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

LAWYER DISCIPLINARY BOARD,

Petitioner,

vs. **No. 21-0590**

JAMES M. PIERSON,

Respondent.

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

Formal charges were filed against James M. Pierson (hereinafter "Respondent") with the Clerk of the Supreme Court of Appeals on or about July 23, 2021, and served upon Respondent via certified mail by the Clerk on July 29, 2021. Lawyer Disciplinary Counsel filed her mandatory discovery on or about August 18, 2021. Respondent filed his Answer to the Statement of Charges on or about August 30, 2021. Respondent did not provide his mandatory discovery, which was originally due on or before September 17, 2021, then on or before April 1, 2022, after requesting a continuance, and then again by July 8, 2022, following another continuance. Lawyer Disciplinary Counsel filed a Motion to Exclude Testimony of Witnesses and Documentary Evidence or Testimony of Mitigating Factors on July 8, 2022. After Respondent, by counsel, indicated that he did not intend to have any witnesses testify other than Respondent, and that the documentation Respondent intended to use at the hearing had already been produced by the Office of Lawyer Disciplinary Counsel, the Hearing Panel Subcommittee deemed this motion moot at the prehearing held on July 19, 2022.[1] An evidentiary hearing was set for August 23, 2022.

Thereafter, this matter proceeded to hearing in Charleston, West Virginia, on August 23, 2022. The Hearing Panel Subcommittee (hereinafter "HPS") was comprised of Gail T. Henderson-Staples, Esquire, Chairperson; William L. Mundy, Esquire; and Loretta Sites, Layperson. Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel, appeared on behalf of the

[1] See Pre-hearing Tr. p. 19. Additional motions were filed in this proceedings, such as Respondent's motions to take the deposition of the Complainant Sherri Goodman Reveal, Esquire, and Cynthia Jones. These motions were granted, and those depositions took place on June 28, 2022. Respondent's motion to take the deposition of Shari Collias, Esquire, was denied. However, Respondent was permitted to issue a Subpoena *duces tecum* to Ms. Collias. Respondent's Motion for Clarification of Charges was denied. ODC's motion to quash the Subpoena *duces tecum* was granted due to Respondent's failure to comply with Rule 3.8, WVRLDP.

Office of Lawyer Disciplinary Counsel (hereinafter "ODC"). Paul Saluja, Esquire, appeared on behalf of Respondent, who also appeared. The HPS heard testimony from Sherri Goodman Reveal, Esquire, Shari Collias, Esquire, Cynthia Jones and Respondent and admitted into evidence ODC Exhibits 1-42, Respondent's Exhibits 1-76, and Joint Exhibits 1-2 were admitted into evidence. Joint Exhibit 1 consisted of agreed joint stipulations regarding findings of fact and conclusions of law which had been reached by the parties prior to the hearing.

On or about December 16, 2022, the HPS issued its decision in this matter and filed its "Report of the Hearing Panel Subcommittee" (hereinafter "Report") with the Supreme Court. The HPS properly found that the evidence established that Respondent committed multiple violations of the Rules of Professional Conduct. The HPS issued the following recommendation as the appropriate sanction:

1. That Respondent's law license be suspended for Ninety (90) days;
2. That upon his reinstatement, Respondent be placed on One (1) year of supervised practice by an active attorney in his geographic area in good standing with the West Virginia State Bar and as agreed upon by ODC;
3. That Respondent must complete nine (9) additional hours of continuing legal education in the area of law office management, including at least six (6) of those hours in IOLTA account management prior to Respondent's reinstatement;
4. That Respondent must comply with the mandate of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure; and
5. That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

B. FINDINGS OF FACT[2]

1. James M. Pierson (hereinafter "Respondent") is a lawyer practicing in Charleston, which is located in Kanawha County, West Virginia. Respondent, having diploma privilege, was admitted to The West Virginia State Bar on May 21, 1985. As such, Respondent is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.

COUNT I
I.D. No. 18-03-191
Complaint of Sherri Reveal, Esquire

2. On July 14, 2014, Ms. Cynthia Jones was involved in an automobile accident. She was insured by Nationwide, the other driver was insured by State Farm. Ms. Jones' Nationwide policy provided for $2,000.00 in medical benefits ("med pay"). At the time of the accident, Ms. Jones was receiving Social Security disability payments and her medical insurer was Medicare. [ODC Vol. I, Ex. 1, Bates 2]

3. On December 13, 2014, Ms. Jones signed a "Contract for Legal Services" for Respondent to represent her "in a matter involving a divorce adverse to David Jones." The "Contract for Legal Services" provided for an initial retainer fee payment of $1,000.00.[3] Respondent's hourly rate was $250.00 and $125.00 for paralegal and law clerk time. [ODC Vol. III, Ex. 33, Sealed Bates 2467- 2473; Hrg. Tr. p. 17-18]

4. The Final Order of Divorce entered March 18, 2016, and May 20, 2016 amended Order provided Mr. Jones was to relinquish any interest in the motorcycle previously delivered

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[2] As found by the Hearing Panel Subcommittee.

[3] Complainant alleged that Ms. Jones paid another $750.00 in or about January 2015, after one of Respondent's paralegals contacted her. Ms. Jones did not have a receipt for this payment. [ODC Vol. I, Ex. 1, Sealed Bates 8; See also ODC Vol. I, Ex. 3]

to Respondent and two firearms (.45 caliber handgun and a 7 mm rifle) that had also been delivered to Respondent. [ODC Vol. I, Ex. 1, Sealed Bates 122-131; ODC Vol. III, Sealed Ex. 40; Hrg. Tr. 18]

5. On or about February 18, 2016, Mr. Jones' counsel forwarded to Respondent the title of a 2005 Jeep and a $2,508.00 check from Geico representing insurance funds regarding the motorcycle that had been wrecked prior to delivery to Respondent. [ODC Vol. I, Ex. 1, Sealed Bates 133-134]

6. Furthermore, since Mr. Jones had liquidated his pension, Ms. Jones and Respondent were granted a judgment for $45,000.00 (which included the prior arrears in alimony, the house payment arrearage before foreclosure, $15,000.00 in attorney fees[4], equitable distribution and family support). Judgment was stayed as long as Mr. Jones made certain payments of $500.00 per month for 30 months until Respondent received his fee of $15,000.00; $400.00 a month thereafter until the $45,000.00 was paid. The Final Order also provided that "[t]he payments set forth in this section shall be made payable to Cynthia Jones and Pierson Legal Services and delivered to Pierson Legal Services" and "[t]hat Cynthia Jones has irrevocably assigned her interest in the judgment to the extent of attorneys fees owed to Pierson Legal Services." [ODC Vol. I, Ex. 1, Sealed Bates 125]

7. A $500.00 alimony payment was due from Mr. Jones on the first of the month beginning March 2016. Ms. Jones' client file reflects a check in the amount of $500.00 on February 25, 2016 from Mr. Jones made payable to Ms. Jones and Respondent. The memo line

[4] Respondent's most recent billing statement for the divorce matter (produced pursuant to this disciplinary proceeding) indicated that Ms. Jones has an outstanding balance with Pierson Legal Services in the amount of $12,777.56.

reads "Alimony – March 2016." There were two other payments made but the alimony check was returned for insufficient funds. [ODC Vol. I, Ex. 1, Sealed Bates 137, 142]

