

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

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State of West Virginia ex rel.
Office of Lawyer Disciplinary Counsel,

Petitioner,

v.

No. 23-619

James W. Keenan, a member
of the West Virginia State Bar,

Respondent.

BRIEF OF THE OFFICE OF THE LAWYER DISCIPLINARY COUNSEL

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I. STATEMENT OF THE CASE

A. NATURE OF PROCEEDINGS

On October 26, 2023, the Office of Lawyer Disciplinary Counsel, by and through counsel Kristin P. Halkias, filed a petition with the Supreme Court of Appeals of West Virginia (hereinafter “Supreme Court”) seeking the immediate suspension of the law license of James W. Keenan (hereinafter “Respondent”) in accordance with Rule 3.27 of the Rules of Lawyer Disciplinary Procedure. Respondent, by and through counsel Joseph M. Farrell, Jr., filed a request for hearing in accordance with Rule 3.27(c) of the Rules of Lawyer Disciplinary Procedure.

The Supreme Court directed the Office of Lawyer Disciplinary Procedure to file a petitioner’s brief on or before January 11, 2024, and the matter was also scheduled for oral argument on April 16, 2024.

B. FINDINGS OF FACT

1. James W. Keenan (hereinafter “Respondent”) is a lawyer practicing in Fayetteville, which is located in Fayette County, West Virginia. Respondent, having diploma privilege, was admitted to The West Virginia State Bar on January 8, 1980. As such, Respondent is subject to the disciplinary jurisdiction of the Supreme Court and its properly constituted Lawyer Disciplinary Board.
2. On June 30, 2022, the Investigative Panel of the Lawyer Disciplinary Board filed a statement of charges against Respondent, and a hearing was held May 16, 2023. Respondent personally appeared by and through counsel. The Hearing Panel of the Lawyer Disciplinary Board

(hereinafter “Hearing Panel”) found that Respondent violated Rules 1.8(j)¹, 8.4(a)² and 8.4(b) of the Rules of Professional Conduct and recommended that he be suspended for six (6) months from the practice of law. Said recommendation was submitted to the Court on September 21, 2023, and ODC consented to the Hearing Panel recommendation on September 25, 2023.

3. By Order issued November 14, 2023, the Supreme Court concurred and approved the Hearing Panel’s recommended disposition. Accordingly, Respondent’s license to practice law was suspended for six (6) months, effective immediately. Should Respondent desire to be reinstated at the expiration of his six (6) month suspension, the Supreme Court Ordered that petition for reinstatement in accordance with Rule 3.32 of the Rules of Lawyer Disciplinary Procedure was required.³
4. On July 26, 2023, a criminal complaint was filed in Fayette County, West Virginia, charging Respondent with brandishing a deadly weapon and assault in violation of W.Va. Code §§ 61-7-11 & 61-2-9(b) in an incident which occurred on July 25, 2023. [Appendix pp. 1-15, Exhibit 1]
5. Sergeant Shaun Maynor with the Fayetteville Police Department responded to the call and drafted the criminal complaint. The complaint is summarized as follows: Benjamin Morgan received a text message from his daughter while she was working at the Stache ice cream shop

¹ **Rule 1.8. Conflict of Interest: Current Clients: Specific Rules.** (j) A lawyer shall not have sexual relations with a client whom the lawyer personally represents during the legal representation unless a consensual sexual relationship existed between them at the commencement of the lawyer/client relationship. For purposes of this rule, “sexual relations” means sexual intercourse or any touching of the sexual or other intimate parts of a client or causing such client to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party or as a means of abuse.

² **Rule 8.4. Misconduct** It is professional misconduct for a lawyer to:(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (d) engage in conduct that is prejudicial to the administration of justice.

³ In its Order of November 14, 2023, the Supreme Court also ordered Respondent complete an additional three (3) hours of continuing legal education in ethics, specifically in the area of awareness and education in unwanted advances and/or sexual harassment/misconduct, which may be completed via electronic pre-recorded presentation, in addition to the ethics hours he is otherwise required to complete; and Respondent was ordered to pay the costs of the disciplinary proceeding.

that a man was blowing his horn in the parking lot. Mr. Morgan, who was working next door, went outside and observed Respondent inside his car blowing his horn.

