

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



LAWYER DISCIPLINARY BOARD,

Petitioner,

vs.

No. 22-0123

J. STEVEN HUNTER,

Respondent.

BRIEF OF THE LAWYER DISCIPLINARY BOARD

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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 J. Steven Hunter (hereinafter “Respondent”) with the Clerk of the Supreme Court of Appeals of West Virginia (hereinafter “Supreme Court”) on or about February 10, 2022, and served upon Respondent via certified mail by the Supreme Court Clerk on February 22, 2022. Disciplinary Counsel filed her mandatory discovery on or about March 14, 2022. Respondent requested and was granted an extension to file his Answer to the Statement of Charges, and the same was filed on or about May 2, 2022. Respondent failed to provide his mandatory discovery, which was due on or before April 29, 2022. Disciplinary Counsel then filed a Motion to Exclude Testimony of Witnesses And/or Documentary Evidence or Testimony of Mitigating Factors on June 14, 2022. The Hearing Panel Subcommittee granted this motion at the telephonic prehearing held on July 12, 2022, with the exception that Respondent could call DéEtta Hunter¹ as a witness, could call any witness listed in the Disciplinary Counsel’s list of witnesses, and could offer his own testimony as to any mitigating factors.

Thereafter, this matter proceeded to hearing in Lewisburg, West Virginia, on August 9, 2022. The Hearing Panel Subcommittee (hereinafter “HPS”) was comprised of Nicole A. Cofer, Esquire, Chairperson;² Charles R. Steele, Esquire; and Mrs. Rachel Scudiere Jones, Layperson. Kristin P. Halkias, Lawyer Disciplinary Counsel, appeared on behalf of the Office of Lawyer Disciplinary Counsel. Respondent appeared *pro se*. The HPS heard testimony from DéEtta Hunter, Judge Robert A. Irons, Peggy Patterson, Leigh Boggs Lefler, Denise Pettijohn, Darrell W.

¹ Respondent’s wife and legal assistant/office manager.

² Mr. Steele served as Chairperson at the hearing because Ms. Cofer was unable to attend in-person.

McCallister, Stephen L. Peters and Respondent. In addition, ODC Exhibits 1-21 and Respondent's Exhibit 1 were admitted into evidence without objection.

On the day Proposed Findings were due, Respondent requested an extension, and the HPS granted a thirty-day (30) extension to November 4, 2022. ODC timely submitted its seventy-four (74) page Proposed Findings of Fact, Conclusions of Law, and Recommended Sanctions to the HPS on November 4, 2022. The Respondent submitted his four (4) page Proposed Findings of Fact on November 8, 2022.

On or about January 6, 2023, the HPS issued its decision in this matter and filed its "Report of the Hearing Panel Subcommittee" (hereinafter "Report") with the Supreme Court. The HPS properly found that the evidence established that Respondent violated Rules 1.5(b), 1.7(a)(1), 1.9(a), 1.15(c), 3.4(c), 4.2, 5.3(c)(1), 5.3(c)(2), 8.4(c) and 8.4(d) of the Rules of Professional Conduct (hereinafter "RPC"). The HPS issued the following recommendations as the appropriate sanction:

- A. That Respondent's law license be suspended for a period of one (1) year pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure;
- B. That Respondent complete an additional nine (9) hours of continuing legal education prior to reinstatement, during the current reporting period, three (3) hours of which should be in IOLTA accounts and the other six (6) hours in the area of ethics and office management;
- C. That Respondent must comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure;
- D. That Respondent be permitted to Petition the Court for Reinstatement following one (1) year suspension pursuant to Rule 3.32, provided the above sanctions are satisfied;
- E. That following Reinstatement, if any, the Respondent shall be placed on one (1) year supervised probation; and

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

B. FINDINGS OF FACT

1. J. Steven Hunter (hereinafter “Respondent”) is a lawyer practicing in Lewisburg, which is located in Greenbrier County, West Virginia. Respondent, having diploma privilege, was admitted to The West Virginia State Bar on May 22, 1973. 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. 20-06-037
Complaint of Stephen L. Peters

2. Complainant Stephen L. Peters is the son of Raymond Peters (hereinafter “Mr. Peters”), an elderly person, now deceased.³ Mr. Peters lived alone on his own property in Alderson, West Virginia, while his three adult children lived outside West Virginia. Complainant lives in Arizona [ODC Ex. 1 at 12; Hrg. Tr. p. 241].

3. Karen Bordonaro (hereafter “Ms. Bordonaro”) was Mr. Peters’ friend who lived on Mr. Peters’ property in a house he built for her use [Hrg. Tr. p. 247].

4. In late 2017, Mr. Peters began experiencing memory lapses and confusion, and Ms. Bordonaro shared this information with Complainant via friendly email exchanges in which she occasionally expressed frustration. The emails included discussion regarding the disposition of Mr. Peters’ property should something happen to him, as well as Mr. Peters’ wishes concerning Ms. Bordonaro’s continued care [ODC Ex. 8 at 424-440].

³ Raymond Peters died on November 23, 2020, during the ODC investigation of the complaint.

5. Mr. Peters granted Complainant medical power of attorney on January 26, 2018, with Ms. Bordonaro listed as his successor representative. On that same date, Mr. Peters signed a Living Will and General Durable Power of Attorney listing Complainant as his Agent [ODC Ex. 8 at 348-354]
6. In July 2018, communication between Ms. Bordonaro and Complainant became strained. Additionally, Complainant observed several social media posts made by Ms. Bordonaro discussing plans to relocate to Rhode Island, and Mr. Peters informed Complainant that he planned to sell the property in Alderson and move with Ms. Bordonaro to Rhode Island. In response, Complainant informed Ms. Bordonaro that he planned to visit Alderson on August 17, 2018, to discuss the situation [ODC Ex. 8 at 442-455; Hrg. Tr. pp. 256-257].
7. On August 16, 2018, Ms. Bordonaro and Mr. Peters were married by the Honorable Jennifer L. Dent, Chief Judge of the Circuit Court of Greenbrier County, prior to Complainant's arrival in West Virginia [ODC Ex. 1 at 14].
8. On August 17, 2018, Complainant, in his capacity as Agent and General Power of Attorney for Mr. Peters, prepared a quitclaim deed granting to himself and Darrell McCallister, a longtime friend and neighbor of Mr. Peters who helped with caring for the land, a one-half undivided interest in Mr. Peters' property. Mr. McCallister later became Complainant's West Virginia proxy [ODC Ex. 1 at 14]
9. Marilyn Glaser, M.D., a physician at Alderson Family Medicine, performed an evaluation of Mr. Peters on August 29, 2018, wherein she determined Mr. Peters suffered from vascular dementia resulting in cognitive impairment which created an inability for him to handle his own affairs [ODC Ex. 6 at 150-157]. Dr. Glaser's report indicated the condition was considered

permanent and progressive, and she recommended that a guardian and conservator be appointed to care for Mr. Peters' affairs [ODC Ex. 6 at 150-157].

10. Local attorney David Hammond had prepared a Durable Power of Attorney for Mr. Peters on September 14, 2018, revoking the previous Power of Attorney appointing Complainant as Agent [ODC Ex. 6 at 69]. Mr. Hammond recommended they contact Respondent for further representation [ODC Ex. 6 at 69].

11. Complainant filed an Emergency Petition for Guardianship on September 11, 2018, refiled by his attorney, Denise Pettijohn, on September 17, 2018, making the following allegations:

- A. Mr. Peters had vascular dementia and was unable to make informed decisions on his own behalf;
- B. Ms. Bordonaro had convinced Mr. Peters to marry him for "convenience" to ensure she would receive his pension and Social Security upon his death;
- C. Ms. Bordonaro had planned to sell Mr. Peters' property and leave West Virginia;
- D. Ms. Bordonaro had stopped communicating with Complainant regarding Mr. Peters' condition; and,
- E. Ms. Bordonaro did not properly perform caregiver tasks, such as maintaining Mr. Peters' personal hygiene or taking care of his medical issues [Hrg. Tr. pp. 180-182].

12. Dr. Jesse Chaffin, M.D. met with Mr. Peters on October 3, 2018, and concluded that Mr. Peters "demonstrates full mental capacity" [ODC Ex. 6 at 97-99]. At the time of the meeting, Mr. Peters reported to Dr. Chaffin that he did not suffer any major lapses in memory or judgment, never left a stove on or unattended, never got lost trying to return home from the grocery store or other nearby locations, had not forgotten how to balance a checkbook or pay bills, could state his name, date, location, and POTUS, and possessed good situational awareness [ODC Ex. 6 at 97-99].

13. An emergency hearing was held on October 5, 2018, wherein Complainant was appointed Mr. Peters' temporary Guardian/Conservator, and Leigh M. Lefler was appointed as Mr. Peters' temporary guardian *ad litem* [ODC Exhibit 8 at 386-389].
14. Respondent encountered Mr. Peters and Ms. Bordonaro while they were in the waiting area of the courthouse that day [ODC Ex. 6 at 68].
15. Respondent found Mr. Peters to be "obviously agitated" at his sons who were with him at the courthouse that day, and Respondent observed a portion of the emergency hearing [ODC Ex. 6 at 68-69]. According to Respondent, his representation of Ms. Bordonaro and Mr. Peters began soon thereafter when Mr. Peters and Ms. Bordonaro sought legal representation regarding the outcome of the Conservator hearing [ODC Ex. 6 at 68-69].
16. Respondent did not confirm the scope of his representation of Mr. Peters and Ms. Bordonaro, or the basis or rate of the fee and expenses for which Mr. Peters and Ms. Bordonaro would be responsible, in writing [ODC Ex. at 584; Hrg. Tr. pp. 306-313].
17. Respondent charged Mr. Peters and Ms. Bordonaro a flat fee of \$2,500.00 for his representation of them [ODC Ex. at 584; Hrg. Tr. pp. 32-34].
18. Mr. Peters wrote a check for the \$2,500.00 fee that was never cashed by Respondent. The uncashed check remains at Respondent's office [Hrg. Tr. pp. 32-33].
19. After the initial meeting with Respondent, Ms. Bordonaro paid him the \$2,500.00 flat fee in two separate checks [Hrg. Tr. p. 33].
20. The \$2,500.00 payment was deposited into the law office checking account and not the trust account by DéEtta Hunter (hereafter "Mrs. Hunter"), Respondent's wife, who works as an office manager in Respondent's law office [Hrg. Tr. p. 34].