8. Respondent filed a Motion for Contempt on April 16, 2016. After a hearing on July 19, 2016, Orders were entered granting Respondent another $1,500.00 in attorney fees and permitted either him or Ms. Jones to collect on the Judgment. Complainant reported that the Family Court eventually appointed a Special Commissioner to effectuate title transfer to Respondent.[5] [ODC Vol. I, Ex. 1, Sealed Bates 146]

9. On November 15, 2016, the Respondent's office prepared a Bureau of Child Support Enforcement application for Ms. Jones to execute and emailed the application to Anastasia Rhodes of the BCSE with a copy to Ms. Jones. This effort resulted in alimony payments that Ms. Jones received until March 2017. [ODC Vol. I, Ex. 1, Bates 10]

10. That on or about June 1, 2017 Buddy Jones died testate leaving David Neal Jones as one of his heirs and upon learning of his death the Respondent did send an email to Ms. Collias and Ms. Jones dated August 14. 2017 advising Ms. Collias and Ms. Jones that her former husband David Neil Jones' father had died that there may be funds available to attach and pay the Judgement which Ms. Jones had gotten in the divorce.

11. Respondent again communicated that there was a pool of funds available to pay the judgment in a letter dated September 7, 2017, advising Ms. Collias that there were funds available to pay the Judgement which Ms. Jones had gotten in the divorce.

12. Ms. Collias responded by letter dated September 11, 2017 wherein [sic] acknowledged Respondent's communication.

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[5] In March of 2017, Ms. Jones went to the Bureau of Child Support Enforcement for assistance in collecting her permanent alimony, which at the time, was in arrears in the amount of $4,340.56. Mr. Jones' wages were garnished, and Ms. Jones received a monthly check for a time.

13. On February 25, 2015, Ms. Jones had signed an authorization for Respondent to "review [a] personal injury case in order to determine if he would represent her in that matter. The authorization read that if [Respondent] decided to proceed with the representation, they would enter into a separate retainer agreement." Ms. Jones subsequently signed a Medical Authorization on January 25, 2016. However, no written contingent fee agreement signed by Ms. Jones has been produced by Respondent for the personal injury representation. [ODC Vol. I, Ex. 1, Bates 2, Sealed Bates 14]

14. No signed contingent fee agreement has been produced by Respondent for the personal injury representation.

15. Ms. Jones testified, however, no written contingent fee agreement signed by Ms. Jones.[6] Ms. Jones testified during her deposition that she agreed to retain Mr. Pierson to represent her in the personal injury matter and that she agreed that Mr. Pierson should apply the net proceeds of the settlement to the balance due on her divorce bill. [See also Hrg. Tr. 18]

16. Nationwide sent a Notice of Subrogation on May 2, 2016, to Respondent indicating that it expected reimbursement from any personal injury settlement of the $2,000.00 med pay it had paid out. [ODC Vol. I, Ex. 3, Sealed Bates 23-24]

17. Respondent sent a settlement demand to State Farm on May 10, 2016, for what "he characterized as the tortfeasor's policy limits of $25,000.00." [ODC Vol. I, Ex. 2, Bates 3, Sealed Bates 26-27]

18. On June 20, 2016, Respondent wrote to Nationwide asking that Nationwide waive its right of subrogation. He also noted that "even if Nationwide sought reimbursement, it would only be entitled to $1,333.22, because under West Virginia law, the company had

[6] This first sentence of ¶ 15 appears to be a typographical error which was not noticed when the parties signed the Agreed Stipulations on August 23, 2022. See, Joint Ex. 1, p. 5.

to pay its proportionate share of [Respondent's] legal fee."[7] [ODC Vol. I, Ex. 2, Bates 3, Sealed Bates 42-43, 45]

19. Respondent negotiated with State Farm over the next six weeks and eventually accepted State Farm's offer to settle for $5,000.00 by letter dated July 8, 2016. [ODC Vol. I, Ex. 2, Bates 3, Sealed Bates 47]

20. Ms. Jones signed a release of State Farm on July 13, 2016, and State Farm issued a check for $5,000.00 on July 22, 2016. [ODC Vol. I, Ex. 2, Bates 3, Sealed Bates 11, 51]

21. On August 2, 2016, Respondent deposited the $5,000.00 State Farm check into an Interest on Lawyers Trust Account (IOLTA) (9196) which he maintained at Premier Bank (also known as First Now on the bank statements). [ODC Ex. 30, Bates 2008-2009]

22. Ms. Jones' client file contains an unsigned Settlement statement.[8] The Settlement Statement indicated that Respondent would receive $1,666.66 in attorney's fees and had advanced expenses in the amount of $217.37 for a total to Pierson Legal Services of $1884.97, leaving $3,115.97. The Settlement Statement then indicated that the following would be paid from the settlement: (1) subrogation claim of Nationwide in the amount of $1,260.88; (2) escrowed from settlement pending verification of subrogation claim of Medicare Part B in the amount of $362.78. The statement indicated that the "TOTAL PAID OR ESCROWED FOR SUBROGATION" was $1,623.66 and the "TOTAL TO

[7] The date on the letters is June 30, 2016.

[8] In or about 2017, Ms. Jones retained Shari Collias, Esquire, to help her file for bankruptcy. As part of the bankruptcy representation, Ms. Collias needed financial information about the two legal matters on which Respondent represented Ms. Jones, the divorce and the personal injury matter. Complainant was contacted by Ms. Collias after Ms. Jones had difficulty obtaining her client file from Respondent despite Ms. Jones' requests for the same. Ms. Jones finally obtained her client file from Respondent on August 15, 2017, with the assistance of ODC after filing an informal complaint against Respondent. Complainant filed the formal complaint on May 29, 2018. [ODC Vol. I, Ex. 2, Bates 2; ODC Vol. III, Ex. 41, Bates 2710]

BE PAID DIRECTLY TO CLIENT" was to be $1,492.31. [ODC Vol. I, Ex. 1, Bates 4, Sealed Bates 53]

23. Complainant, on behalf of Ms. Jones, alleged that Ms. Jones did not receive her portion ($1,492.31) of the $5000.00 settlement funds which had been deposited into Respondent's Premier Bank IOLTA account (9196) on August 2, 2016.[9] [ODC Vol. I, Ex. 2, Bates 4] However, Ms. Jones testified during her deposition that she did receive payment of $1,492.31 from Pierson Legal, although she returned the amounts to him towards her outstanding legal fees.