Respondent reportedly stated, "I want some fucking ice cream," and Mr. Morgan asked that he not use profanity because children were in the area. Mr. Morgan said Respondent became angry and, when he was within approximately three feet of the car, Mr. Morgan said that Respondent "was pointing a gun in his direction" from the waist area while sitting in the car. Mr. Morgan said he could clearly see the gun given the type of car Respondent was in (a BMW convertible), and he believed the gun to be a black Ruger LCP. Mr. Morgan reported that Respondent was "screaming that he would shoot him and whoop his ass."

Sergeant Maynor said that while he was taking Mr. Morgan's statement, a witness approached his partner and gave a statement. The witness said that she saw a man in a convertible BMW pull into the ice cream shop parking lot and repeatedly threaten to shoot a man on the balcony. She said he "kept repeating it over and over again". Sergeant Maynor confirmed the subject was Respondent, and the vehicle was a 2021 light blue BMW 430 convertible that is registered to Respondent. [Appendix p. 16, Exhibit 2]

6. The criminal charges are pending in Fayette County Magistrate Court.
7. On August 10, 2023, ODC opened an investigation into the criminal matter. By response dated September 1, 2023, Respondent invoked his fifth amendment constitutional right against self-incrimination. The ODC investigation remains open, but is stayed until the underlying criminal matter is resolved.
8. On July 31, 2023, The Honorable Thomas H. Ewing, Circuit Court Judge for the Twelfth Judicial Circuit of West Virginia, sent a letter to Chief Lawyer Disciplinary Counsel advising of a Facebook post made by Respondent. [Appendix pp.17-18, Exhibit 3] Respondent had messaged both Judge Ewing and Judge Matthew England, a Family Court Judge for the

Fourteenth Family Court Circuit in Fayette County, in a group message in which he shared his Facebook post with them.

9. In his letter, Judge Ewing said he felt duty bound pursuant to Rule 2.15(D) of the Code of Judicial Conduct⁴ to alert ODC of the contents of the message.
10. The Facebook post in question began: “I have been criticized by the WV State Bar ODC for using the word ‘fuck’ to my clients so:...” and Respondent proceeded to replace the “F word” with the word “COITUS” throughout the post. The last line read “The WV State Bar ODC can go COITUS themselves!” The post was made at 1:05 a.m. on July 14, 2023. [Appendix p. 19, Exhibit 4]
11. On July 31, 2023, at 12:46 a.m., Respondent posted a poem on Facebook and changed his signature to include the phrase “Ready to Draw”. [Appendix p. 20, Exhibit 5]
12. On September 21, 2023, Respondent sent unsolicited and unwelcomed profane text messages to Jennifer Smith, Deputy Chief Probation Officer for the Twelfth Judicial Circuit in Fayette County (hereinafter “Deputy Chief Smith”). The text messages state as follows:

Respondent: I have nearly died 6 times in the last 3 years from heart attacks and infections! I MUST eat your pussy & fuck the hell out of ya before I do die! Come to me!!

Respondent: Let’s arrange a visit here!

13. Deputy Chief Smith immediately reported the messages to the Chief Probation Officer, Jerrod White, who advised Deputy Chief Smith to report the incident to the Honorable Paul Blake, Jr., Chief Circuit Court Judge for the Twelfth Judicial Circuit.

⁴ **Rule 2.15(D) of the Code of Judicial Conduct:** A judge having knowledge indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.