21. On November 16, 2018, Respondent filed a *Motion to Terminate Conservatorship and Guardianship* in Summers County Circuit Court on behalf of Mr. Peters and Ms. Bordonaro. The Motion alleged that:

- A. Complainant improperly removed \$121,000.00 from Mr. Peters' account on October 4, 2018, at a time his Power of Attorney was revoked upon the execution of the September 14, 2018, Power of Attorney [ODC Exhibit 8 at 386-389]);
- B. Mr. Peters' funds were frozen following the temporary Order entered after the October 5, 2018 hearing, preventing Mr. Peters from having funds for paying bills, buying groceries, etc., and the situation was only remedied upon intervention of the guardian *ad litem* on November 9, 2018;
- C. Ms. Bordonaro, as Mr. Peters' wife, was the best person to be named Conservator as she had been assisting him with his care for years; and,
- D. Complainant was not a suitable Conservator or Guardian. [ODC Ex. 6 at 78-84].

22. Amelia Winsby, Psy.D, Licensed Psychologist, performed a forensic psychological evaluation of Mr. Peters on December 17, 2018, and completed a 24-page report on January 10, 2019.⁴ Dr. Winsby diagnosed Mr. Peters with Possible Major Neurocognitive Disorder due to Alzheimer's, without Behavioral Disturbance, and opined that Mr. Peters would have problems related to living alone. He was found to have a significant decline in memory across all indexes, and his auditory, visual, immediate, and delayed memory abilities were impaired. Dr. Winsby concluded that Mr. Peters met the requirements of being a protected person within the definition of West Virginia Code §44A-1-4, and she recommended the Court appoint a Guardian/Conservator for him. Dr. Winsby also recommended the Court examine the validity of Mr. Peters' marriage

⁴ Dr. Winsby was tragically killed in a car accident on April 3, 2020.

certificate from August 2018, given his significant cognitive impairment at that time. Dr. Winsby recommended the Guardian work with DHHR to ensure Mr. Peters' living situation was safe and appropriate [ODC Ex. 1 at 9-32].

23. On March 18, 2019, Ms. Lefler submitted to the Court a *Report of the Guardian Ad Litem*, wherein she found:

- A. Mr. Peters granted Complainant a durable power of attorney on or about January 26, 2018.
- B. Mr. Peters and Ms. Bordonaro were married on August 16, 2018, but lived in separate residences on Mr. Peters' property.
- C. Ms. Bordonaro was a convicted felon who served time in prison in Alderson.
- D. Throughout her evaluations, Mr. Peters expressed his desire to sell his assets and travel with Ms. Bordonaro to Rhode Island.
- E. On August 18, 2018, Mr. Peters granted to Complainant and a neighbor, Mr. McCallister, a one-half undivided interest in his real property, allegedly to prevent Ms. Bordonaro from having an interest in the property because Mr. Peters did not trust her.
- F. On September 14, 2018, a second power of attorney was executed by Mr. Peters, this one granting power of attorney to Ms. Bordonaro.
- G. At the temporary hearing held on October 5, 2018, Ms. Bordonaro was present in the lobby of the courthouse, but did not enter the courtroom. The guardian *ad litem* requested the bailiff ask Ms. Bordonaro if she desired to be present and Ms. Bordonaro declined.
- H. Mr. Peters reported to Ms. Lefler that his mind had become a "leaky cauldron," and he appeared confused and frustrated as to the nature of the court proceeding.
- I. Ms. Lefler visited Mr. Peters at his home in January 2019, and he did not recall meeting her previously. The home was cluttered and dusty, but there was plenty of food, heat and running water. Although he appeared to not have bathed in several days, Mr. Peters seemed to be in good physical health. He reported it had been "a while" since he had seen his wife, and he was frustrated with his inability to express his thoughts accurately.

- J. Ms. Lefler reviewed the financial disclosures and medical reports and recommended the Court find Mr. Peters to be a protected person within W. Va. Code §44A-2-8, and that a guardian/conservator be appointed.
- K. Ms. Lefler recommended Complainant be allowed to continue in his role as guardian and conservator based on his qualifications, and that she would not recommend Ms. Bordonaro based upon the limitations placed upon her due to her felony conviction record.
[ODC Ex. 1 at 3-8]

24. At the March 25, 2019 hearing, Dr. Winsby testified about her evaluation of Mr. Peters, and the Court deemed her an expert in the field of Forensic Psychology and Neuropsychology. Dr. Winsby reported that Mr. Peters' memory problems were documented as far back as 2017, based upon emails and records she reviewed during her evaluation, and caused her to question the validity of the marriage certificate from August 2018. Dr. Winsby testified that Mr. Peters suffered from a major cognitive disorder and qualified as a protected person within the West Virginia Code standard. Dr. Winsby noted that although Mr. Peters denied having memory problems, the testing showed that he had significant impairment. She questioned the validity of all the documents executed by Mr. Peters after mid-2017, including both Durable Powers of Attorney from 2018, as well as the Quitclaim Deed from August 2018. Dr. Winsby testified that Dr. Chaffin's October 2018 conclusions were based mostly upon an interview, versus formal testing, and were not very reliable [ODC Ex. 6 at 187-206].

25. During the March 25, 2019 hearing, the Honorable Robert A. Irons, Judge for the 21st Judicial Circuit, issued a declarative ruling from the bench that Mr. Peters was a protected person pursuant to West Virginia Code §44A-1-4. Complainant was named full Guardian and Conservator, and Leigh M. Lefler, Esquire, was appointed as Mr. Peters' full guardian *ad litem*. Both Ms. Bordonaro and Respondent were present at this hearing [ODC Ex. 6 at 275-276; Hrg. Tr. pp. 87-88].

26. The parties agreed that Mr. Peters was to receive a \$300 monthly cash allowance for spending money since his bills were paid online by Complainant, his Conservator. Anything above that amount required approval by Complainant prior to the withdrawal or purchase [Hrg. Tr. pp. 147-148].

27. Due to various technical delays, the Court did not enter the Order from the March 25, 2019 hearing until July 11, 2019 [ODC Ex. 8 at 390-394; Hrg. Tr. p. 186].

28. On or about June 18, 2019, without Complainant's knowledge, authorization, or permission, Mrs. Hunter assisted Mr. Peters as he withdrew \$5,000.00 from his Discover Savings account and gave the check to Respondent. The check was made out to "Steve Hunter Associates L.C.", and "Legal Services/Retainer" was listed in the Memo portion [ODC Ex. 8 at 459; Hrg. Tr. pp. 50-53].

29. Mrs. Hunter assisted Mr. Peters when he contacted Discover Bank to request the \$5,000.00 for legal services in June 2019. The call was made on speakerphone from Respondent's law office. Mrs. Hunter participated in the call and indicated to the Discover agent they were calling from Respondent's law office [Hrg. Tr. pp. 50-52].

30. Mrs. Hunter considered the \$5,000.00 to be fees for the purpose of Respondent's continued representation. This was an additional payment above the \$2,500.00 flat fee already paid a few months earlier by Ms. Bordonaro [Hrg. Tr. pp. 54-55].

31. Respondent did not communicate a change in fee in writing to Mr. Peters and Ms. Bordonaro [Hrg. Tr. p. 55].

32. The \$5,000.00 Discover check for legal services/retainer was given to Mrs. Hunter, who deposited it on or about July 10, 2019, into the regular law office account, and not the IOLTA/client trust account [ODC Ex. 8 at 459; Hrg. Tr. p. 56].

33. A hearing upon Mr. Peters' Restated Motion to Terminate Conservatorship and Guardianship and Notice of Intent to Appeal, filed by Respondent in August 2019, was held on September 6, 2019, before Judge Irons. Complainant and the guardian *ad litem* were present, but neither Respondent nor Ms. Bordonaro were in attendance. Respondent initially claimed to not have known the hearing was set for September 6, 2019, but admitted under oath on November 8, 2019, that he had received the email notification of the hearing date and time [ODC Ex. 6 at 291-292; ODC Ex. 8 at 481].

34. The Order from the September 6, 2019 hearing, which was issued on September 27, 2019, held that Respondent's motion "seeks to relitigate the issues decided by the Court at the hearing on March 25, 2019, and reflected in the Order Appointing Guardian and Conservator entered July 11, 2019." Additionally, the Order further held:

- A. The motion was filed beyond the statutorily prescribed time of thirty (30) days for notice of appeal, and Respondent's motion was ultimately denied;
- B. Complainant was given leave to file for divorce on behalf of Mr. Peters pursuant to W.Va. Code §48-5-202, as Mr. Peters and Ms. Bordonaro had lived separate and apart since their marriage began;
- C. That "there is a direct conflict pursuant to Rule 1.7 of the West Virginia Rules of Professional Conduct of [Respondent's] representation of both Karen Bordonaro and Raymond S. Peters, as their interests are directly adverse;"
- E. The Court further enjoined Ms. Bordonaro from "in any way dissipating, damaging, disposing, or encumbering any part of the estate" or any financial account of Mr. Peters;
- F. Ms. Bordonaro was ordered by the Court to have no contact with Mr. Peters;
- G. Respondent was ordered to return the \$5,000 retainer fee; and
- H. Ms. Bordonaro was ordered to reimburse Mr. Peters the \$656.06 purchase she made using Mr. Peters' credit card without prior permission from the conservator [ODC Ex. 8 at 397-400].

35. Respondent filed a *Motion for Emergency Stay of Judgement* on behalf of Ms. Bordonaro in September 2019.⁵ The Motion stated that Ms. Bordonaro was the legal wife of Mr. Peters and had been his sole caretaker for many years, but was prohibited from having any contact with Mr. Peters at the September 6, 2019 hearing, and that Mr. Peters would be at serious health risk given that he had no transportation and lived in a remote area. It further stated that the Order “was done on an *ex parte* basis” when Respondent failed to appear at the September 6, 2019 hearing. Respondent stated within the Motion that the hearing notice was incorrect [ODC Ex. 1 at 41-46].

36. The Motion for Stay was denied by Order entered October 17, 2019 [ODC Ex. 1 at 45-46].

37. A *Petition for Show Cause Order and/or Protective Order Preventing Financial Exploitation* was filed by Ms. Lefler, Mr. Peters’ guardian *ad litem*, in the Circuit Court of Summers County on October 29, 2019. The Petition alleged that:

- A. Ms. Lefler was notified by Mr. McCallister, Complainant’s WV proxy, that Mrs. Hunter had entered Mr. Peters’ home and denied entry to Mr. McCallister, stating that Mr. Peters was not dressed. The Petition stated that Mrs. Hunter claimed to be there for a wellness check as a friend to Mr. Peters;
- B. Mrs. Hunter, as wife to Ms. Bordonaro’s attorney, is an agent and/or proxy for Ms. Bordonaro, and that her contact was in direct violation of the Final Order for the September 6, 2019 hearing, which directed Ms. Bordonaro to not have contact with Mr. Peters;
- C. Despite being ordered to return the \$5,000 retainer fee, Respondent had not done so, and that he was instead using that money to fund a baseless appeal filed before the West Virginia Supreme Court of Appeals after Respondent failed to appear at a hearing for which all parties received adequate notice;
- D. Ms. Lefler alleged that Mrs. Hunter continued to travel to financial institutions with Mr. Peters to withdraw funds despite the Court ruling that Mr. Peters was a protected person;
- E. Mrs. Hunter had entered Mr. Peters’ home as late as October 26, 2019;

⁵ Although Respondent’s Motion is dated August 9, 2019, it was filed after the September 6, 2019 hearing.