24. After receiving an extension of time to respond, Respondent filed a response to the complaint on August 14, 2018. While he referenced numerous "Resp. Exhibits" in the response, Respondent failed to attach the same to his response. [ODC Vol. I, Ex. 6, 7]

25. By Memorandum Decision and Mandate entered July 8, 2019, Respondent was administratively suspended for failure to provide proof of compliance with the mandatory continuing legal education reporting requirements. [ODC Vol. I, Ex. 8, Bates 175-183] Respondent was reinstated on July 10, 2019. [ODC Ex. 8, Bates 184] During this time period, Mr. Pierson was consumed with his personal medical issues, as he was diagnosed with cancer. [ODC Vol. I, Ex. 11, Bates 192; ODC Ex. 22, Bates 253]

26. By certified letter dated August 5, 2019, Respondent was advised that his sworn statement was set for November 6, 2019, at ODC. The original subpoena and an

[9] In a billing statement dated September 11, 2017, Respondent credited Complainant's account on July 22, 2016, in the amount of $1,492.31. The entry is labeled "Regular Payment – Thank You. Personal Injury Proceeds (MP)." Respondent also credited Ms. Jones' account on February 9, 2016, in the amount of $500.00 for Mr. Jones' guns; $500.00 on March 11, 2016 for a Postal Order from Mr. Jones; $500.00 for a check from Mr. Jones; and $3,500.00 on September 5, 2017, for credit for the sale of Mr. Jones' motorcycle. The total still due, including finance charges, was $12,777.56. [ODC Vol. III, Ex. 36, Bates 2612]

acknowledgment of service were included in the letter. The green card, signed by Teconia Williams, was returned to ODC on August 9, 2019. [ODC Vol. I, Ex. 9]

27. By letter dated November 4, 2019, sent by both facsimile and certified mail, ODC advised Respondent that his request for a continuance of the November 6, 2019 sworn statement was granted and that a new subpoena would be issued for his appearance at ODC on January 15, 2020. The green card, signed by Respondent, was returned to ODC on November 12, 2019. [ODC Vol. I, Ex. 12]

28. By letter dated January 15, 2020, ODC granted Respondent's request to continue the January 15, 2020 sworn statement, and rescheduled the same for 1:30 pm. on February 13, 2020. Respondent was advised that "all other provisions in the Investigative Subpoena issued on November 4, 2019, including the production of documents, remain in full force and effect, …." [ODC Vol. I, Ex. 13]

29. By letter dated February 13, 2020, ODC confirmed a 11:30 a.m. conversation Senior Lawyer Disciplinary Counsel had with Respondent wherein Respondent stated that he did not have the February 13, 2020 sworn statement on his calendar and was "reminded of it upon receipt of recent letter from [ODC] which contained a reference to [the February 13, 2020] sworn statement." Respondent also advised ODC that he "would like the opportunity to obtain counsel for these proceedings and requested two (2) weeks to do so." ODC released Respondent from his February 13, 2020 appearance and stated that ODC "will expect to hear from [Respondent] or [his] counsel no later than Thursday, February 27, 2020, in order to arrange a mutually convenient date for [Respondent's] sworn statement. [ODC Vol. I, Ex. 15]

30. On February 27, 2020, Respondent's counsel faxed a letter to ODC advising that he had been retained by Respondent to represent him, but he would be out of the office until after March 15, 2020. [ODC Vol. I, Ex. 16]

31. By letter dated March 4, 2020, ODC sent a confirming letter to Respondent's counsel based upon a conversation with his assistant wherein it was agreed that Respondent would appear at ODC on April 16, 2020, for his sworn statement. New subpoenas were issued and included in the March 4, 2020 letter. [ODC Vol. I, Ex. 17]

32. On March 22, 2020, the Supreme Court of Appeals issued an Administrative Order declaring a Judicial Emergency due to the COVID pandemic and stayed all proceedings, subject to certain emergency proceedings, in the State of West Virginia, until April 10, 2020. [ODC Vol. I, Ex. 21, Bates 228-229] On April 3, 2020, the Supreme Court of Appeals issued an amended Order extending the stay until May 4, 2020. [ODC Vol. I, Ex. 21, Bates 230-231] On April 22, 2020, the Supreme Court of Appeals issued a Second Amended Order which extended the stay until May 15, 2020. [ODC Vol. I, Ex. 21, Bates 232-33]

33. After ongoing discussions with Respondent's counsel throughout the spring and summer of 2020, Respondent's sworn statement was scheduled to occur over two (2) days, October 14, and October 15, 2020. New subpoenas were issued and sent to Respondent's counsel by letter dated September 10, 2020. Pursuant to later discussions between ODC and Respondent's counsel, Respondent appeared for his sworn statement on October 20, 2020, and October 27, 2020. [ODC Vol. II, Ex. 31; ODC Vol. II, Ex. 32]

34. On October 27, 2020, Respondent provided the exhibits which had been referenced but not attached to his August 24, 2018 [response to the complaint].[10] [ODC Vol. III, Sealed Ex. 33]

35. By letter dated October 29, 2020 addressed to Respondent's counsel, ODC confirmed ODC's request from the October 27, 2020 sworn statement that Respondent provide additional information, Ms. Jones' billing records, within twenty (20) days. Respondent did not respond. [ODC Vol. III, Ex. 34]

36. By certified letter dated November 30, 2020, addressed to Respondent's counsel, ODC again requested that Respondent provide Ms. Jones' billing records no later than December 14, 2020. The green card, signed on December 1, 2020, was returned to ODC on December 3, 2020. [ODC Vol. III, Ex. 35]

37. By letter dated December 22, 2020, and received by ODC by email on December 23, 2020, and original received by U.S. Mail on December 26, 2020, Respondent provided Ms. Jones' billing records. [ODC Vol. III, Ex. 36]

38. In September 2016, Respondent wrote the following checks from his Premier Bank IOTLA account (9196): (1) September 1, 2016, check no. 7077, payable to Pierson Legal Services for $5,000.00, no memo; (2) September 9, 2016, check no. 7078, payable to Pierson Legal Services for $2,000.00, memo – to Summit; (3) September 13, 2016, check no. 7080, payable to Pierson Legal Services for $1,000.00, memo – to Summit Gen.; (4) September 15, 2016, check no. 7072, payable to Pierson Legal Services for $2,800.00, no

[10] By email dated October 13, 2020, in response to an inquiry to Senior Lawyer Disciplinary Counsel, Respondent's counsel was advised that Respondent's exhibits to the August 14, 2018 response had not been previously submitted to ODC.

memo; (5) September 16, 2016, check no. 7082, payable to Pierson Legal Services for $1,100.00, no memo. [ODC Vol. II, Ex. 30, Bates 2014-2022]

39. In addition to the Premier Bank IOLTA account (9196), and the Summit Bank General Account (4633) which were associated with Respondent and Pierson Legal Services during this time, Respondent also maintained a General Account (9212) at Premier Bank, a second IOLTA Account (4625) at Summit Bank[11], a second General Account (0768) at Summit Bank, a third IOLTA account (4504) at BB&T and a third General Account (7448) at BB&T. All of these accounts are associated with Respondent and Pierson Legal Services.[12] [See ODC Vol. I, Ex. 24, 25, 26, ODC Vol. II, Ex. 27, 28, 29, 30]

40. Complainant also alleged that Respondent did not promptly pay Nationwide its subrogation claim. [ODC Vol. I, Ex. 1, Bates 4-5] In or about November 2016, Respondent's staff emailed Nationwide and attached the June 30, 2016 letter wherein Respondent had requested that Nationwide waive its subrogation claim and requesting that "Could you please respond accordingly?" [ODC Vol. I, Ex. 2, Bates 2, Sealed Bates 59] Eventually, Respondent paid Nationwide by check dated March 27, 2017, in the amount of $1,333.33 (not the $1,260.88 on the Settlement statement) from his General Account (4633) at Summit Bank. [ODC Vol. I, Ex. 2, Sealed Bates 61] In his response to the complaint, Respondent asserted that this 2017 check was a replacement check for a check allegedly written in or about November 2016.

