly [Hrg. Tr. pp. 24-25].

At the hearing, Amber Hanna, Program Coordinator Director for WVJLAP, provided information regarding Respondent's entry and involvement with a WVJLAP monitoring agreement [Hrg. Tr. pp. 7-13] [Exhibit 26]. She testified as to the determination that Respondent's previously diagnosed conditions appeared to be treatable as office management issues and that he was a good fit for the monitoring program. She asserted that the monitoring program requires that Respondent check in every day with an online-based recovery system and that he would also receive random alcohol and drug testing as well as testing that he is on the proper medications that he has been prescribed by his doctors. The HPS also noted that Respondent is to attend therapy and a mental health support group on a weekly basis. Ms. Hanna stated that if there was any failure to comply with the terms of the agreement, it would be

immediately reported to the ODC. As of this filing, Respondent reportedly remains compliant with the program.

It was noted by the HPS that Respondent agreed to waive any compensation he would be entitled to in the representation of clients in the billing referenced in this case. The record reflects that the events at issue in the Statement of Charges took place when Respondent had been practicing for about five to six years. Respondent also discussed the remorse he had for this matter at the hearing [Hrg. Tr. p. 24].

5. There is an aggravating factor present.

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). The HPS found an aggravating factor present in this case to be a dishonest or selfish motive. In addition, although Respondent has never been disciplined by the Supreme Court of Appeals of West Virginia, the HPS observed that he was issued an admonishment by the Investigative Panel of the Lawyer Disciplinary Board for a violation of Rule 1.3 and Rule 1.4 of the Rules of Professional Conduct on December 8, 2017 [Exhibit 25, pp. 1003-1009].

C. RESPONDENT’S CONDUCT REQUIRES SERIOUS 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 Point 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 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 fundamental 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). Indeed, "the primary purpose of the ethics committee [ODC] is not punishment but rather the protection of the public and the reassurance of the public as to the reliability and integrity of attorneys. *Office of Lawyer Disciplinary Counsel v. Albers*, 214 W.Va. 11, 13, 585 S.E.2d 11, 13 (2003) citing *Committee on Legal Ethics of the West Virginia State Bar v. Ikner*, 190 W.Va 433, 436, 438 S.E.2d 613, 616 (1993) (internal citations omitted).

This disciplinary proceeding involves admitted intentional and knowing violations of the Rules of Professional Conduct committed by Respondent. Respondent stipulated that he misrepresented his actual and necessary time expended for services performed in filings before the appointed circuit judge and/or appointing tribunal and engaged in improper and unsubstantiated billing regarding cases in which he was appointed to represent indigent clients on behalf of the PDS. Although circumstances were considered to mitigate Respondent's conduct, it is still behavior not to be taken lightly. For the public to have confidence in our State's disciplinary and legal systems, lawyers who engage in the type of conduct exhibited by Respondent must receive a strong sanction. A license to practice law is a revokable privilege; when the privilege is abused, the privilege should be revoked or suspended.

Following the hearing, the parties agreed that Respondent should be suspended for his conduct along with the imposition of other sanctions. However, in its Report, the HPS believed a 180-day suspension was a more appropriate sanction than the recommendation of a 90-day suspension, while agreeing with the other joint recommendations of the parties as to sanction, including supervision and WVJLAP compliance. As the ODC chose not to object to the HPS's recommendation, even though it was different from the stipulation that it had reached with Respondent, Lawyer Disciplinary Counsel now acts as an advocate on behalf of the Lawyer Disciplinary Board at the Supreme Court level. The recommended sanction of 180-days is firmly supported by the evidence and applicable law.

Indeed, absent any aggravating or mitigating circumstances, the American Bar Association recognizes that in cases involving improper fees, a suspension is generally appropriate 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. *ABA Model Standards for Imposing Lawyer Sanctions*, 7.2 (1992). The Supreme Court of Appeals has specifically held in cases of fraudulent PDS billing, suspensions appear to be the norm. In *Lawyer Disciplinary Board v. Cooke*, 239 W.Va. 40, 799 S.E.2d 117 (2017), this Court ordered a two-year suspension for a lawyer's misconduct of overbilling PDS. Although Mr. Cooke did not have a history of discipline and voluntarily entered into a conciliation agreement with PDS, he had two additional complaints involving failure to timely file a brief as guardian *ad litem* in an abuse and neglect case and failure to communicate and refund funds in a case wherein he took an up-front retainer. The Court was also concerned with the cumulative amount of time Mr. Cooke was billing to PDS annually for multiple years. Thereafter, in *Lawyer Disciplinary Board v. Hassan*, 241 W.Va. 298, 824 S.E.2d 224 (2019), this Court suspended the law license of a lawyer for six-months for the intentional use of "value billing" to PDS. Most recently, in *Lawyer*

Disciplinary Board v. Daniel R. Grindo, 243 W.Va. 130, 842 S.E.2d 683 (2020), this Court imposed a two-year suspension for intentional errors in PDS billing as well as failure to be truthful about self-reporting his misconduct along with having prior discipline from the Court.