- F. Respondent was aware of the Court's ruling and that he and his wife engaged in conduct regarding Mr. Peters that was in direct violation of the Court's directives;
- G. Respondent was in direct violation of the West Virginia Rules of Professional Conduct;
- H. Respondent, Ms. Bordonaro, and Mrs. Hunter engaged in the financial exploitation of Mr. Peters;
- I. Ms. Lefler requested the Court issue a show cause order as to why Ms. Bordonaro and/or her counsel should not be found to be in contempt of the Court's Order for the September 6, 2019 hearing, and that the Court enter a financial exploitation protective order [ODC Ex. 1 at 49-55].

38. Mrs. Hunter is Respondent's wife having been married in 1979. She has worked in Respondent's law office with and without pay and served as a legal assistant/office manager. Respondent admits that Mrs. Hunter developed a close personal relationship with Mr. Peters and Ms. Bordonaro, which lead to too much involvement and concern for the alleged lack of care of Mr. Peters at the end of his life.

39. By correspondence dated October 29, 2019, Complainant's counsel, Denise N. Pettijohn, sent a letter to Respondent regarding the unauthorized contact between Mrs. Hunter and Mr. Peters despite an order of no contact in place between them. The letter reminded Respondent that the Court found a conflict of interest in Respondent's representation of Ms. Bordonaro and Mr. Peters, and reaffirmed that Respondent did not represent Mr. Peters, as he had a guardian *ad litem* appointed for him, as well as a Guardian/Conservator. The letter also demanded Respondent and his staff cease and desist from any and all communication with Complainant pursuant to Rule 4.2 of the Rules of Professional Conduct, as Complainant was a represented party. It further cautioned that Complainant would be forced to seek a protective order against Respondent and his staff if they failed to cease and desist all contact with Mr. Peters [ODC Ex. 1 at 47-48].

40. No further contact was made by Mrs. Hunter with Mr. Peters after the incident at his home wherein Mr. McCallister had asked her to leave on October 26, 2019. Respondent said he admonished Mrs. Hunter upon learning that she had visited the home of Mr. Peters without seeking the approval or consent of those entrusted with his care. For her part, Mrs. Hunter admitted to being concerned about Mr. Peters' physical and emotional well-being.

41. On November 8, 2019, a hearing was held before Judge Irons regarding the *Amended Verified Petition for Show Cause Order and/or Protective Order Preventing Financial Exploitation*, filed by the guardian *ad litem*. [ODC Ex. 8 at 463-517] Respondent was present and requested that he be permitted to testify in the matter. Respondent testified that:

- A. He had been unaware of the September 6, 2019 hearing until he ran into the judge at the courthouse the following Monday, September 9, 2019, and realized the hearing had been conducted in his and Ms. Bordonaro's absences;
- B. He acknowledged that electronic notice was sent to his correct email address with the proper date and time of the hearing;
- C. He was the retained attorney for both Mr. Peters and Ms. Bordonaro;
- D. Respondent admitted receiving the \$5,000.00 as a retainer for representing both Mr. Peters and Ms. Bordonaro, and that the money was "not likely" to have been deposited into his trust account;
- E. Mrs. Hunter had visited Mr. Peters' home on several occasions, and that she had grown fond of Mr. Peters;
- F. Respondent admitted to having knowledge of Mrs. Hunter's presence at financial institutions with Mr. Peters "regarding requests for withdrawals of cash";
- G. Respondent indicated he would willingly return the \$5,000.00 retainer if ordered by the Court⁶ [ODC Ex. 8 at 463-517].

42. The Order for the hearing of November 8, 2019, issued on November 18, 2019, held:

⁶ Respondent had been ordered to return the \$5,000.00 at the September 6, 2019, hearing, and this was reflected in the September 27, 2019 Order, which was sent via email to all parties.

- A. Complainant, who was Guardian/Conservator at the time of the transactions, had not authorized Respondent to transfer the money from Mr. Peters' Discover account;
- B. Complainant had not authorized Mrs. Hunter to visit Mr. Peters' home;
- C. Complainant had not authorized Mrs. Hunter to make withdrawals of cash for Mr. Peters at a bank;
- D. Ms. Bordonaro had improperly accessed Mr. Peters' credit cards for her personal use without authorization from Complainant;
- E. Respondent's representation "happened at a time after Mr. Peters had been declared to be a protected person," and Respondent denied "awareness as to whether this would constitute a conflict of interest;"
- F. Respondent and Ms. Bordonaro "engaged in the financial exploitation of Raymond Peters within the meaning of W.Va. Code §55-7J-1";
- G. Both Respondent and Ms. Bordonaro were held in contempt;
- H. Respondent and Ms. Bordonaro were ordered to "immediately reimburse" Mr. Peters for the \$5,000.00 retainer fee paid to Respondent, and for the cost of the tires purchased by Ms. Bordonaro.
- I. Respondent, Mrs. Hunter, and Ms. Bordonaro were enjoined from having contact with Mr. Peters until further Order of the Court. This included entering Mr. Peters' residence, any electronic or telephonic communication, and/or any direct or indirect attempts of communication [ODC Ex. 8 at 416-420].

43. On or about January 29, 2020, Complainant filed an ethics complaint against Respondent. Complainant stated Respondent was ordered to return a \$5,000.00 "retainer fee" in a hearing held on September 6, 2019, and again in a November 8, 2019 hearing, but had failed to do so. Additionally, Complainant alleged that Mrs. Hunter went to Mr. Peters' house on October 26, 2019, after Ms. Bordonaro had been served an order of protection to stay away from Mr. Peters. Complainant maintained that Respondent had known Mr. Peters was a protected person since the hearing on March 25, 2019, that Respondent had engaged in the financial exploitation of Mr. Peters, and that Respondent was in contempt of court for failing to repay the \$5,000.00 retainer

fee. Complainant further alleged that it was a conflict of interest for Respondent to represent both Mr. Peters and Ms. Bordonaro after Respondent became aware that their interests were not the same [ODC Ex. 1 at 1-2].

44. By letter dated February 25, 2020, the Office of Lawyer Disciplinary Counsel sent Respondent a copy of the complaint and directed him to file a response within twenty (20) days [ODC Ex. 2 at 62-63].

45. On April 3, 2020, Respondent requested additional time to file a response, as the matter was complex, and he was anticipating his response would consist of many pages and documents. He was given an additional thirty days to respond [ODC Ex. 4 at 66].

46. Respondent filed his response on May 1, 2020, wherein he described his first meeting with Mr. Peters and Ms. Bordonaro, and that it was his belief that Ms. Bordonaro assisted with Mr. Peters' care by providing transportation to appointments, errands, hearings, buying groceries, and to the bank to retrieve his \$300 monthly allowance. Respondent opined that allowing Mr. Peters to receive only \$300 each month deprived him of his Social Security Benefits and IBM pension, and that many calls to address the issue were made to Complainant's attorney and the guardian *ad litem* "to no avail." Respondent said that Ms. Bordonaro was expected to provide transportation for Mr. Peters, yet when she purchased tires for her vehicle, the guardian *ad litem* challenged the purchase [ODC Ex. 6 at 71-72].

47. Respondent also stated in his response that Complainant failed to appoint anyone in the State of West Virginia to assist Mr. Peters with the above tasks, and that Complainant and his wife "attempted to alienate" Mr. Peters from Ms. Bordonaro, his legal wife, and that the Circuit Court interfered by directing Ms. Bordonaro to have no contact with Mr. Peters [ODC Ex. 6 at 70-71].

48. Respondent admitted that the Court had issued a judgement against him for the \$5,000.00 retainer fee. Respondent noted that he had initially filed an appeal with the Supreme Court, but after delays in receiving the transcripts, he eventually withdrew the appeal. Respondent stated that he continued to work on the Deed issue after Ms. Bordonaro was ordered to vacate the house Mr. Peters had built for her use, and he planned to “again file” motions regarding the Conservatorship involving Complainant [ODC Ex. 6 at 73-74].

49. Respondent questioned Dr. Winsby’s qualifications to make the determination regarding Mr. Peters’ dementia, opining that Mr. Peters was of elder age and suffered from hearing loss and poor eyesight, but that he was an “interesting individual” who repeatedly maintained he did not want his sons to manage his money or provide for his care [ODC Ex. 6 at 74].

50. Respondent acknowledged that Mrs. Hunter developed a close relationship with Mr. Peters, stating that Mr. Peters always appeared knowledgeable and alert. Respondent confirmed that Mrs. Hunter accompanied Mr. Peters to Kroger and that she was “quite amused” when Mr. Peters showed her how he could get a little cash in his pocket (\$60.00) from his Discover Card. Additionally, Respondent admitted knowledge and awareness of Mrs. Hunter’s involvement and that she also accompanied Mr. Peters and Ms. Bordonaro to City National Bank when he received his \$300.00 monthly allowance [ODC Ex. 6 at 75].

51. Respondent also acknowledged that Mrs. Hunter was present for the conversation with Discover where Mr. Peters requested the \$5,000.00 check to use as a retainer [ODC Ex. 6 at 76].

52. Respondent stated that Complainant was upset that Respondent has made allegations that Complainant has failed to care for his father; has failed to account for funds received and disbursed; and declares that this is a family matter, although he “excludes a sister.” Respondent stated that he

intends “to see this matter to the end” in the best interests of Mr. Peters and Ms. Bordonaro [ODC Ex. 6 at 76].

53. Complainant replied to Respondent’s response on May 9, 2020, and reiterated that his main issues involved Respondent’s failure to return the \$5,000.00 retainer as ordered by the Court, as well as the continued violation of the order of protection by Mrs. Hunter, whom he viewed as Ms. Bordonaro’s proxy. Complainant alleged Mrs. Hunter made several visits to Mr. Peters’ home without notifying Complainant or Mr. McCallister, Complainant’s WV proxy, despite being aware of the Order of Protection [ODC Ex. 8 at 341].

54. Complainant alleged Respondent took advantage of “technicalities” with paperwork caused by a delay with the entry of the Order from the March 25, 2019 hearing not being filed until July 11, 2019, because Respondent was aware the temporary orders established on October 5, 2018, were superseded by the permanent orders issued on March 25, 2019, as Respondent was present in the courtroom when the judge issued the ruling. Complainant also noted Respondent’s reply to the complaint exhibited “truly unprofessional behavior for an attorney with 40+ years of experience” [ODC Ex. 8 at 341].