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[11] The September 30, 2016 bank statement for Respondent's Summit IOLTA bank account (4625) indicates a Deposit on September 1, 2016, of Respondent's Premier Bank IOLTA account ending in 4633, September 1, 2016, check no. 7077, payable to Pierson Legal Services for $5,000.00; a Remote Capture Deposit of $2,000.00 on September 9, 2016; and a Deposit on September 19, 2016, of Respondent's Premier Bank IOLTA Account ending in 4633, September 16, 2016, check no. 7082, payable to Pierson Legal Services for $1,100.00. [ODC Ex. Vol. I, Ex. 26, Bates 862-866]

[12] Respondent also maintained payroll accounts at both Premier Bank and Summit Bank.

41. While the unsigned Settlement Statement indicated that Respondent "escrowed from settlement pending verification of subrogation claim of Medicare Part B in the amount of $362.78," Respondent failed to set aside, maintain and preserve funds that may have been due to Medicare and/or the Centers for Medicare and Medicaid Services ("CMS"). [ODC Vol. I, Ex. 2, Sealed Bates 53] Ms. Jones received and delivered two Conditional Payments Notices dated September 8, 2016, and October 20, 2016, to Respondent's office, and received an acknowledgment of receipt of the CMS notices on November 1, 2016, from Respondent's office staff. Respondent still did not issue payment to CMS. Ms. Jones then received a Notice of Intent to Refer Debt to the Department of Treasury for Cross-Servicing and Offset of Payments from CMS dated January 24, 2017. Ms. Jones again delivered this notice to Respondent's office.[13] [ODC Vol, I, Ex. 2, Bates 5-7, Sealed Bates 65-94; Hrg. Tr. 21-23]

42. By December 1, 2016, Respondent's Premier Bank IOTLA Account (9196) had a balance of $250.01. [ODC Vol. II, Ex. 30, Bates 2044]

43. Respondent used the Pierson Legal Services Summit Bank IOLTA account (4625) for purposes other than those outlined in the Rules of Professional Conduct and State Bar Administrative Rule 10. Specifically, the December 16, 2016 bank statement for Respondent's Summit Bank IOLTA account (4625), includes a notation for a Remote Capture Deposit of $2,734.25 on December 5, 2016, and on the same day a Debit of $2,700.00 identified as "Farm income sale of cattle" on December 5, 2016. [ODC Vol. I, Ex. 26, Bates 884]

[13] On February 1, 2017, Ms. Jones wrote a check herself to pay CMS in the amount of $456.71 (total after accumulation of interest). [Hrg. Tr. 21-23]

44. Respondent alleges that he did enter into a written contingency fee agreement with Ms. Jones. However, the Respondent has not been able to produce a copy of the agreement.

45. Ms. Jones and Mr. Pierson both testified that they agreed, albeit orally, for Pierson Legal Services to represent Ms. Jones in her personal injury matter. [Hrg. Tr. 18]

C. CONCLUSIONS OF LAW[14]

46. Respondent admitted that he failed to promptly pay the subrogation claims owed to Nationwide and CMS while representing Cynthia Jones in violation of Respondent violated Rule 1.15(d), as follows:

> **Rule 1.15. Safekeeping Property.**
> (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

47. Respondent admitted that he failed to safeguard funds belonging to clients or third person, including Nationwide and CME, and on this occasion (December 5, 2016 deposit of Pierson Farm Income) comingled personal property with property of clients or third persons in his Premier Bank IOLTA account (4633) and his Summit Bank IOLTA account (4625) in violation of Rule 1.15(a) of the Rules of Professional Conduct, as follows:

> **Rule 1.15. Safekeeping.**
> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account designated as a "client's trust account" in an

[14] As found by the Hearing Panel Subcommittee.

> institution whose accounts are federally insured and maintained in the state where the lawyer's office is situated, or in a separate account elsewhere with the consent of the client or third person. Such separate accounts must comply with State Bar Administrative Rule 10 with regard to overdraft reporting. Other property shall be identified as such and appropriated safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

48. Respondent admits that his use of his IOLTA accounts were and are not incompliance with his obligations under the Rules of Professional Conduct and State Bar Administrative Rule 10, and that as such he violated Rule 1.15(b), 1.15(f) and State Bar Administrative Rule 10, by depositing funds from his farm business into his IOLTA account and on the same day removed the improper deposit, as follows:

> **Rule 1.15. Safekeeping Property.**
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> (b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.
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> ***
>
> (f) IOLTA (Interest on Lawyers Trust Accounts). A lawyer who receives client funds that are nominal in amount or are expected to be held for a brief period shall establish and maintain a pooled, interest or dividend-bearing account for the deposit of such funds at an eligible financial institution in compliance with State Bar Administrative Rule 10.
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> **West Virginia State Bar Administrative Rule 10. Client Trust Accounts; IOLTA Program.**[15]

49. Based upon the record, Disciplinary Counsel and Respondent jointly recommend dismissal of the Rule 8.4 violation in paragraph 44 of the Statement of Charges.[16]

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[15] See, https://wvbar.org/wp-content/uploads/2020/10/Rule-10-Client-trust-accounts.pdf

[16] The Hearing Panel Report also noted the following additional Stipulations regarding bank records and court records: that Judicial Notice [was] taken, and all foundation and/or authenticity requirements are waived, as to all

II. SUMMARY OF ARGUMENT

This Court has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but also to protect the public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard its interests in the administration of justice. Lawyer Disciplinary Board v. Taylor, 192 W.Va. 139, 451 S.E.2d 440 (1994). The HPS found that the clear and convincing evidence established that Respondent committed violations of Rules 1.15(d); 1.15(a); 1.15(b); 1:15(f) of the Rules of Professional Conduct; and West Virginia State Bar Administrative Rule 10. ODC respectfully submits to this Honorable Court that the clear and convincing evidence also supports finding that Respondent committed a violation of Rule 1.5(c) of Rules of Professional Conduct as stipulated to by the parties.[17] Moreover, ODC respectfully submits to this Honorable Court that the HPS' recommended sanction of a ninety (90) days suspension, among other sanctions, is inadequate in consideration of the seriousness of the proven charges, the fact that the HPS found that Respondent's misconduct was both knowing and intentional, and that the HPS found numerous aggravating factors were present but no mitigating factors.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Office of Lawyer Disciplinary Counsel filed an objection to the recommended decision of the HPS on January 13, 2023. Respondent also filed an objection on January 13,

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pleadings, motions, orders, hearing transcripts, and court documents submitted in this matter; that the parties hereby stipulate[d] that all bank records including those from Premier Bank (now known as First Now), Summit Bank and BB&T submitted in this matter including but not limited to Respondent's IOLTA/Client Trust Accounts, General Accounts, and or Payroll Accounts are authentic and properly obtained by a lawfully executed subpoena; and that the parties hereby agree[d] to waive foundation requirements for any bank records submitted as exhibits in this matter. *See*, Hearing Panel Report at p. 15.

[17] *See*, Joint Exhibit 1, pp. 14-15.

2023. This Honorable Court's February 2, 2023 Order indicated that this matter would be scheduled for oral argument pursuant to Rule 19 of the Rules of Appellate Procedure.

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). 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, 464 S.E.2d at 189; McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381.