14. Deputy Chief Smith drafted a MEMO to Chief Judge Blake, and copied Judge Thomas Ewing and Chief White. Deputy Chief Smith's MEMO included a screenshot of the messages. [Appendix pp. 20-21, Exhibit 6]
15. The MEMO identified the phone number the messages were sent from as 304-640-1034. A screen printout of Respondent's phone number in the West Virginia State Bar directory on September 26, 2023, confirmed 304-640-1034 as being Respondent's phone number. [Appendix p. 23, Exhibit 7]
16. Deputy Chief Smith provided an affidavit regarding the incident, which confirmed she was not currently, nor had she ever, been in a romantic relationship with Respondent, and that the messages were alarming, offensive, unsolicited and unwelcomed. [Appendix pp. 24-25, Exhibit 8]
17. Pursuant to Rule 2.15(B) of the Code of Judicial Conduct, Chief Judge Blake informed ODC of Deputy Chief Smith's report regarding the harassing messages sent by Respondent.⁵ [Appendix pp. 26-27, Exhibit 9]
18. On September 15, 2023, Respondent failed to attend a properly noticed hearing before Judge Ewing on plaintiff's Motion for Summary Judgment in the matter of *Sheriff of Summers County Justin Faris Conservator for Arnold Maddy v. Zachary Maddy* (CC-10-2023). During the hearing, Respondent's client, defendant Zachary Maddy, informed the Court that he had paid Respondent to represent him in the case. Plaintiff's motion for summary judgment was granted by Order issued September 25, 2023. [Appendix pp. 28-32, Exhibit 10]
19. Judge Ewing provided an affidavit wherein he said he has concerns about Respondent's recent conduct and fears that "his decision-making is impaired to the point to where it is negatively

⁵ **Rule 2.15(B) of the Code of Judicial Conduct:** A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

impacting his representation of clients and undermining the credibility of the legal profession and the legal system.” [Appendix pp. 28-32, Exhibit 10].

C. CONCLUSIONS OF LAW

Because Respondent’s personal and professional misconduct and erratic behavior continues to escalate and includes threats of violence and harassment against the public and Court employees, Respondent has violated Rules 8.4(b) and 8.4(d) of the Rules of Professional Conduct, which state in pertinent part:

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

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

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

II. SUMMARY OF ARGUMENT

The emergency petition was filed with the Supreme Court in October 2023 because a number of reports involving Respondent’s troubling and escalating dangerous conduct were made to ODC prior to issuance of the November 14, 2023 Supreme Court Order and while the related charges therein were pending. Although the Supreme Court issued its Order on November 14, 2023, and thereby immediately suspended Respondent’s license for six (6) months as recommended by the Hearing Panel, none of the matters regarding Respondent’s subsequent troubling conduct have been addressed. Given the nature of the reported threatening conduct, coupled with Respondent’s regular and vociferous self-reports of being “armed” and “ready to draw”, Respondent is currently a danger to the public and needs to be removed from the practice of law indefinitely.

Respondent has committed clear violations of the Rules of Professional Conduct and discipline is required. The findings of fact and conclusions of law asserted above demonstrate that Respondent violated the duties a lawyer owes to the public, to the legal system, and to the profession, and that he acted in an intentional and knowing manner, and caused actual and potential injury. By indefinitely suspending Respondent until at least the underlying criminal matter in which he has pleaded the fifth amendment in his answer to the ODC's request for information has concluded in court and he has cooperated fully with the ODC investigation thereto, 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 Supreme Court has set oral argument under Rule 19 of the Rules for Appellate Procedure for Tuesday, April 16, 2024 in this matter.

IV. ARGUMENT

A. STANDARD OF REVIEW UNDER RULE 3.27 OF THE RULES OF LAWYER DISCIPLINARY PROCEDURE

This Honorable Court has the exclusive authority to define, regulate and control the practice of law in West Virginia. Syl. Pt. 1, State ex rel. Askin v. Dostert, 170 W.Va. 562, 295 S.E.2d 271 (1982).

Under the authority of the Supreme Court of Appeal's inherent power to supervise, regulate and control the practice of law in this State, the Supreme Court of Appeals may suspend the license of a lawyer or may order such other actions as it deems appropriate, after providing the lawyer with notice and an opportunity to be heard,

when there is evidence that a lawyer (1) has committed a violation of the Rules of Professional Conduct or is under a disability and (2) poses a substantial threat of irreparable harm to the public until the underlying disciplinary proceeding has been resolved.

Syl. Pt. 2, Committee on Legal Ethics v. Ikner, 190 W.Va. 433, 438 S.E.2d 613 (1993).

Rule 3.27 of the Rules of Lawyer Disciplinary Procedure provides a mechanism to immediately suspend the license of a lawyer who is (1) accused of violating the West Virginia Rules of Professional Conduct and (2) poses a substantial threat of irreparable harm to the public. Office of Disciplinary Counsel v. Albers, 214 W.Va. 11, 13, 585 S.E.2d 11, 13 (2003). Rule 3.27 of the Lawyer Disciplinary Procedure should only be utilized in the most extreme cases. Syl. Pt. 1, Office of Disciplinary Counsel v. Battistelli, 193 W. Va. 629, 630, 457 S.E.2d 652, 653 (1995).