55. Complainant defended the conversation witnessed by Respondent in the waiting area of the courthouse on October 5, 2018, as part of a family dynamic which was unknown to Respondent, and noted that Respondent is not a medical professional qualified to deem an elderly person completely alert and oriented. Complainant explained that he and his father had a respectful relationship and that he gave his father his space, but that once he noticed his father’s memory began to deteriorate, he became more involved, as needed. He visited his father monthly once he was aware of his decline [ODC Ex. 8 at 341-342].

56. Complainant questioned the timing of Ms. Bordonaro marrying Mr. Peters once communication ceased between he and Ms. Bordonaro, after she had lived on the property for more than a decade with no interest in marrying Mr. Peters. Complainant alleged that his communication with Ms. Bordonaro had broken down during Complainant's July 26, 2018 visit to West Virginia, that Ms. Bordonaro stopped communicating thereafter and was married to his father within three weeks. Complainant stated he first learned of Mr. Peters' marriage to Ms. Bordonaro when he received a call on August 15, 2018, from the Summers County courthouse alerting him that a marriage license was being obtained. Complainant spoke with Mr. Peters that same day regarding the situation, and that Mr. Peters indicated that a prenuptial agreement would be executed to protect his previously held assets [ODC Ex. 8 at 342].

57. Complainant reported that he had several recorded conversations with Mr. Peters and Ms. Bordonaro, including one in which Mr. Peters wanted "to shoot Karen for marrying him and never coming around." Complainant also recorded the conversation with Mrs. Hunter when she was with Mr. Peters at City National Bank. Complainant stated that he shared these recordings with his attorney, and Mr. Peters' guardian *ad litem*, as well as the late Dr. Winsby, and he offered to provide them to ODC, if necessary. Complainant also noted that Discover had the recording of the June 18, 2019, phone call when Mrs. Hunter claimed to be Ms. Bordonaro and Mr. Peters' attorney. Complainant also allegedly had recorded conversations between himself and Ms. Bordonaro where she accused Mr. Peters of pitting Complainant and Ms. Bordonaro against each other, and she had confirmed that Mr. Peters always wanted Complainant to have the Alderson property [ODC Ex. 8 at 342-343].

58. Complainant provided a copy of his Durable Power of Attorney, filed on March 6, 2018. He also admitted to removing savings bonds from the safety deposit box at the request of Mr.

Peters, stating that Mr. Peters did not want Ms. Bordonaro to access them. Complainant reported that he cashed several bonds amounting to \$120,000.00 and submitted them to the Bureau of the Fiscal Service on September 5, 2018, who then deposited the money into Mr. Peters' bank account in Alderson, West Virginia, where it remained at the time the complaint was filed [ODC Ex. 8 at 343, 348-354].

59. Complainant also stated that he had spoken with attorney David Hammond in September 2018, and filed for Guardianship/Conservatorship of Mr. Peters based upon Mr. Hammond's advice [ODC Ex. 8 at 343].

60. Complainant stated that one time when Mrs. Hunter accompanied Ms. Bordonaro and Mr. Peters to City National Bank to collect Mr. Peters' \$300 monthly allowance, the bank manager contacted Complainant for approval. Complainant declined approving the transaction because Ms. Bordonaro had taken Mr. Peters to collect the money twice in the previous month, in addition to using the credit card for grocery purchases. Complainant allegedly requested Ms. Bordonaro provide receipts for her purchases for accounting purposes, yet she failed to do so [ODC Ex. 8 at 344].

61. Regarding the purchase of tires for Ms. Bordonaro on Mr. Peters' credit card, Complainant stated that Ms. Bordonaro was present in the courtroom on March 25, 2019, when the judge ordered that any purchases were to be authorized by the Guardian/Conservator prior to purchase [ODC Ex. 8 at 344].

62. Complainant stated that his sister, Lisa Ward, is fully aware of all the issues and has indicated to him on several occasions that she does not want to deal with any of it [ODC Ex. 8 at 345].

63. Complainant designated Darrell McCallister as his West Virginia Proxy in Complainant's absence in a document filed with the court on or about October 17, 2019, by Complainant's then counsel, Denise Pettijohn [ODC Ex. 8 at 345].

64. Complainant stated that Kyle Lusk assumed representation of Complainant, and filed a Notice of Appearance on Complainant's behalf in Mr. Peters' divorce from Ms. Bordonaro in January 2020 [ODC Ex. 8 at 345].

65. Complainant also provided a transcript of the November 8, 2019 hearing wherein Respondent stated that he would return the retainer fee and work for Ms. Bordonaro for free, and that he did not know where the money had been deposited "and did not care as long as he had money to have a few drinks here and there" [ODC Ex. 8 at 346].

66. On August 18, 2021, an Investigative Subpoena Duces Tecum was issued to City National Bank commanding a copy of any and all documents for all business accounts, including operating, trust or IOLTA accounts, that were open and in use by Respondent for his law practice from June 1, 2019, through September 30, 2019 [ODC Ex. 11 at 523-526].

67. ODC received the bank documents on August 30, 2021, for the JBH Farm Trust rather than Respondent's client trust account [ODC Ex. 19].

68. ODC was notified after the Statement of Charges was filed that there was another account and, after contacting the bank, ODC received bank statements for Respondent's IOLTA account with the last four digits of 1691 on June 6, 2022. The bank statements are dated June 28, 2019, July 31, 2019, August 30, 2019, and September 30, 2019, with no deposits of \$5,000.00 made during that time, and no deposit on or around July 10, 2019, the date the check was cashed [ODC Ex. 19 at 682-695; ODC Ex. 8 at 459].

69. By correspondence dated August 23, 2021, Complainant provided additional information regarding ongoing litigation in the case:

- A. On January 20, 2021, Ms. Bordonaro presented a testamentary document,⁷ executed by Mr. Peters on October 10, 2018, to the Summers County Commission. Based upon that will, the Summers County Fiduciary appointed Ms. Bordonaro Executrix of Mr. Peters' estate, and granted her Letters of Administration [ODC Ex. 12 at 561].
- B. By Order dated February 10, 2021, the County Commission of Summers County, West Virginia, temporarily revoked Ms. Bordonaro's Letters of Administration after all three of Mr. Peters' children contested the 10/10/18 will presented by Mr. Bordonaro. The matter was set for hearing on April 14, 2021 [ODC Ex. 12 at 561].
- C. Complainant stated that neither Respondent, nor Ms. Bordonaro, were present at the April 14, 2021 hearing because they claimed they were not notified of the Commission Hearing. However, Complainant provided a log/diary from the Commission which indicated Ms. Bordonaro was called on February 11, 2021, to notify her of the Commission decision to suspend her authority until further notice pending the hearing. The commission notes indicate she was told of the objections, given the date of the hearing, and advised to refrain from doing estate business until the hearing. The Commission notes also state Mrs. Hunter contacted the Summers County Fiduciary Supervisor on February 22, 2021, and indicated she was "upset that 'they' hadn't received any notification of the objections, hearing, or commission order because they were at the beach." She was informed that notices had been sent via certified mail to their Lewisburg office address. Mrs. Hunter was "insistent" that they had not received the notice. She asked that they send additional copies of the objections and orders of law to the Lewisburg address. Ultimately, the certified mail was accepted by all parties except Respondent and Ms. Bordonaro. The Commission mailed copies of the Commission Order, Hearing Notice and Unclaimed Certified Letters to the Greenbrier County Clerk, who said he would place the copies in Respondent's box at the courthouse. In addition, the Commission published the hearing notice in The West Virginia Daily News on March 29, 2021, and the Hinton News on March 24, 2021 [ODC Ex. 12 at 568-575].
- D. By Order issued April 14, 2021, the Summers County Commission unanimously rejected the October 10, 2018, Last Will and Testament of Mr. Peters, and determined that Mr. Peters was found to be a protected person by Order dated October 5, 2018, and lacked testamentary capacity to have executed a will on October 10, 2018 [ODC Ex. 12 at 566-567].

⁷ The Last Will and Testament executed on October 10, 2018, appointed Ms. Bordonaro as the Executrix and left the majority of Mr. Peters' estate to Ms. Bordonaro. The will was reportedly prepared by attorney David Hammond [ODC Ex. 12 at 554-560].

- E. On April 15, 2021, Complainant requested to the Commission that he be appointed as personal representative. Complainant obtained a bond and was appointed that same day, at which time he presented another Last Will and Testament to the Commission [ODC Ex. 12 at 569].
- F. On July 11, 2021, Respondent filed an appeal to the Circuit Court of Summers County on behalf of Ms. Bordonaro, who was “misnamed by Counsel as Linda”⁸, which was dismissed without prejudice on the Court’s *sua sponte* Order of July 21, 2021 [ODC Ex. 12 at 540].

70. Respondent filed a *Second Appeal to the County Commission’s Order of April 14, 2021* on July 29, 2021, wherein Respondent stated that:

- A. The will executed by Mr. Peters on October 10, 2018, was valid, and that all people present at the testamentary execution attested to his capacity⁹;
- B. The April 14, 2021, hearing notice was not properly served on Petitioner;
- C. The Commission violated both the United States Constitution and West Virginia’s Constitution pertaining to Due Process;
- D. The Commission relied on an Order of the Circuit Court of Summers County in a Guardian and Conservatorship proceeding, in which the burden of proof and elements are “totally different from a will contest,” and that the Commission acted improperly and illegally by relying on an “Order as presented to them in an Ex Parte manner by their attorney.”¹⁰
- E. Dr. Chaffin’s report from October 3, 2018, was determinative [ODC Ex. 12 at 540-544].

71. By correspondence dated August 18, 2021, ODC sent a letter to Respondent asking if he had paid the refund ordered by the court and, if so, to provide a copy of the reimbursement check [ODC Ex. 10 at 522].

⁸ Respondent provided this quote from the July 21, 2021 Court Order in his Second Appeal dated July 29, 2021.

⁹ The October 10, 2018 will was executed five days *after* the Court had ruled Mr. Peters to be a statutorily protected person with both a Guardian/Conservator and guardian *ad litem* appointed for his protection in the hearing held October 5, 2018.

¹⁰ This is the second time in these proceedings where Respondent has failed to attend a hearing, and then claimed *ex parte* communications occurred at the hearing in his absence.

72. After receiving no response from Respondent, on or about September 15, 2021, ODC sent a second letter via certified and regular U. S. Mail asking if Respondent had refunded the \$5,000.00 retainer fee as ordered by the Court, and if so, to provide a copy of the reimbursement check [ODC Ex. 13 at 576-577].