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*, Syl. Pt. 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995). "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." Syl. Pt. 3, Matter of Starcher, 202 W.Va. 55,

501 S.E.2d 772 (1998) *citing* Syl. Pt. 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." Syl. Pt. 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. Matter of Starcher, 202 W.Va. at 61, 501 S.E.2d at 778. Furthermore, the Supreme Court has also held that "[s]tipulations or agreements made in open court by the parties in the trial of a case and acted upon are binding and a judgment founded thereon will not be reversed." Syl. Pt. 3, Lawyer Disciplinary Board v. Cavendish, 226 W.Va. 327, 700 S.E.2d 779 (2010).

Finally, 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

Syl. Point 4 of Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998) holds: 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. A review of the extensive record in this matter indicates that Respondent has transgressed all four factors set forth in Jordan.

1. Whether Respondent has violated a duty owed to a client, to the public, to the legal system or to the legal profession.

Lawyers owe duties of candor, loyalty, diligence and honesty to their clients. A lawyer also owes a fiduciary duty to a client and, with that duty, an obligation to act in the client's best interests. The evidence in this case establishes by clear and convincing proof that Respondent violated his duties owed to his client, to the public, to the legal system, and to the legal profession. Indeed, lawyers are officers of the court and must act in a manner to maintain the integrity of the Bar and the profession and Respondent's admitted conduct in this matter fell short of all these stated obligations.

While the HPS found that Respondent violated Rules 1.15(d); 1.15(a); 1.15(b); 1.15(f) of the Rules of Professional Conduct and West Virginia State Bar Administrative Rule 10, the HPS did not find that Respondent had violated Rule 1.5(c) of the Rules of Professional which provides in relevant part that:

> A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.

However, Respondent stipulated to a violation of Rule 1.5(c) and admitted that he could not produce a signed written contingent fee agreement.[18] The fact that Respondent and Ms. Jones testified that they had an oral understanding that Respondent would represent Ms. Jones in a

[18] *See*, Joint Exhibit 1, pp. 14-15.

personal injury contingent fee case does not negate Respondent's obligation under the Rules of Professional Conduct to have written contingent fee agreement signed by Ms. Jones. Moreover, Respondent's obligations under the Rules of Professional Conduct to have a written contingent fee agreement which would include the details of how the fees and expenses would be calculated cannot be waived by his client. This Court has held that "the Rules of Professional Conduct cannot be waived by a client, so as to permit a lawyer to do that which the Rules prohibit, unless the Rules themselves provide a specific exception allowing waiver. The Rules reflect the high standards by which all lawyers must abide regardless of the wishes of the client." Syl. Pt. 3, Lawyer Disciplinary Board v. Ball, 219 W.Va. 296, 633 S.E.2d 241 (2006). Rule 1.5(c) does not provide for any such client waiver. ODC asserts that the clear and convincing evidence demonstrates that Respondent did not have a signed written contingent fee agreement for his representation of Ms. Jones in her personal injury matter, that this misconduct violated duties owed to his client, the public, the legal system and the legal profession and constitutes a violation of Rule 1.5(c) of the Rules of Professional Conduct.

The fact that there is no signed written and signed contingent fee agreement is problematic in this case because it led to confusion about the status and distribution of the settlement proceeds to Respondent's client, and status and payment of known subrogation claims.[19] On August 2, 2016, Respondent deposited the $5,000.00 State Farm settlement check into an Interest on Lawyers Trust Account (IOLTA) (9196) which he maintained at Premier

[19] In the complaint, Complainant stated that Ms. Jones had agreed that Respondent "could have her share of any personal injury settlement." However, prior to the settlement of the personal injury matter, Respondent was awarded attorney's fees. Therefore, Complainant said that they decided that Ms. Jones could keep her share of the personal injury settlement. There is no writing that reflects any agreement between Respondent and Ms. Jones for disbursal of the State Farm settlement funds. Respondent's Contract for Legal Services with Ms. Jones in the divorce matter provides in paragraph 9 that "We will have a lien on all your documents, property, or money in my possession for the payment of all sums due use from you under the terms of this agreement. In addition, We [sic] are entitled to a charging lien ensuring that, if We [sic] elect, payment to us will come from any money you receive as part of the settlement in your case." [ODC Vol. I, Ex. 1, Bates 7; *See also* Joint Ex. 1, p. 11]

Bank (also known as First Now on the bank statements). [ODC Ex. 30, Bates 2008-2009] Furthermore, despite the notation on the unsigned Settlement Statement indicating that Ms. Jones was to receive $1,492.31 from the State Farm settlement, no check payable to Ms. Jones, in the amount of $1,492.31 to indicate that she received her share of the $5,000.00 State Farm settlement could be located in Respondent's Premier Bank IOLTA account (9196). [ODC Vol I., Sealed Bates 53; ODC Vol. II, Ex. 30, Bates 2008-2098] In the complaint, Complainant stated that Ms. Jones had agreed that Respondent "could have her share of any personal injury settlement." However, prior to the settlement of the personal injury matter, Respondent was awarded attorney's fees. Therefore, Complainant said that they decided that Ms. Jones could keep her share of the personal injury settlement. There is no writing that reflects any agreement between Respondent and Ms. Jones for disbursal of the State Farm settlement funds. Respondent's Contract for Legal Services with Ms. Jones in the divorce matter provides in paragraph 9 that "We will have a lien on all your documents, property, or money in my possession for the payment of all sums due use from you under the terms of this agreement. In addition, We [sic] are entitled to a charging lien ensuring that, if We [sic] elect, payment to us will come from any money you receive as part of the settlement in your case." [ODC Vol. I, Ex. 1, Bates 7; *See also* Joint Ex. 1, p. 11] In addition, Ms. Jones also testified during her deposition that she received payment from Pierson Legal Services of her portion of the settlement funds but said she returned the funds in cash to Respondent to go towards her outstanding legal fees. Clearly, under these circumstances, the evidence supports finding that Respondent's misconduct in failing to have a written and signed contingent fee agreement constitutes a violation of Rule 1.5(c) of the Rules of Professional Conduct.

The HPS properly found that Respondent failed to timely pay both the Nationwide and CMS subrogation claims. Respondent clearly violated duties he owed to his client and third parties for this failure. The Nationwide claim was indicated on the unsigned Settlement Statement and in or about November 2016, Respondent's staff emailed Nationwide and attached the June 30, 2016 letter wherein Respondent had asked that Nationwide waive its subrogation claim and requesting that "Could you please respond accordingly?" [ODC Vol. I, Ex. 2, Bates 2, Sealed Bates 59] Eventually, Respondent paid Nationwide by check dated March 27, 2017, in the amount of $1,333.33 (not the $1,260.88 on the settlement statement) from his General Account (4633) at Summit Bank. [ODC Vol. I, Ex. 2, Sealed Bates 61] Respondent's assertion that his 2017 check to Nationwide was a replacement check for a check allegedly written in or about November 2016 is not credible. Respondent produced no evidence of any prior issued check to Nationwide and no prior check to Nationwide could be located in relevant bank records.