ODC asks the Court to consider whether the allegations included herein, most of which are undisputed and supported by documentary and testamentary evidence, demonstrate that Respondent has violated the Rules and presently poses a substantial threat of irreparable harm to the public. *See* Office of Disciplinary Counsel v. Duffy, 237 W.Va. 295, 299, 787 S.E.2d 566, 570 (2016). When analyzing a case under Rule 3.27, this Court has previously focused its attention on the aspects of the case that are essentially uncontested or to which the lawyer failed to provide an adequate response. *See* Office of Lawyer Disciplinary Counsel v. Nichols, 212 W.Va. 318, 321, 570 S.E.2d 577, 580 (2002) and Office of Disciplinary Counsel v. Morgan, 242 W. Va. 667, 677, 839 S.E.2d 145, 155 (2020). As it relates to the second factor, “[t]he standard of “substantial threat of irreparable harm to the public” is rather amorphous and requires some degree of speculation, dependent upon the facts of each case.” Office of Lawyer Disciplinary Counsel v. Plants, 233 W. Va. 477, 482, 759 S.E.2d 220, 225 (2014).

The Court has stated consistently that the “primary purpose of the ethics committee [Office of Lawyer Disciplinary Counsel] is not punishment but rather the protection of the public and the

reassurance of the public as to the reliability and integrity of attorneys.” Office of Lawyer Disciplinary Council v. Albers, 214 W.Va. 11, 13, 585 S.E.2d 11, 13 (2003) *citing* Committee on Legal Ethics of West Virginia State Bar v. Ikner, 190 W.Va. 433, 436, 438 S.E.2d 613, 616 (1993) (internal citations omitted). When looking at the totality of circumstances in Respondent’s increasingly erratic and dangerous behavior, his repeated threats of being “armed” and “ready”, his open possession of guns, his pattern of mocking authority and disrespecting discipline, and his utter disregard for normal everyday rules regarding civility and conduct, Respondent presents a substantial threat of irreparable harm to the public. A license to practice law is neither a right, nor an entitlement, but is a privilege conferred on the lawyer primarily for the benefit of the public. Although Respondent’s current privilege to practice law is suspended for six (6) months related to violating Rules 1.8(j) and 8.4(a) and (d) of the Rules of Professional Conduct, Respondent’s escalating and dangerous behavior that make up this emergency petition has not been addressed. Without indefinite suspension, his troubling conduct exposes the public and Court employees to a significant risk of substantial threat of irreparable harm. Accordingly, Respondent’s actions warrant indefinite suspension of his law license at least and until such time as the underlying criminal matter involving brandishing a gun is concluded and Respondent has cooperated fully with the ODC in the investigation into the matter.

B. Analysis of Recommended Sanction

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 include: 1) prior discipline; 2) pattern of misconduct; 3) multiple offenses; 4) substantial risk of real and potential harm; 5) intentional and knowing conduct; and 5) substantial experience in the practice of law.

Respondent has been practicing law since 1980, which gives him more than forty-three (43) years of experience in the practice of law. Respondent's conduct regarding his social media threats and inappropriate and vulgar communications with court employees was intentional and knowing. Additionally, Respondent's prior disciplinary history is lengthy, and most concerning is that the conduct referenced in this petition occurred while disciplinary matters were pending before this Honorable Court, exemplifying both a cavalier attitude toward disciplinary proceedings and disregard for the integrity of the practice of law.

Standard 9.22(a) of the ABA Standards for Imposing Lawyer Sanctions indicates that prior disciplinary offenses constitute an aggravating factor. Respondent has been recently admonished for threatening behavior involving guns. On November 4, 2022, the Investigative Panel of the Lawyer Disciplinary Board admonished Respondent for threatening opposing counsel. The Investigative Panel was "gravely concerned with Respondent's threatening and erratic behavior both in and out of Court," and determined that Respondent engaged in professional misconduct in violation of Rule 8.4(d) of the Rules of Professional Conduct. The investigation had revealed Respondent sent opposing counsel messages saying "suck my dick," "SUCK MY DICK you fucking chickenshit bisexual alcoholic coke head motherfucker," and when asked to refrain from that conduct, Respondent said that opposing counsel deserved it, that he was "entitled" to treat opposing counsel that way since the Standards of Professional Conduct are voluntary.