73. By letter dated September 16, 2021, Respondent replied that he had paid the refund to the law firm of Lusk and Bradford, PLLC, Complainant's counsel. Although Respondent failed to comply with ODC's request to provide a copy of the reimbursement check, Respondent submitted a receipt from Lusk & Bradford, dated November 25, 2020, for payment of \$5,000.00, for client Raymond Peters, c/o Stephen Peters, from Respondent, check number 11523 [ODC Ex. 14 at 579-580].

74. By correspondence dated October 26, 2021, ODC sent a letter to Respondent asking if he had a written fee agreement with Mr. Peters and/or Ms. Bordonaro and, if so, to provide a copy of said documents. Additionally, if he had failed to execute a fee agreement, ODC requested Respondent provide an explanation as to why he had not [ODC Ex. 15 at 581].

75. After receiving no response, on or about December 1, 2021, Disciplinary Counsel sent a second letter by certified and regular U.S. mail directing Respondent to file a response by December 13, 2021 [ODC Ex. 16 at 582-583].

76. Respondent replied on December 10, 2021, that the Peters/Bordonaro file is "rather large," and that, after looking, he "did not do an engagement letter" with them. Respondent stated that he gave them a "flat fee" that had been refunded to Mr. Peters' Estate per Court Order. Respondent indicated that he has been working "pro bono for Karen Bordonaro" on the remaining pending matters "and will continue to do so," as she "has no money." He stated that he has advanced her Court costs [ODC Ex. At 584].

77. Fourteen (14) months after first being ordered by the Court to reimburse Mr. Peters' Estate the \$5,000.00 legal fee, Respondent provided a \$5,000.00 payment to Complainant's counsel on November 25, 2020¹¹ via check number 11523 paid from Respondent's IOLTA Account ending in 1691 [ODC Ex. 14 at 579-580; ODC Ex. 21].

C. CONCLUSIONS OF LAW

1. At the outset of his representation, Respondent failed to execute a written engagement letter or fee agreement and failed to communicate the scope of the representation including how expenses and fees would be handled. He further failed to communicate any changes in the basis or rate of the fee, in writing, to Mr. Peters and Ms. Bordonaro. Accordingly, Respondent violated Rule 1.5(b) of the West Virginia Rules of Professional Conduct, which provides:

Rule 1.5. Fees.

* * *

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

2. To compound matters at the outset of representation, Respondent failed to deposit the \$5,000.00 retainer fee into his client trust account and provided no billing statements to support when the fees were earned, or expenses were incurred. Further, the evidence shows that Respondent ultimately reimbursed the Estate of Mr. Peters from the IOLTA Account despite having never produced any evidence that the monies received from this particular representation

¹¹ Respondent's letter dated September 16, 2021 mistakenly provided November 25, 2021 as the date of payment.

were ever deposited into the account. Accordingly, Respondent violated Rule 1.15(c) of the West Virginia Rules of Professional Conduct, which provides:

Rule 1.15 Safekeeping Property.

* * *

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

3. By Court Order of September 27, 2019, in the case of Stephen Peters v. Raymond Peters, case number 45-2018-G-5, the Circuit Court of Summers County determined that “there is a direct conflict pursuant to Rule 1.7 of the West Virginia Rules of Professional Conduct of [Respondent’s] representation of both Karen Bordonaro and Raymond S. Peters, as their interests are directly adverse” [ODC Ex. 8 at 399]. This conflict should have been readily apparent to the Respondent absent a Court Order. Respondent violated Rule 1.7(a)(1) of the West Virginia Rules of Professional Conduct, which provides:

Rule 1.7. Conflict of Interest; Current Clients.

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

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

4. After the aforementioned Court Order, and substantially after it should have become apparent that an actual conflict existed, the Respondent continued to represent Ms. Bordonaro in the same or substantially related matter in which her interests were determined by the Court in the Order dated September 27, 2019, to be adverse to the interests of Mr. Peters. To continue such representation, Mr. Peters, through his representative, would have had to provide written consent to the continued representation of Ms. Bordonaro. No such consent was ever sought or obtained by the Respondent. Accordingly, Respondent is in violation of Rule 1.9(a) of the West Virginia Rules of Professional Conduct, which provides:

Rule 1.9. Duties to Former Clients.

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

5. On September 27, 2019, a written Court Order directed Respondent to return the \$5,000.00 retainer fee [ODC Ex. 8 at 399]. Said Order was reiterated via the November 18, 2019 Court Order, which directed him to "immediately return" the money. [ODC Ex. 8 at 419]. Ultimately, only after an ODC complaint was filed and the Complainant's new counsel demanded repayment, the Respondent replied to the ODC letter dated September 16, 2021, that he had paid the refund to the law firm of Lusk and Bradford, PLLC, with evidence of receipt by that law firm dated November 25, 2020 –or over one (1) year from the time the Court originally Ordered the repayment to occur [ODC Ex. 14 at 579-580]. There was never any assertion by the Respondent that the obligation to repay the retainer fee was not due and owing. There was no appeal or further motion practice to challenge that the obligation existed. Thus, Respondent violated Rules 3.4(c) and 8.4(c) of the West Virginia Rules of Professional Conduct, which provide:

Rule 3.4. Fairness to Opposing Party and Counsel.

A lawyer shall not:

* * *

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

* * *

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

6. Respondent had direct supervisory authority over his office manager, Mrs. Hunter, and failed to make reasonable efforts to ensure that her conduct toward Mr. Peters was compatible with

Respondent's professional obligations as a lawyer and Mr. Peters' status as a protected person under the law. The evidence establishes that the Respondent had direct supervisory authority over Mrs. Hunter and knew of her conduct, but failed to mitigate or remediate the consequences. Accordingly, Respondent is in violation of Rules 5.3(b), 5.3(c)(1), and 5.3(c)(2) of the West Virginia Rules of Professional Conduct, which provide:

Rule 5.3. Responsibilities Regarding Nonlawyer Assistance.

With respect to a nonlawyer employed or retained by or associated with a lawyer:

* * *

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

(c) a lawyer shall be responsible for conduct of such a person that would be a violate of the Rules of Professional Conduct if engage in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

7. Because Respondent was aware the Court deemed Mr. Peters to be a protected person within the meaning of the West Virginia Code, and had appointed Ms. Lefler as a *guardian ad litem*, and Respondent failed to obtain consent from Ms. Lefler before communicating with Mr. Peters, Respondent is in violation of Rule 4.2 of the West Virginia Rules of Professional Conduct, which provides:

Rule 4.2. Communication with Persons Represented by Counsel.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

8. Because Respondent was in direct violation of a lawful Order of the Court, and his continued course of conduct created the need for ongoing litigation, Respondent is in violation of Rule 8.4(d) of the Rules of Professional Conduct, which provides:

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

* * *

(d) Engage in conduct that is prejudicial to the administration of justice.

All of the above violations were proven by clear and convincing evidence and with late and reluctant admittance by the Respondent.

II. SUMMARY OF ARGUMENT

The Hearing Panel Subcommittee of the Lawyer Disciplinary Board (hereinafter “HPS”) correctly found that Respondent committed multiple violations of the *Rules of Professional Conduct*. The HPS recommended that Respondent’s law license be suspended for a period of one (1) year pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure; that Respondent complete an additional nine (9) hours of continuing legal education prior to reinstatement, during the current reporting period, three (3) hours of which should be in IOLTA accounts and the other six (6) hours in the area of ethics and office management; that Respondent must comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure; that Respondent be permitted to Petition the Court for Reinstatement following one (1) year suspension pursuant to Rule 3.32 provided the above sanctions are satisfied; that Respondent shall be placed on one (1)

year supervised probation following the Reinstatement, if any; and that Respondent be ordered to reimburse the Lawyer Disciplinary Board the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

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 addition, by adopting the recommendations of the HPS as to the sanction in that matter, 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

The Office of Disciplinary Counsel does not object to oral argument in this matter. The issues raised by Respondent and the findings made by the Hearing Panel Subcommittee do not address any new issues of law that would require Disciplinary Counsel to request oral argument pursuant to Rule 20 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).

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

The Supreme Court of Appeals of West Virginia has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but also to protect the

public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard its interests in the administration of justice. Lawyer Disciplinary Board v. Taylor, 192 W.Va. 139, 451 S.E.2d 440 (1994). Factors to be considered in imposing appropriate sanctions are found in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure. These factors consist of: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. *See also*, Syl. Pt. 4, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998). A review of the extensive record in this matter indicates that Respondent has transgressed all four factors set forth in Jordan.

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

The evidence in this case is clear and convincing that Respondent has violated duties to his client, Mr. Peters, as well as to the public, to the legal system and to the profession. The evidence clearly and convincingly demonstrates that Respondent committed multiple violations of the Rules of Professional Conduct, including but not limited to: (1) intentionally and knowingly disobeying multiple Court Orders when he failed to promptly return the \$5,000.00; (2) failing to deposit the \$5,000.00 retainer fee into his client trust account (IOLTA Account), and failing to keep or provide billing records regarding the fees; (3) failing to execute a fee agreement, failing to communicate the scope of the representation and expenses and fees, and failing to communicate any changes in the basis or the rate of the fee, in writing, to Mr. Peters and Ms. Bordonaro; (4) continuing to represent Ms. Bordonaro without the informed consent of Mr. Peters after the Court determined a conflict existed; (5) failing to properly supervise Mrs. Hunter, failing to make reasonable efforts

to ensure that Mrs. Hunter's conduct was compatible with Respondent's professional obligations as a lawyer, and failing to take reasonable remedial action to avoid or mitigate the consequences of her conduct; and (6) taking an additional \$5,000 from a client above the \$2,500.00 flat fee charged at the onset of his representation.

At the hearing in this matter, Respondent admitted that he had committed the above violations of the Rules of Professional Conduct in the underlying matter. The HPS provided the following reasonings pertaining to their conclusions of law with regard to Respondent's rule violations:

(a) Rule 1.5. Fees. As the record demonstrates, Mr. Peters was deemed a court-ordered protected person¹² at all times throughout Respondent's representation of him. When a client already has an appointed legal representative, the lawyer should look to the representative prior to accepting the representation or when making decisions on the client's behalf, which the Respondent never did. *See*, Comment 4 to Rule 1.14 of the Rules of Professional Conduct. Respondent failed to execute a written fee agreement memorializing the basis or rate of his \$2,500.00 flat fee in Mr. Peter's case, and he failed to note any changes in writing when the \$2,500.00 flat fee increased to \$7,500.00, after Respondent accepted the \$5,000.00 Discover check.