Respondent also violated duties owed to his client and third parties regarding his failure to timely pay the CMS subrogation claim despite having notice of the same. In addition to the Nationwide subrogation claim, the unsigned Settlement Statement also indicated that Respondent "escrowed from settlement pending verification of subrogation claim of Medicare Part B in the amount of $362.78," However, the clear and convincing evidence proved that Respondent failed to set aside, maintain and preserve funds that were due to CMS. [ODC Vol. I, Ex. 2, Sealed Bates 53] Respondent clearly had notice of the CMS claim because it was referenced on the settlement statement. In addition, on November 1, 2016, Respondent's client delivered two Conditional Payments Notices dated September 8, 2016, and October 20, 2016, regarding the CMS claim to Respondent's office and she was provided an acknowledgment of receipt of the notices from Respondent's office staff. When Respondent did not issue payment to CMS, Ms.

Jones received a Notice of Intent to Refer Debt to the Department of Treasury for Cross-Servicing and Offset of Payments from CMS dated January 24, 2017. Ms. Jones again delivered this Notice to Respondent's office. [ODC Vol, I, Ex. 2, Bates 5-7, Sealed Bates 65-94; Hrg. Tr. 21-23]. Respondent still did not issue payment to CMS which led to Ms. Jones writing her own check to CMS on February 1, 2017, in the amount of $456.71 (total after accumulation of interest).[20] [Hrg. Tr. 21-23] Respondent's misconduct in this regard is a violation of Rule 1.15(d) of the Rules of Professional Conduct.

The HPS also properly found that Respondent failed to take proper precautions to ensure the protection of client and third-party funds by not properly utilizing his IOLTA account when he deposited his own personal funds into his IOLTA account. This conduct violated his duties owed to his clients, the public, the legal profession, and the legal system and constitutes a violation of Rules 1.15(b), 1.15(f) and State Bar Administrative Rule 10.

2. Respondent acted intentionally, knowingly or negligently.

The evidence establishes that in representing Ms. Jones, Respondent acted intentionally and knowingly and that his actions were not the result of simple negligence or mistake. 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

[20] Respondent provided a check to Ms. Jones at the August 23, 2022 hearing in the amount of $538.92. [Joint Ex. 2] At the hearing, Respondent's counsel stated that the check represented "the amount of the CMS payment plus the statutory rate of interest from the time it was paid to Ms. Jones. In her deposition, they provided a copy of the check that she sent, so we used the date of the check to the date of today, and it's approximately $500." [Hrg. Tr. 25-26]

from the standard of care that a reasonable lawyer would exercise in the situation. *ABA Model Standards for Imposing Lawyer Sanctions*, Definitions (1992).

In this matter, Respondent certainly knew that Ms. Jones had a personal injury matter as he had Ms. Jones sign a "File Review Agreement." Respondent then proceeded to work on the personal injury matter, reached a settlement and produced a Settlement Statement detailing the contingent fee distribution of the settlement proceeds. The Supreme Court has held that "lawyers who engage in the practice of law in West Virginia have a duty to know the Rules of Professional Conduct and to act in conformity therewith." Lawyer Disciplinary Board v. Ball, 219 W.Va. 296, 633 S.E.2d 241 (2006). The Rules of Professional Conduct require written contingent fee agreements and Respondent admitted to not having one in this matter. Furthermore, Respondent had knowledge that there were subrogation claims to be paid in Ms. Jones' case and he did not pay the CMS claim even after being advised by Ms. Jones herself that the claim had not been paid. Respondent also had to be advised by Nationwide some months later that Nationwide's subrogation claim had yet to be paid. [ODC Vol. I, Ex. 1, Sealed Bates 65-85] Respondent's failure to issue a refund to Ms. Jones of the amount she paid to CMS for the subrogation claim constitutes intentional misconduct. Respondent had knowledge of the CMS subrogation claim, he knew that it had not been paid, and he knew for some time that Ms. Jones paid that subrogation claim herself and then did not issue a refund to her until the disciplinary hearing. The evidence also supports that Respondent knowingly failed to safeguard funds owed to his clients and third parties and comingled his personal funds with money belonging to his clients and third parties. Finally, the evidence establishes that Respondent's improper use of his IOLTA bank account was knowing and intentional.

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

As a direct result of Respondent's misconduct, his client, Ms. Jones suffered real and actual injury. Despite Respondent having knowledge of the CMS subrogation claim and that he was holding money from her July 2016 settlement to pay the same, Ms. Jones had to pay the CMS claim herself in February 2017 after receiving notices from CMS (which she personally delivered to Respondent) that the subrogation claim had not been paid. [Hrg. Tr. 21; See also ODC Vol. I, Ex. 1, Sealed Bates 65-85] Ms. Jones testified that "it's taken [her] six years to get here" and that she "had to pay a lot of money out of her own pocket[.]" [Hrg. 21, 23, 28]. Ms. Jones also testified that she "trusted" Respondent because he had been recommended to her by her father's friend. [Hrg. Tr. 23-24]. After her experience with Respondent representing her in her divorce and in the personal injury case, Ms. Jones said "[she] know[s] that there are good lawyers out there and I know he's a bad lawyer" and that, in her opinion, Respondent is "dishonest." [Hrg. Tr. 23, 28].

4. The existence of any aggravating factors.

Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Court to examine when considering the imposition of sanctions. Elaborating on this rule, the Scott Court held "that aggravating factors in a lawyer disciplinary proceeding 'are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.'" Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E.2d 550, 557(2003) *quoting ABA Model Standards for Imposing Lawyer Sanctions,* 9.21 (1992). The HPS properly found that there were several aggravating factors present in this case, including (1) dishonest or selfish motive, (2) pattern of misconduct, (3) multiple offenses, (4)

vulnerability of victim, (5) substantial experience in the practice of law, (6) indifference to making clearly owed restitution and (7) prior disciplinary offenses.

The HPS did not find that Respondent's admitted comingling of his personal funds with his client and third-party funds in his IOLTA account could be considered to be an aggravating factor.[21] [ODC Vol. I, Ex. 26, Bates 884 -891] The HPS found that this was a "technical violation" and that no evidence had been presented of an intent to defraud a client as a result of the deposit of Respondent's "farm" funds into his law office IOTLA account or that any client was harmed. However, Respondent's bank records also establish that Respondent deposited personal funds into his IOTLA account on more than one occasion which established a pattern of misconduct for the purpose of aggravation. [ODC Vol. I, Ex. 26, Bates 862, 921, 942, 951] Respondent should be held accountable for the misuse of his IOLTA fund and should not be characterized as a "technical violation." As an attorney with more than thirty-five (35) years of experience, it is presumed that Respondent is well aware of his obligations under the Rules of Professional Conduct. See, Lawyer Disciplinary Board v. Ball, *supra*. Moreover, Respondent violated his duties owed to his clients, the public, and the legal profession when he improperly deposited personal funds into his IOLTA account.

Respondent committed multiple violations of the Rules of Professional Conduct during his representation of Ms. Jones and in the operation of his law practice. Ms. Jones was in vulnerable position when Respondent undertook her representation, and he was aware of the fragile state of her health. Ms. Goodman also testified that she noted that Ms. Jones "was a fragile client." [Hrg. Tr. 12-13, ODC Vol. I, Ex. 2, Bates 2]. Ms. Collias, Ms. Jones' bankruptcy attorney, likewise testified that Ms. Jones had significant health issues and would easily get upset discussing matters. [Hrg. Tr. 39-41] Respondent has been licensed to practice law since 1985.

[21] HPS Report, pp. 19-20.