Most importantly, Respondent's professional misconduct included threats of bodily harm and he readily admitted to carrying a gun and being "always armed," and that if the opposing counsel made an attempt to "BEAT UP ON THIS CRIPPLE, THAT WILL BE THE DAY THAT

HIS LIFE ENDS.” Respondent disagreed that his conduct was erratic and, instead, admitted about himself that “he has been regular and readily predictable in his pattern of despicable, offensive, dismissive conduct towards Complainant, and opined that it was justifiably so.”

The Investigative Panel found Respondent’s behavior “extremely alarming,” and had “risen to a level beyond mere incivility and, instead, is prejudicial to the administration of justice. The Investigative Panel warned Respondent that future violations of such behavior would result in stronger discipline. He was also referred to JLAP for further assistance regarding any infirmity or impairment he may suffer from. [Appendix pp.33-51, Exhibit 11] In November 2022, ODC notified JLAP of the Investigative Panel’s referral of Respondent to JLAP. Upon information and belief, JLAP sent a courtesy outreach letter to Respondent, but Respondent never responded.

A separate Investigative Panel of the Lawyer Disciplinary Board closing ordered on October 22, 2022, involved a complaint Respondent filed against Gerald Hayden (case number 21-03-035). Mr. Hayden, who was opposing counsel in a divorce matter, appeared at a properly noticed hearing in which Respondent had filed a last-minute request to continue that was not granted by the family court judge. Despite the judge not granting the continuance request, neither Respondent nor his client attended the hearing, which was held in their absence. Respondent was furious that the hearing had been held in his absence, and engaged in threatening and belligerent behavior thereafter, which included filing the ODC complaint. Respondent’s conduct was so alarming the Investigative Panel took the unusual position of warning the Complainant in the matter, as Respondent was the Complainant therein, to be mindful of “his responsibilities as they relate to his clients, his legal and ethical obligations to comply with Court orders, and the importance of respect and civility to all parties during all communications, interaction, and negotiations.” [Appendix pp 52-63, Exhibit 12]

Despite the aforementioned recent closings, and a then-pending statement of charges recommending suspension, Respondent failed to respect the jurisdiction of the ODC, the Lawyer Disciplinary Board, and the Supreme Court, and continued to escalate his conduct.

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).

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. Moreover, 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 acts in such a manner as to cause real or potential injury to his clients, the public, the legal system and the legal profession. The body of evidence herein demonstrates that Respondent is a danger to the public and the Court and that indefinite suspension of his license to practice law is warranted.

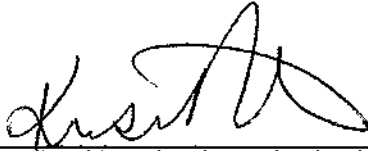
For the public to have confidence in our disciplinary and legal systems, lawyers who engage in the type of conduct exhibited by Respondent must be removed from the practice of law for some period of time. A license to practice law is a revokable privilege and when such privilege is abused, the privilege 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.

VI. CONCLUSION

WHEREFORE, ODC requests that this Court suspend Respondent's license to practice law indefinitely until such time as the underlying herein matters have been properly investigated

and concluded by the ODC, pursuant to Rule 3.27 due to Respondent's threat of irreparable harm to the public, and assess Respondent the costs of this proceeding.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel

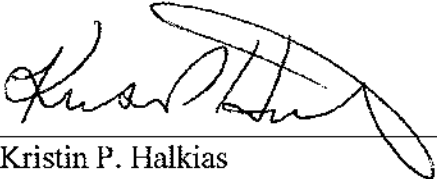


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CERTIFICATE OF SERVICE

This is to certify that I, Kristin P. Halkias, Lawyer Disciplinary Counsel, have this day, the 8th day of January 2024, served a true copy of the foregoing “**BRIEF OF THE OFFICE OF LAWYER DISCIPLINARY COUNSEL**” upon Joseph M. Farrell, Jr., counsel for Respondent James W. Keenan, electronically through File and Serve Xpress, and via First Class Mail to the following address:

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Kristin P. Halkias