Respondent failed to maintain any billing records or invoices of hours worked, fees, and expenses incurred in Mr. Peters' case, and could provide no documentation when requested to do so by ODC. When questioned regarding whether his normal practice involves routine execution of

¹² "Protected person" means an adult individual, eighteen years of age or older, who has been found by a court, because of mental impairment, to be unable to receive and evaluate information effectively or to respond to people, events, and environments to such an extent that the individual lacks the capacity: (A) To meet the essential requirements for his or her health, care, safety, habilitation, or therapeutic needs without the assistance or protection of a guardian; or (B) to manage the property or financial affairs or to provide for his or her support or for the support of legal dependents without the assistance or protection of a conservator. W.Va. Code § 44A-1-4(13).

fee agreements, Respondent and Mrs. Hunter stated that they charged “flat fees” for almost everything, disregarding the fact that Rule 1.5(b) of the Rules of Professional Conduct requires written fee agreements in all matters before, or within a reasonable time after, commencing the representation¹³ [Hrg. Tr. a 31-32; 306].

Respondent attempted to justify his conduct by stating that he’s “just trying to do [his] own stuff and doing it the way [he’s] been doing it for 50 years,” disregarding the fact that the Rules of Professional Conduct were both enacted and amended within that timeframe, and that he has an affirmative duty as a lawyer to stay abreast of any changes in the rules or laws [Hrg. Tr. at 312]. Respondent admitted that he “finally” sat down and read the *Rules* during the investigation of the complaint herein and claimed he has “never in the last 20 years...been to a seminar where anybody went through those rules,”¹⁴ blaming others for his failure to stay up-to-date regarding rules and laws. The most worrisome logical conclusion from Respondent’s statements is that he has been practicing law for years without any care or consideration to abide by the Rules of Professional Conduct [Hrg. Tr. at 312].

Respondent further explained his failure to execute written fee agreements because he has a “smalltown practice” and types his own documents. However, the Rules of Professional Conduct apply equally to all members of the Bar, regardless of how one has historically done things, the size of one’s office, or where one’s office is located [Hrg. Tr. at 310-312]. Keeping records and written fee agreements also serves to protect lawyers, because the burden of proof is always upon

¹³ There is an exception when the lawyer is charging a regularly represented client on the same basis or rate, which is not the case herein. *See*, Rule 1.5(b).

¹⁴ When the amendments were enacted in 2015, Chief Lawyer Disciplinary Counsel spoke at seminars in every region across the state to discuss all the changes to the WV Rules of Professional Conduct.

the attorney to show the reasonableness of the fees charged, regardless of the fee structure. Syl. Pt. 2, Committee on Legal Ethics v. Tatterson, 177 W.Va. 356, 352 S.E.2d 107 (1986).

(b) Rule 1.15. Safekeeping Property. The Rules require lawyers to hold the property of others with the care of a professional fiduciary, and to not commingle the lawyer's own funds with client funds. *See*, Comments 1 and 2 of Rule 1.15 of the Rules of Professional Conduct. All legal fees and expenses are to be deposited into the client trust account (hereinafter "IOLTA") and withdrawn by the lawyer as fees are earned and expenses are incurred. To protect client funds, lawyers are required to maintain acceptable accounting practices and accurate records to determine which part of the funds belongs to the lawyer.

Respondent initially charged Mr. Peters a flat rate of \$2,500.00 for his representation, and that money was to be deposited into the trust account until it was earned, absent a written agreement to the contrary [Hrg. Tr. at 33]. The burden of proof is always upon the attorney to show the reasonableness of the fees charged. Tatterson, 177 W.Va. 356. "Attorneys who fail to effectively document their efforts on behalf of a client run the risk of being unable to convince a reviewing court, based on their word alone, of the reasonableness of the fee charged or, in cases where it applies, the full and proper value of fees to be awarded on a *quantum meruit* basis." Bass v. Cotelli Rose, 216 W.Va. 587, 592, 609 S.E.2d 848, 853 (2004).

Mrs. Hunter, who handled all the money in Respondent's law office, participated in acquiring – then accepted and deposited into Respondent's regular operating checking account – the unauthorized and improperly withdrawn \$5,000.00 Discover check [Hrg. Tr. at 50-56]. Mrs. Hunter testified that this money was so "[t]hat Mr. Hunter would continue to help them", despite

having just received payment in full for the flat fee case seven (7) months earlier¹⁵ [Hrg. Tr. at 54]. Respondent never personally discussed this substantial increase in fees with Mr. Peters, never memorialized the change in writing, and failed to keep accurate billing records, in direct violation of the Rules. Given that Mr. Peters was a protected person with a court-appointed conservator at the time of this transaction makes these actions even more egregious and in violation of both the Court Orders and Respondent's duty to Mr. Peters.

Additionally, despite having never deposited either the \$2,500.00 or the \$5,000.00 payments into his IOLTA, Respondent repaid the \$5,000.00 money to Mr. Peters' estate in November 2020 from his IOLTA. Without accurate records to support which portion of the trust account funds are Respondent's, if any, this payment was improper and in violation of the Rules of Professional Conduct.

(c) Rule 1.7. Conflict of Interest; Current Clients. Loyalty and independent judgement are essential elements in the lawyer's relationship with a client, and these can be jeopardized when an attorney represents two parties who are directly adverse. *See*, Comments 1 and 6 of Rule 1.7 of the *Rules of Professional Conduct*. The Court ordered that a direct conflict existed between Mr. Peters and Ms. Bordonaro in its Order of September 27, 2019 [ODC Ex. 8 at 399]. This rule also prohibits a lawyer from using information relating to the representation to the disadvantage of the former client, except as Rule 1.6 and Rule 3.3 would permit, or when the information has become generally known. This adverse interest rule arises from the basic duty of loyalty that an attorney owes to the client and that duty continues after the termination of the attorney-client relationship.

¹⁵ Ms. Hunter testified that Raymond Peters initially gave them a \$2,500.00 check to pay the flat fee, but rather than cash that check or return it to him, she placed it in a drawer where it reportedly remains, yet she cashed two separate checks totaling \$2,500.00 from Ms. Bordonaro. [Hrg. Tr. at 32-33].

(d) Rule 1.9. Duties to Former Clients. Pursuant to Rule 1.9(a) of the Rules of Professional Conduct, Respondent was required to obtain Mr. Peters' informed consent in writing to continue representing Ms. Bordonaro in the same or substantially related matter when Mr. Peters and Ms. Bordonaro's interests were materially adverse, as they were deemed by the Court [ODC Ex. 8 at 399]. However, Respondent never sought, and Mr. Peters' guardian/conservator never provided, informed consent on behalf of Mr. Peters for Respondent to continue his representation of Ms. Bordonaro [Hrg. Tr. at 281,332]. Therefore, Respondent remains in violation of Rule 1.9(a) of the Rules of Professional Conduct to the extent he continues to represent Ms. Bordonaro in matters related to Mr. Peters' estate [ODC Ex. 12 at 540].

(e) Rule 3.4. Fairness to Opposing Party and Counsel. Lawyers have a duty to maintain the integrity of the Bar and the profession, and not engage in conduct that interfered with the administration of justice. Accordingly, lawyers are required to follow court orders and abide by the rule of law, even when they disagree with the ruling of the Court, and Respondent's conduct fell far short of this obligation when he failed to reimburse the \$5,000.00 to Mr. Peters' estate.

The Court first ordered Respondent to return the \$5,000.00 payment to Mr. Peters' estate by the order issued September 27, 2019, delivered via email to all parties, yet Respondent failed to comply¹⁶ [ODC Ex. 8 at 396-400]. On November 18, 2019, the Court determined that Respondent engaged in the financial exploitation of Mr. Peters and held Respondent in contempt of the Court's Order following the September 6, 2019 hearing [ODC Ex. 8 at 419]. Respondent was further Ordered to "immediately reimburse" Mr. Peters for the \$5,000.00 retainer [ODC Ex. 8 at 419]. Despite the specific language of the Court ordering him to "immediately reimburse" Mr. Peters, Respondent again failed to timely comply with the order.

¹⁶ The Court also granted leave for Complainant to file a divorce action on behalf of Mr. Peters.

Judge Irons testified at the hearing that “it’s really important for lawyers to follow the court orders, even when they don’t want to. And if they don’t like it...in this particular situation, Mr. Hunter clearly didn’t want to agree with my findings. He could’ve appealed. He did not...There was a court order that said Mr. Peters was protected and Mr. and Mrs. Hunter had taken Mr. Peters’ money” [Hrg. Tr. at 115-116]. Judge Irons testified further that he was “appalled by [Respondent’s] conduct” and that “this is not the kind of behavior I would expect in a lawyer practicing in my court” [Hrg. Tr. at 115]. Judge Irons also stated that “in hindsight, I probably made a mistake. I should’ve ordered Mr. Hunter to pay the attorney’s fees for that hearing” as a contempt sanction [Hrg. Tr. at 113-114]. Respondent’s disregard of the Court Orders demonstrates a clear dereliction of his duty to Mr. Peters, the public, the legal system and the Bar, and shows no respect whatsoever for the Court’s authority.

(f) Rule 5.3. Responsibilities Regarding Nonlawyer Assistance. Rule 5.3(b) of the Rules of Professional Conduct requires a lawyer having direct supervisory authority over a nonlawyer assistant to make reasonable efforts to ensure that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer. Lawyers are required to provide appropriate instruction and supervision regarding the ethical aspects of their employment and are ultimately responsible for the nonlawyer’s work product. *See*, Comment 2 to Rule 5.3 of the Rules of Professional Conduct.

Although Mrs. Hunter is Respondent’s wife, she is also an employee in his office, and he is ultimately professionally responsible for her conduct. The Respondent must keep his nonlawyer assistants apprised of the outcome of hearings, the significance of court orders, the need to not only be aware of court orders, but the importance of following them, and an awareness and understanding of court-ordered legal restrictions and directives involving their work and their clients. Mrs. Hunter disregarded Court Orders and violated the Rules of Professional Conduct,

with examples including the following: her handling of the office finances and management of the office, her assisting a protected client in obtaining unauthorized money and depositing it into their operating account, and her violation of a no-contact order by the court and visiting a protected person without permission from their guardian [Hrg. Tr. at 50-56, 134, 224-224; ODC Ex. 8 at 399].

The record demonstrates that neither Respondent nor his office staff, ever obtained authorization from Mr. Peters' legal representatives when they assisted him in the withdrawal of the \$5,000.00 from Mr. Peters' Discover account for legal fees [Hrg. Tr. at 56]. The Guardian/Conservator proceeding was to protect him from exploitation and manipulation and to safeguard against such abuse by requiring permission from his court-appointed guardian/conservator before decisions or purchases were made on his behalf. As Judge Irons testified at the hearing, "the whole thing was to stop people from taking Mr. Peters' money" – yet Respondent and Ms. Hunter engaged in the very activity that the Guardian/Conservator proceedings were meant to safeguard against [Hrg. Tr. at 115].