The Supreme Court has held that "lawyers who engage in the practice of law in West Virginia have a duty to know the Rules of Professional Conduct and to act in conformity therewith." Lawyer Disciplinary Board v. Ball, 219 W.Va. 296, 633 S.E.2d 241 (2006).

The fact that Respondent issued a refund check to Ms. Jones for the CMS subrogation claim which she paid plus interest on the day of his disciplinary hearing in August 2022 does not negate his misconduct, is not a defense, and should not mitigate the sanction. Syl. pt. 8, Lawyer Disciplinary Board v. Geary M. Battistelli, 206 W.Va. 197, 523 S.E.2d 257 (1999); Syl. pt. 4, Committee on Legal Ethics v. Hess, 186 W.Va. 514, 413 S.E.2d 169 (1991); and Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 569-570, 505 S.E.2d 619, 632-633 (1998), *remanded with directions*, see Lawyer Disciplinary Board v. Kupec (Kupec II), 204 W.Va. 643, 515 S.E.2d 600 (1999). Battistelli and Hess note that mitigation of punishment because of restitution must be governed by the facts of the particular case. Kupec I also provides that:

> Where the restitution has been made after the commencement of disciplinary proceedings, or when made as a matter of expediency under the pressure of the threat of disciplinary proceedings, some courts have refused to consider it a mitigating factor.

Kupec I, 515 S.E.2d at 570, *citations omitted*. Respondent knew that the CMS subrogation claim was due and he did not timely pay CMS subrogation claim or issue a refund to Ms. Jones of the money she had paid until the day of his disciplinary hearing. As Ms. Jones testified at the hearing, she waited six (6) years for Respondent to issue her a refund.

The Supreme Court of Appeals of West Virginia also considers prior Investigative Panel admonishments to be aggravating. See, e.g., Lawyer Disciplinary Board v. Sturm, 237 W.Va. 115, 785 S.E.2d 821 (2016); Lawyer Disciplinary Board v. Grindo, 231 W.Va. 365, 745 S.E.2d 256 (2013). Respondent has been previously admonished on four (4) occasions by the

Investigative Panel of the Lawyer Disciplinary Board. In I.D. No. 08-01-378, Respondent was admonished for violating Rules 1.4(a) and 1.4(b) for failing to communicate with his client in a manner consistent with his obligations under the Rules of Professional of Conduct. [ODC Vol. III, Ex. 42, Bates 2923-2932]. In I.D. No. 10-05-006, the Investigative Panel admonished Respondent for violating Rule 1.5(a) of the Rules of Professional Conduct after the Family Court and the Circuit Court of Fayette County, West Virginia, found Respondent's fee to be unreasonable. [ODC Vol. III, Ex. 42, Bates 2958-2968]. Respondent was again admonished by the Investigative Panel in I.D. No. 19-01-014 and 19-01-490 for violating Rule 8.1(b) of the Rules of Professional Conduct after the Panel found that beginning in May 2019, ODC had to send multiple letters to Respondent to obtain a response from him after requesting additional information. While the Panel recognized that Respondent was undergoing medical treatment and that court operations were suspended for a short period of time due to the COVID pandemic during these proceedings, there were still many months when Respondent had knowledge of ODC's requests for additional information and had knowledge of his obligation to respond to the requests for information, and did not tender a response until October 2020. [ODC Vol. III, Ex. 42, Bates 3126-3160; 3161-3183] As the evidence reflects, the numerous aggravating factors in this case clearly outweigh any possible mitigating factors Respondent may assert.

5. The existence of any mitigating factors.

In addition to adopting aggravating factors in Scott, the Scott court also adopted mitigating factors in a lawyer disciplinary proceedings and stated that mitigating factors "are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E.2d 550, 557 (2003) *quoting*

ABA Model Standards for Imposing Lawyer Sanctions, 9.31 (1992)[1]. It should be clear that mitigating factors were not envisioned to insulate a violating lawyer from discipline. Respondent may assert that he was experiencing medical issues that warrant mitigation, but the HPS found that there were no mitigating factors present in this case.

At the hearing, Respondent's counsel asked Respondent to "shed some light as to [his] medical situation as to why [Respondent] may or may not have been quite so attentive[.]" [Hrg. Tr. 69]. In response, Respondent said that he had "two medical issues that were that were relatively close together. [He] had a horse, which fell on [him] and crushed [his] pelvis.... [He] was diagnosed with cancer. And [he] underwent chemotherapy and radiation for the cancer.... [He] was hospitalized for a few weeks with the cancer." [Hrg. Tr. 70]. However, Respondent did not submit any medical records regarding his medical issues. The only evidence is Respondent's letter dated November 1, 2019, wherein he requested a continuance of his November 4, 2019 sworn statement and stated that "earlier this year [he] was diagnosed with throat cancer, ... [o]n September 30, 2019, [he] began a course of treatment ...." [ODC Vol. I, Ex. 11, Bates 192]. Based upon his letter, ODC agreed to continue his sworn statement even though Respondent had known about the November 6, 2019 sworn statement since the August 2019 service of the subpoena. [ODC Vol. I, Ex. 9, Bates 186-189] Then on March 27, 2020, Respondent's counsel sent an undated letter[22] from Respondent's treating physician indicating that he had been treating Respondent since August 9, 2019 when he was referred for a consult, diagnosis and treatment of

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[1] 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.

[22] While the letter is undated, it does appear to have been faxed from Respondent's physician on March 24, 2020.

throat cancer. [ODC Vol. I, Ex. 22, Bates 253] Clearly, Respondent's medical issues involving his cancer diagnosis occurred more than two years after the conclusion of his representation of Ms. Jones and he cannot therefore justify receiving mitigation for misconduct that took place prior to his medical diagnosis and treatment. Likewise, Respondent should not receive any mitigation for the horse fall injury because he could not even recall the date he suffered that injury when questioned by Senior Lawyer Disciplinary Counsel. [Hrg. Tr. 71]

> Question: When was the horse accident? You did not provide any dates of that?
> Answer: I don't recall. I know it was before this but I still –
> Question: Before this, what dates? Is it prior to 2014?
> Answer: It was probably right around there.
> Question Was it prior to 2014, the date you began representing Ms. Jones?
> Answer: I don't think so.
> Question: Have you produced any records regarding a horse accident—
> Answer: No.

C. 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).

Absent any aggravating or mitigating circumstances, Standard 4.12 of the *ABA Model Standards for Imposing Lawyer Sanctions* provides that suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client and Standard 4.42 provides 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 and causes injury or potential injury to a client.

In the instant matter, Respondent committed multiple violations of several Rules of Professional Conduct. Respondent failed to have a written contingent fee agreement. Respondent also failed to timely pay the Nationwide subrogation claim and failed to pay the CMS subrogation claim altogether despite having knowledge that payments must be made and that he was withholding money to pay the same from Ms. Jones' personal injury settlement. Respondent also failed to take proper precautions to ensure the protection of client and third-party funds when he deposited, on more than one occasion, his own personal funds into his IOLTA account. Respondent's misconduct also caused his client, Ms. Jones, to worry that her disability status could be impacted by the failure to promptly pay the CMS claim.[23] Moreover, no mitigating factors were found by the HPS in this case. Therefore, a serious sanction, such as suspension, should be imposed when an experienced lawyer such as Respondent knowingly and intentionally

[23] Ms. Collias who was Ms. Jones' bankruptcy attorney testified that Ms. Jones came to her office on several occasions with the notices from CMS about the unpaid subrogation claim and that she advised Ms. Jones that "it was best to go ahead and – she was so upset over it, afraid it would impact her Social Security payment. I said 'Just go ahead and pay it.'" [Hrg. Tr. 38]

fails to comply with his obligations, including his fiduciary responsibilities, under the Rules of Professional Conduct.