In another recent case involving improper PDS billing, the Court suspended the lawyer's license for six-months, with all six months deferred, placing the lawyer on a two-year probationary period subject to the conditions of two years supervised practice and continued compliance with a five-year WVJLAP agreement. *See Lawyer Disciplinary Board v. Courtney L. Ahlborn*, No. 18-0344 and 18-0549 (WV 1/30/20). In that matter, Ms. Ahlborn was found to have been negligent in PDS billing matters, as opposed to intentional or knowing, and presented evidence to support mitigation, including an ADHD diagnosis and initial compliance with a WVJLAP monitoring agreement. Additionally, in *Lawyer Disciplinary Board v. David A. Kirkpatrick*, No. 18-1113 (WV 7/23/20), this Court imposed six-month suspension where a rogue legal assistant was responsible for the errors in PDS billing but was considered "knowing" conduct as inferred from the circumstances. In *Kirkpatrick*, the Court took into consideration multiple mitigating factors including no prior discipline, good character, efforts to mitigate the issues, and restitution. As this Court has observed, "there is no 'magic formula' . . . 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).

Review of the aforesaid case law indicates a correlation of the instant matter to *Hassan*. Mr. Hassan was found to have engaged in improper billing practice over a course of years, where he billed in increments of .5 hours regardless of actual time spent, which was not in conformity to the statute and billing guidelines. Finding that Mr. Hassan's conduct was intentional and that

there had been clear injury to the taxpayers of West Virginia, and potential injury to any criminal defendant ordered to reimburse legal fees, this Court imposed a six-month suspension. Mitigating factors in that case were lack of disciplinary history, remorse, and good character and solid reputation in local community, while aggravating factors were substantial experience in the practice of law and Mr. Hassan's receipt of financial benefit from his conduct. The Court acknowledged that Mr. Hassan accepted full responsibility for his actions and promptly arrived at an agreement with PDS regarding restitution.

Like *Hassan*, Respondent has engaged in improper and deceitful billing practices which were intentional and caused damages. Because of the intervening acts taken by a Circuit Judge and PDS, Respondent received no financial gain from his misconduct. The stipulations entered into by Respondent demonstrate the understanding of the wrongfulness of his actions and his willingness to accept responsibility for such. In addition, it is commendable that Respondent appears to be taking care of his mental and physical health through the available resources of the State Bar and elsewhere. However, Respondent's conduct is troubling and cannot be condoned.


A served suspension along with the condition of supervised practice and continued compliance with a WVJLAP contract appropriately serves the interests of the disciplinary process, including imposing an appropriate punishment upon Respondent, deterring other lawyers from engaging in similar conduct in the future and restoring the faith of the general public in the integrity of the legal profession. In reaching its decision, the HPS properly considered the reliable, probative, and substantial evidence on the whole adjudicatory record, the factors set forth in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure, the applicable law, and made an appropriate recommendation to this Honorable Court.

V. CONCLUSION

The factual findings clearly and convincingly establish that Respondent violated Rules 3.3(a)(1), 1.5(c) and 8.4(c) and (d) of the Rules of Professional Conduct. For the reasons set forth above, the ODC urges that this Honorable Court uphold the following sanctions made by the Lawyer Disciplinary Board in this matter:

1. That Respondent's law license be immediately suspended for a period of 180-days, and that he be ordered to fully comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure upon suspension, and Rule 3.32 of the Rules of Lawyer Disciplinary Procedure upon reinstatement.
2. That upon reinstatement Respondent be placed on two years of supervised practice by an active attorney in his geographic area in good standing with the West Virginia State Bar and agreed upon by ODC. The goal of the supervised practice will be to improve the quality and effectiveness of Respondent's law practice to the extent that Respondent's sanctioned behavior is not likely to recur.
3. That Respondent remain compliant with the monitoring agreement he entered into with WVJLAP on December 2, 2020, as contained in the record at Exhibit 26.
4. That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel

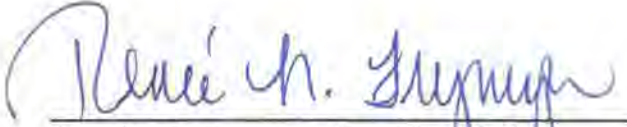

Rachael L. Fletcher Cipoletti [Bar No. 8806]
Chief Lawyer Disciplinary Counsel
rfcipoletti@wvdc.org
Renée N. Frymyer [Bar No. 9253]

Lawyer Disciplinary Counsel
rfrymyer@wvdc.org
Office of Lawyer Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304
(304) 558-7999
(304) 558-4015 - *facsimile*

CERTIFICATE OF SERVICE

This is to certify that I, **Renée N. Frymyer**, Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 17th day of June, 2021, served a true copy of the foregoing **"BRIEF OF THE LAWYER DISCIPLINARY BOARD"** upon Respondent Counsel Sean T. Logue, Esquire, by mailing the same via United States Mail, with sufficient postage, to his counsel at the following address:

Sean T. Logue, Esquire
27 Main Street
Carnegie, WV 15106


Renée N. Frymyer [Bar No. 9253]