(g) Rule 4.2. Communication with Persons Represented by Counsel. Once the Court ordered that no contact be had with Mr. Peters, the Respondent and his entire office staff had the obligation to refrain from such contact irrespective of any alleged motive of decency or concern for Mr. Peters' well-being.

(h) Rule 8.4(d). Misconduct. Respondent's continued representation by way of motion practice and continued dealings with clients who had direct conflicts with one another were prejudicial to the administration of justice.

2. Respondent acted intentionally and knowingly.

The *ABA Standards for Imposing Lawyer Sanctions* states that 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, but without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

The record herein demonstrates that Respondent's actions were intentional with regard to his failure to comply with the court orders. Respondent's actions were knowing with regard to his failure to execute written fee agreements, his general failure to stay abreast of rule and law changes, his continued representation of Ms. Bordonaro after the Court determined conflict existed, his delegation of all financial duties to Mrs. Hunter without properly supervising or educating her, and his failure to mitigate or remediate the consequences of Mrs. Hunter's actions. There is no evidence to the contrary, and Respondent presented none. Although Respondent expressed regret at his mishandling of the matter when asked by the HPS, the expressed regret and admission came late with considerable hindsight and reflection [Hrg. Tr. at 335-337].

Respondent claimed to be regretful and that he should have returned the money sooner, yet where was his regret in the moment, when he could have quickly remedied the situation? [Hrg. Tr. at 338]. Respondent attempted to justify his delay in repaying the money he was **ordered by the court to repay** due to negotiations with Complainant's counsel regarding the divorce. This is alarming considering Respondent knew the \$5,000.00 was money they had taken from Mr. Peters

without permission and for no legitimate reason. Respondent attempted to use money the court determined was the product of Respondent's financial exploitation of his client to negotiate additional money for himself [Hrg. Tr. at 338]. Respondent testified "Mr. Lusk and I were talking and we were trying to resolve everything and a part of that was who's going to pay me? You know, he married her" [Hrg. Tr. at 338]. Respondent had already been paid \$5,000.00 **ABOVE** the \$2,500.00 flat fee amount, yet he was still trying to get more money for himself.

3. The amount of real and potential injury is great.

"Injury" as defined by the American Bar Association is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. Annotated ABA Standards for Imposing Lawyer Sanctions, Definitions (2015). The level of injury can range from "serious" injury to "little or no" injury. Id. Furthermore, "potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct. Id.

Respondent's refusal to accept and comply with the Court's Orders caused considerable frustration, struggle and expense to Complainant during a very difficult time in his life while he was coping with his once brilliant father's deterioration. Respondent testified that he and Mrs. Hunter were fond of Mr. Peters because they knew the struggle of dealing with a parent with Alzheimer's, yet they gave no consideration or understanding to Complainant, who was going through the same thing in real time. Respondent assumed that the Complainant was not fond of or had some ulterior motive with respect to his own father and, as a result, he intentionally dismissed the authority of the Court and its orders.

Respondent and Mrs. Hunter's actions in violating the no contact order and failing to repay the money required Complainant to seek additional legal assistance – and ultimately resulted in his filing the complaint herein. Respondent demonstrated a pattern and practice of placing his own opinions and interests above the directives of the Court. The evidence demonstrates Respondent has failed to stay current and abreast of changes in the law particularly with respect to client contracts/agreements and the handling of client funds. Those failures create great potential for harm to the public, the profession, and the legal system.

Respondent acknowledged that Mrs. Hunter's behavior was improper and that he was aware of her ongoing misconduct, yet the record demonstrates that he was unable to prevent her from continuing to engage in ongoing improper conduct and failed to mitigate any damage she caused [Hrg. Tr. at 334-336]. The danger with the employment arrangement in Respondent's law office with Mrs. Hunter's disregard for the rules and his direction is that she is his wife. This is not a rogue office employee Respondent can fire and replace. Mrs. Hunter runs Respondent's law office. She handles the calls, screens clients, discusses payments with clients, handles all money transactions within the office, visits with clients, and Respondent relies upon her significantly [Hrg. Tr. 25-32].

Both Respondent and Mrs. Hunter indicated Respondent was unable to practice without Mrs. Hunter's assistance.¹⁷ He has repeatedly expressed the large role Mrs. Hunter plays in his law office, that she's his "right arm and left arm sometimes," yet Mrs. Hunter's refusal to abide by Respondent's direction, along with her lack of understanding the rules and disregard for Court

¹⁷ Accommodations were made by the HPS to permit Mrs. Hunter to be the first witness called at the August 9, 2022 hearing because Respondent required her assistance during the hearing at counsel table and he did not want the Rules of Sequestration to inhibit her participation.

Orders, poses potential harm to the public, the legal system, the legal profession, and other vulnerable clients [ODC Ex. 6 at 73; Hrg. Tr. at 350].

Because the legal profession is largely self-governing, it is vital that lawyers abide by the rules of substance and procedure that shape the legal system. Indeed, the rules enacted by the Supreme Court of Appeals governing the practice of law and conduct of lawyers have the force and effect of law. *See* W.Va. Const. Art. VIII, §3. Respondent's disregard for the Rules of Professional Conduct and the laws of this State, as exhibited in the record, is clearly detrimental to the legal system and legal profession, his conduct undermines the public confidence in the administration of justice, and he has brought the legal system and profession into disrepute.

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 aggravating factors present in this case are: 1) vulnerability of victim; 2) delay in rectifying misconduct; 3) prior discipline; 4) pattern of misconduct; and 5) substantial experience in the practice of law.

Respondent has been practicing law since 1973, which gives him fifty years of experience in the practice of law. Respondent repeatedly failed to respond to Disciplinary Counsel's initial requests on numerous occasions [ODC Ex. 13 at 576-578; 582-583]. Additionally, Respondent's client, Mr. Peters, was a Court Ordered protected person at all times throughout his representation,

yet Respondent engaged in his financial exploitation, as deemed by the Court. [ODC Ex. 8 at 419] Respondent knowingly accepted the unauthorized \$5,000.00 payment when Respondent had already charged a \$2,500.00 flat fee that had been paid in full, causing unjust enrichment. Moreover, Respondent continued to negotiate for additional money with Complainant's new counsel before he was willing to reimburse the money the court ordered him to pay fifteen months earlier, when he had already been paid \$5,000.00 above the flat fee rate [Hrg. Tr. at 338]. Finally, regarding his prior disciplinary offenses, Respondent had received four admonishments by the Investigative Panel at the time of the herein complaint's filing, two in 2002, one in 2015, and one in 2019, where Respondent was admonished for violation of Rules 1.3, 1.4, 1.15(a), 1.16(d) and 5.1(a) of the West Virginia Rules of Professional Conduct.

Standard 9.22(a) of the ABA Standards for Imposing Lawyer Sanctions indicates that prior disciplinary offenses constitute an aggravating factor. Respondent was warned of the need for written fee agreements in 2015. In the January 31, 2015 Lawyer Disciplinary Board Investigative Panel Closing in Thomas E. Withrow's complaint, I.D. No. 14-05-001, the Investigative Panel was "troubled by Respondent's failure to have a written contingent fee agreement" and stated that the "[n]ew Rule 1.5 which became effective January 1, 2015 now requires all fee agreements are to be in writing." (emphasis included in document). The Investigative Panel admonished Respondent and warned that "any future failure to put fee agreements in writing will result in the filing of formal charges, especially in light of new Rule 1.5 requiring written fee agreements in all cases." [ODC Ex. 18 at 647-658] This is the Rule Respondent claimed to have no knowledge of at the hearing and for which he blamed ODC for its failure to properly educate practitioners. [Hrg. Tr. at 312]

Respondent was also warned of the need to properly account for fees earned and billed in the Lawyer Disciplinary Board Investigative Panel Closing in Ronald E. Cook's complaint, I.D. No. 18-02-288, issued on December 3, 2019. The Investigative Panel was "disturbed" that Respondent was unable to either locate the Complainant's file or provide any billing or accounting information of the fee paid to the firm by Complainant. Since he failed to keep record of his hours worked, Respondent was unable to properly account for the fees and the Investigative Panel ordered Respondent to refund the full \$10,000.00 retainer to Complainant. Upon proof of compliance with the repayment, the Investigative Panel closed the matter and admonished Respondent for violating the Rules [ODC Ex. 18 at 663-667].

Despite being admonished for his violation of the Rules in 2015 and 2019, and being warned that any future violations would result in charges, Respondent failed to respect the Investigative Panel's discipline and disregarded their warnings.

5. The existence of any mitigating factors.

In addition to adopting aggravating factors in Scott, the Scott court also adopted mitigating factors in 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). 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.

It should be clear that mitigating factors were not envisioned to insulate a violating lawyer from discipline. The HPS finds that Respondent has demonstrated (5), (7), and (12) of the factors, above, for mitigation purposes. Respondent admitted to transgressions at the hearing in this matter and participated with respect to the process, itself – although some of his submissions to the Complainant were on the cusp of disrespect – not advocacy. Respondent testified at hearing as to his own character, that he has had a small-town practice that has benefitted the local community and its citizens for many years; has been active on boards and participated in numerous fund-raising activities for those in need; and currently serves Greenbrier County as its Fiduciary Commissioner [Hrg. Tr. at 342-35]. Additionally, the HPS finds that Respondent has shown and demonstrated remorse with respect to his professional actions and/or inactions with regard to his representation.

V. SANCTION

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

In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the

discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.

As noted above, 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). This type of conduct has a dramatic impact on the public's confidence in the integrity of the Bar and annulment is the appropriate sanction. See Lawyer Disciplinary Board v. Wade, 217 W.Va. 58, 614 S.E. 2d 705 (2005); Lawyer Disciplinary Board v. Daniel, Supreme Court Nos. 32569 and 32755 (2006)(*unreported*); and Lawyer Disciplinary Board v. Askintowicz, Supreme Court No. 33070(2007)(*unreported*).