Furthermore, while Respondent eventually reimbursed the funds that Ms. Jones had paid to CMS, this action does not negate the misconduct, is not a defense, and in this case should not mitigate any proposed sanction. Syl. pt. 8, Lawyer Disciplinary Board v. Geary M. Battistelli, 206 W.Va. 197, 523 S.E.2d 257 (1999); Syl. pt. 4, Committee on Legal Ethics v. Hess, 186 W.Va. 514, 413 S.E.2d 169 (1991); and Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 569-570, 505 S.E.2d 619, 632-633 (1998), *remanded with directions*, see Lawyer Disciplinary Board v. Kupec (Kupec II), 204 W.Va. 643, 515 S.E.2d 600 (1999). Battistelli and Hess note that mitigation of punishment because of restitution must be governed by the facts of the particular case. Kupec I provide that:

> Where the restitution has been made after the commencement of disciplinary proceedings, or when made as a matter of expediency under the pressure of the threat of disciplinary proceedings, some courts have refused to consider it a mitigating factor.
> Kupec I, 515 S.E.2d at 570, citations omitted.

In the instant matter, the HPS recommended that a ninety (90) day suspension was the appropriate sanction.[24] ODC respectfully submits that the recommended sanction is inadequate in consideration of the seriousness of the proven charges, the numerous aggravating factors and the fact that the HPS found that there were no mitigating factors present in this case.

The West Virginia Supreme Court has issued suspensions in cases where an attorney improperly dealt with client property. In Lawyer Disciplinary Board v. Santa Barbara, 229 W.Va. 344, 729 S.E.2d 179 (2012), the Supreme Court dealt with an attorney who failed to diligently handle client matters, failed to communicate with his clients, failed to competently

[24] While not specified in the HPS Report, it is presumed that the HPS intended that reinstatement would be pursuant to Rule 3.31 [Automatic Reinstatement] of the Rules of Lawyer Disciplinary Procedure based upon a ninety (90) day suspension.

represent his clients, and failed to properly manage his client trust account, and which resulted in a one (1) year suspension. In Mr. Santa Barbara's case, the Court was also faced with multiple complaints and the attorney's depression which was considered by the Court as a mitigating factor to lessen the ultimate sanction to a one (1) year suspension, albeit in consideration of significant mitigation present in that matter.

Unlike Mr. Santa Barbara, Respondent does not have any mitigation to lessen the severity of his sanction. Furthermore, unlike the attorneys in cases where the attorney received shorter suspensions, see *infra*, Respondent conduct has been found to be knowing and intentional in this matter. In the past this Court has also looked to the overall history of the lawyer, including such things as prior wrongdoing and discipline, when determining what sanction to impose. Syl. pt. 5, Committee on Legal Ethics v. Tatterson (Tatterson II), 177 W. Va. 356, 352 S.E.2d 107 (1986) (*prior discipline aggravating because it calls into question a lawyer's fitness to practice a profession imbued with the public's trust*). Additionally, 9.22(a) of the *ABA Standards for Imposing Lawyer Sanctions* states that any prior discipline of an attorney should also be viewed as an aggravating factor.

However, it is noted that this Court has also issued shorter suspensions in cases involving similar misconduct. In Lawyer Disciplinary Board v. Harmon-Schamberger, No. 16-0662 (WV 5/16/17) (unreported), the attorney was issued a three (3) month suspension for violating Rules 1.1, 1.4(a) and (b), 1.5(b),1.15(a), 1.15(c) 1.16(d), 5.3(b) and 8.4(c) of the Rules of Professional Conduct. The attorney was found to have acted negligently in the management of her law practice by authorizing an improperly trained employee to handle communication with clients, and collect payments from them on her behalf, without any supervision, resulting in the employee's use of funds for personal use. It was noted that the attorney should have recognized

the many warning signs presented by the situation and that she could have mitigated damages had she been properly monitoring her employee.

In Lawyer Disciplinary Board v. Hoosier, No. 16-1028 (WV 8/30/17) (unreported), the attorney was found to have violated Rules 1.1; 1.2(a); 1.3; 1.4(a) & (b); 3.2; 1.15(a); 1.15(f); and 7.1(a) in his representation of multiple appointed clients in *habeas* matters. Mr. Hoosier was found to have co-mingled client funds with personal funds when he deposited client settlements into his operating account and had advertising issues. In Hoosier, the Supreme Court issued a three (3) month suspension to the attorney in addition to the imposition of additional continuing legal education hours in the area of ethics and office management.

In Lawyer Disciplinary Board v. Blyler, 237 W.Va. 325, 787 S.E.2d 596 (2016), the Supreme Court suspended the attorney for sixty (60) days for improperly naming the account in which he had been holding almost $100,000.00 of client funds in trust. The funds were appropriated from the improperly named account by the State to pay the attorney's back taxes. Id. In that case, the Court also considered the fact that the attorney was dealing with his wife's early onset Alzheimer's disease to be a mitigating factor. Id.

This Court has also issued reprimands in some cases. In Lawyer Disciplinary Board v. Chittum, 225 W.Va. 83, 689 S.E.2d 811 (2010), the Supreme Court issued a reprimand to an attorney found to have co-commingled client funds with his own funds with no intent to convert client funds and no actual injury. The Supreme Court also issued a reprimand to an attorney in Lawyer Disciplinary Board v. Niggemyer, No. 31665 (W.Va. May 11, 2005) (unreported). In that case, Mr. Niggemyer was found to have violated Rules 1.3 (lack of diligence), 1.4(a) (communication, failure to keep the client informed about the status of a case), 1.15(a) (safekeeping funds or property of clients or third parties), 1.15(b) (promptly delivering funds or

property to clients or third parties), 1.15(d) (properly maintaining an IOLTA account), 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) and 8.4(d) (engaging in conduct prejudicial to the administration of justice) stemming from his mishandling of a client's settlement funds.

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

V. CONCLUSION

Accordingly, for the reasons set forth above, the Office of Disciplinary Counsel requests that this Honorable Court adopt the following sanctions:

1. That Respondent's law license be suspended for at least six (6) months;
2. That Respondent petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure;
3. That if reinstated, Respondent be placed on one (1) year of supervised practice by an active attorney in his geographic area in good standing with the West Virginia State Bar and as agreed upon by ODC;

4. That Respondent must complete nine (9) additional hours of continuing legal education in the area of law office management, including at least six (6) of those hours in IOLTA account management prior to Respondent's reinstatement;

5. That Respondent must comply with the mandate of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure; and

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

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel

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CERTIFICATE OF SERVICE

This is to certify that I, Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 20th day of March, 2023, served a true copy of the foregoing "**Brief of the Office of Lawyer Disciplinary Counsel**" upon Paul Saluja, Esquire, counsel for Respondent James M. Pierson, by emailing and mailing the same via United States Mail with sufficient postage, to the following address:

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Andrea J. Hinerman