Respondent's most serious transgressions in this matter are undoubtedly his failure to properly supervise Mrs. Hunter's misappropriation and conversion of the \$5,000.00 Discover check, coupled with his failure to quickly remediate the matter and reimburse the estate after ordered to do so by the Court. The Supreme Court has repeatedly held that "[t]he general rule is that absent compelling extenuating circumstances, misappropriation or conversion by a lawyer of funds entrusted to his/her care warrants disbarment." Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998); Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 561, 505 S.E.2d 619, 631 (1998) *remanded with directions*, See Lawyer Disciplinary Board v. Kupec (Kupec II), 204 W.Va. 643, 515 S.E.2d 600 (1999). See also Lawyer Disciplinary Board v. Wheaton, 216 W.Va. 673, 610 S.E.2d (8) (2004); Lawyer Disciplinary Board v. William H. Duty, 222 W.Va. 758, 671S.E.2d 763 (2008). The Kupec I Court recognized as follows:

The term misappropriation can have various meaning. In fact, the misuse of another's funds is characterized as misappropriation or conversion. Black's defines misappropriation as '[t]he

unauthorized, improper, or unlawful use of funds or other property for purposes other than that for which intended . . . including not only stealing but also unauthorized temporary use for [the] lawyer's own purpose, whether or not he derives any gain or benefit from therefrom. Black's Law Dictionary (6th ed.1990). *See In re Wilson*, 81 N.J. 451, 409 A.2d 1153, 1155 n.1 (1979) (defining misappropriation as 'any unauthorized use by the lawyer of client's funds entrusted to him including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or no he derives any personal gain or benefit therefrom").

Kupec I, 202 W.Va. at 202-3, 505 S.E.2d at 262-3.

Moreover, the fact that Respondent finally reimbursed the \$5,000.00 on November 25, 2020, fifteen months after first being ordered to do so by the Court, should not mitigate any proposed sanction. Respondent's untimely reimbursement does not negate his admitted misconduct in failing to timely comply with the Court Order and should not be considered a defense to his conversion of the money he was holding for his own personal use. 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. However, Kupec I 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.

In this case, the evidence is clear that Respondent knew that he was to reimburse the Peters' Estate the \$5,000.00, that he was ordered by the Court to return the money on multiple occasions, that Mr. Peters was a protected person with a Conservator, and that he wrongfully accepted the

money when Mr. Peters' account was paid in full. Moreover, Respondent did not pay back the \$5,000.00 until November 25, 2020, more than a year after he was first ordered to do so, after the disciplinary proceeding herein had commenced, and only after Complainant's new counsel demanded payment.

The Supreme Court has 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). In Tatterson I, the respondent was suspended for six months for commingling client funds, failure to deliver to client proper share of settlement proceed, failure to account properly for proceeds or make an accounting, misrepresentation of facts to client, and conversion of client funds to attorney's own use. Committee on Legal Ethics v. Tatterson (Tatterson I), 173 W.Va. 613, 319 S.E.2d 381 (1984).

Cases in West Virginia concerning such misconduct has resulted in the suspension of an attorney's license to practice law. See Lawyer Disciplinary Board v. Morgan, 228 W.Va. 114, 717 S.E.2d 898 (2011) (one year suspension for violation of Rules 1.3, 1.4, 8.1(b), 8.4(d), and other violations); Lawyer Disciplinary Board v. Phalen, Supreme Court No. 11-1746 (W.Va. 11/14/12) (*unreported*) (one year suspension for violation of Rules 1.3, 1.4, and other violations); Lawyer Disciplinary Board v. Sullivan, 230 W.Va. 460, 740 S.E.2d 55 (2013) (suspension for thirty days and two years supervised practice for violation of Rules 1.3, 1.4, and another violation); Lawyer Disciplinary Board v. Rossi, 234 W.Va. 675, 769 S.E.2d 464 (2015) (three year suspension for violation of Rules 1.3, 1.4, 8.1(b) and 8.4(d) and other violations); Lawyer Disciplinary Board v. Sturm, 237 W.Va. 115, 785 S.E.2d 821 (2016) (suspension for ninety days and two years supervised practice for violation of Rules 1.3, 1.4, 8.1(b), 8.4(d), and other violations); Lawyer Disciplinary Board v. Palmer, 238 W.Va. 688, 798 S.E.2d 610 (2017) (suspension for thirty days

and six months probation and supervised practice for violation of Rules 1.3, 1.4, 3.2, and 8.4(d)); and Lawyer Disciplinary Board v. Davis, No. 18-0640 (W.Va. 6/10/19) (*unreported*) (suspension for thirty days, additional CLE hours, and two years of probation with supervised practice for Rule 1.4 and 8.1(b)).

In Lawyer Disciplinary Board v. James B. Atkins, Supreme Court No. 18-0918 (2020) (*unreported*), the Supreme Court found that Petitioner had admitted to violating Rules 1.3, 1.4, 1.15(d), and 5.3 of the Rules of Professional Conduct, and that the clear and convincing evidence demonstrated that he also violated Rules 1.15(a), 8.4(c) and 8.4(d) of the Rules of Professional Conduct. The Court also found that Petitioner violated duties he owed to his client, the legal system and to the legal profession. The Court found that Petitioner's negligent supervision of his nonlawyer staff resulted in the settlement funds being co-mingled and misappropriated for use in paying for his law office operating expenses and that after he became personally aware of the failure to remit the funds in November 2016, he did not remit the funds until after the filing of the complaint. However, the Court concluded that in light of the fact that Petitioner had misappropriated client funds and had been untruthful, the Hearing Panel Subcommittee's recommended sanction of a three (3) month suspension with automatic reinstatement was "too lenient." The Court instead imposed a nine (9) month suspension which required Petitioner to petition for reinstatement, followed by one year of probation. The Court adopted the remaining recommendations: that he complete an additional nine (9) hours of continuing legal education prior to reinstatement, during the current reporting period, three (3) hours of which should be in IOLTA accounts and the other six (6) hours in the area of ethics and office management; that Petitioner comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure; and that

Respondent pay costs pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure, and that the same shall be paid prior to reinstatement.

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). Accordingly, there is no magic involved in deciding the appropriate sanction.

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

Suspension should be imposed when an experienced lawyer such as Respondent knowingly fails to comply with Court Orders and negligently supervises his office staff which results in real harm to clients. Suspension should be imposed when lawyers such as Respondent fail to adhere to the rules of procedure governing civil matters and fail to stay abreast of changes in the law which result in conduct which brings the administration of justice into disrepute and further burdens the Court system. Indeed, lawyers, like Respondent, who intentionally disregard Court Orders,

knowingly fail to mitigate or remediate known or potential damage caused, and neglect their supervisory and professional duties, should face longer periods of suspension. Respondent knowingly violated his duties to his clients, the legal system, and the legal profession, and his actions caused significant injury to his client, the legal system, and the legal profession. Moreover, Respondent does not have safeguards in place to prevent this type of issue from recurring. Accordingly, the suspension of his license to practice law is warranted.

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.

Respondent's problems were of his own making right at the start of the representation and continued from that point on. Respondent had no written agreement with either Ms. Bordonaro or Mr. Peters at the time he first undertook their representation in October of 2018. Such failure was the subject of prior Investigative Panel admonishments which apparently did not register. He received two installment payments of \$2,500.00 (the first of which was never negotiated and the second of which was negotiated and deposited through two separate checks totaling \$2,500.00). The failure to memorialize the scope of the representation led to very clear questions: Who was Respondent representing? What was the scope of the representation? And what was the charge for legal services arrangement?

Thereafter, Respondent persisted in his representation of presumably both Mr. Peters and Ms. Bordonaro when every possible judicial ruling told him not to do so. His own ethical compass should have told him not to do so. There was a very simple solution to the ethical issues now

presented which were laid out before Respondent in black and white in the form of Court Orders which found a conflict. He or his client may have disagreed with the decided Orders. They could have appealed them. They did not. Instead, Respondent simply failed to heed those Orders or in any way conform his conduct to the directives of the Orders and the Rules of Professional Conduct.

Additionally, Respondent has been practicing for almost fifty years and it is implausible to suggest that he did not have knowledge of his fiduciary duties to his clients and the need for his office staff to properly manage client money. His failure to properly educate Mrs. Hunter in managing client money, and then failing to supervise her conduct, constitutes more than mere neglect, especially once he had actual knowledge of her repeated and habitual misconduct. His knowing failure to supervise Mrs. Hunter resulted in real injury to their client as deemed by Court Order, and potential injury for their other vulnerable clients and the general public.

Mrs. Hunter, while an employee in Respondent's office, assisted in acquiring unauthorized money from a protected client and commingled the funds when she admittedly deposited them into the firm operating expense account, yet she expressed a complete lack of appreciation for the gravity of the situation or the legal ramifications of her actions [Hrg. Tr. at 50]. That Mrs. Hunter did not even consider discussing the Discover matter with Respondent prior to engaging in the conduct provides valuable insight into how Respondent's law office operates, and to date, there are no reliable or effective safeguards in place.

Respondent committed several additional violations, as well. Most serious is his knowing violation of Court Orders to reimburse the money taken from his client. Respondent admitted knowing what he did was wrong, yet he made no effort to remediate the matter on his own, or even shortly after the Court ordered him to do so, or even soon after the herein disciplinary action commenced.

Additionally, Respondent reimbursed the money from his IOLTA when the money had never been deposited into that account. Since Respondent failed to maintain any billing records or invoices regarding his representation, there is no evidence that the \$5,000.00 paid from the IOLTA to the Peters estate belonged to Respondent. Neither Respondent nor Mrs. Hunter appeared to possess understanding of client trust accounts despite their fiduciary duty to properly manage client money.

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

Given the seriousness of the transgressions set forth above, particularly as it relates to a protected person under the law and the intentional disregard of Court Orders, the HPS does not believe that probation, a limitation on practice, a supervised practice, or a mere admonishment or reprimand to be strong enough to punish Respondent for his actions/inactions or to deter others from those same or similar actions. Further, they would not serve to restore public confidence in the legal profession or to protect the public.

VI. CONCLUSION

In reaching its recommendation as to sanctions, the Hearing Panel Subcommittee considered the evidence, the facts and recommended sanction, the aggravating factors and mitigating factors. The Office of Lawyer Disciplinary Counsel urges that this Honorable Court uphold the sanctions recommended by the Hearing Panel Subcommittee in Case No. 22-0123. To wit:

- A. That Respondent's law license be suspended for a period of one (1) year pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure;

- B. That Respondent complete an additional nine (9) hours of continuing legal education prior to reinstatement, during the current reporting period, three (3) hours of which should be in IOLTA accounts and the other six (6) hours in the area of ethics and office management;
- C. That Respondent must comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure;
- D. That Respondent be permitted to Petition the Court for reinstatement following one (1) year suspension pursuant to Rule 3.32 provided the above sanctions are satisfied;
- E. That following Reinstatement, if any, the Respondent shall be placed on one (1) year supervised probation; and
- F. That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel



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CERTIFICATE OF SERVICE

This is to certify that I, Kristin P. Halkias, Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 17th day of March, 2023, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" upon Respondent J. Steven Hunter by mailing the same via United States Mail with sufficient postage, to the following address:

J. Steven Hunter, Esquire
921 Court Street North
Lewisburg, West Virginia 24901



Kristin P. Halkias