IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

Re: PATRICK DOHENY, a member of
The West Virginia State Bar

Bar No.: 8799
Supreme Court No.: 18-0363
I.D. No.: 17-01-439

RECOMMENDED REPORT OF THE HEARING PANEL SUBCOMMITTEE

This is a reciprocal disciplinary matter brought against Respondent, Patrick J. Doheny, Esquire, an active member of the West Virginia State Bar, pursuant to Rule 3.20 of the West Virginia Rules of Lawyer Disciplinary Procedure. Respondent is a lawyer who was admitted to the West Virginia State Bar on October 10, 2001. As such, he is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.

I. NATURE OF THE PROCEEDINGS

On January 23, 2013, Respondent was convicted of (1) Aggravated Assault by Motor Vehicle while Driving Under the Influence, (2) Driving Under the Influence of Alcohol or Controlled Substance, (3) Driving Under the Influence of Alcohol, high rate of alcohol, (4) Driving Under the Influence of Alcohol or Controlled Substance, and (5) Failure to Keep Right. Respondent had also been charged, but was acquitted of, reckless driving. The convictions arose out of a motor vehicle accident that occurred on the night of October 5, 2011, wherein Respondent's vehicle crossed the center line of a roadway and collided with a motorcycle traveling in the oncoming direction. The operator of the motorcycle sustained serious bodily injuries. A civil action was also filed due to the accident, which resulted in a civil settlement.

As a result of his criminal conviction in Commonwealth of Pennsylvania v. Patrick J. Doheny, Jr., Criminal Docket No: CP-02-CR-0001734-2012, Respondent was sentenced on June

24, 2013, as follows: (1) placement into a county intermediate punishment program (IPP) for a period of eighteen (18) months which consisted of house arrest, work release, and the wearing of an ankle monitoring device; (2) probation for a period of four years supervised by the Allegheny County Adult Probation Office subject to the following conditions: (a) payment of restitution in the amount of $1.00; (b) have no contact with victim; (c) perform 100 hours of community service; and (d) do not operate a motor vehicle unless and until driver's license is restored; (3) court-ordered drug and alcohol evaluation; (4) safe driving classes; and (5) payment of a $500.00 fine. Respondent's punishment commenced on June 24, 2013, and his probation continued until June of 2017.[1]

Respondent self-reported his conviction to ODC by letter dated February 13, 2013, and ODC opened a complaint identified as I.D. No. 13-01-081.[2] In addition to providing information on his criminal conviction, Respondent self-reported the Pennsylvania disciplinary action taken

[1] Respondent filed a direct appeal of his criminal conviction in or about January 2014, and the Superior Court of Pennsylvania affirmed Respondent's criminal convictions by Order entered on April 29, 2015. Respondent then filed a Petition for Allowance of an Appeal with the Supreme Court of Pennsylvania on the basis of newly discovered evidence obtained during his direct appeal. The Supreme Court of Pennsylvania denied Respondent's Allowance of an Appeal on February 8, 2016, and the matter became final on March 9, 2016. Respondent next filed a Petition for Post-Conviction Collateral Relief on February 8, 2017, wherein he sought reversal, in the form of acquittal or new trial, of his conviction. An evidentiary hearing was held on June 5, 2017, and by Order entered June 5, 2017, the Court of Common Pleas of Allegheny County dismissed his Petition for Post-Conviction Collateral Relief. Respondent filed a Notice of Appeal of the denial of his Petition for Post-Conviction Collateral Relief on June 9, 2017. On December 27, 2018, the Superior Court of Pennsylvania affirmed the denial of Respondent's Petition for Post-Conviction Collateral Relief. See, Commonwealth v. Doheny, No. 846 WDA 2017, 2018 WL 6803713 (Pa. Super. Ct. Dec. 27, 2018).

[2] On September 23, 2015, the Chair of the Investigative Panel of the West Virginia Lawyer Disciplinary Board issued a stay on I.D. No. 13-01-081 pending the resolution of Respondent's underlying criminal charges and Pennsylvania disciplinary proceedings. In Legal Ethics Committee v. Pence, 161 W.Va. 240, 253, 240 S.E.2d 668, 674 (1977), the Court found that Legal Ethics Committee (now known as the Lawyer Disciplinary Board) should not defer disciplinary proceedings where only a civil case is also pending involving substantially similar factual allegations but disciplinary proceedings should be deferred until there a termination of pending criminal litigation involving substantially similar factual allegations, provided that the respondent-attorney proceeds with reasonable dispatch to insure the prompt prosecution and conclusion of the pending litigation.

against him to ODC by letter dated January 10, 2017. Respondent attached to his letter the Private Reprimand, the Order accepting the Report and Recommendation of the Hearing Panel Committee, and the Report and Recommendation of the Hearing Panel Committee.

On April 24, 2018, the Office of Lawyer Disciplinary Counsel (hereinafter "ODC") filed a "Notice of Reciprocal Disciplinary Action Pursuant to Rule 3.20 of the Rules of Lawyer Disciplinary Procedure." Paragraph 9 of that Notice advised Respondent that Disciplinary Counsel will request that the Hearing Panel Subcommittee (hereinafter "HPS") impose a similar, but not the same sanction as the Disciplinary Board of the Supreme Court of Pennsylvania because the West Virginia Rules of Lawyer Disciplinary Procedure do not provide for a private reprimand as a permissible sanction. In Paragraph 10 of that notice, in accordance with Rule 3.20(d) of the Rules of Lawyer Disciplinary Procedure, ODC advised Respondent of his right to challenge the validity of his Pennsylvania discipline, advised of his right to request a formal hearing and provide a complete copy of the record to the ODC within thirty (30) days.

The Respondent did none of the above, including failing to request a hearing on the matter. Instead, on May 23, 2018, Respondent filed his "Motion to Dismiss Notice of Reciprocal Disciplinary Action for Lack of Jurisdiction and to Seal Record of Proceedings" with the Supreme Court of Appeals of West Virginia.

On June 4, 2018, Senior Lawyer Disciplinary Counsel filed "Office of Lawyer Disciplinary Counsel's Response to Respondent's 'Motion to Dismiss Notice of Reciprocal Disciplinary Action for Lack of Jurisdiction and to Seal Record of Proceedings'" with the Supreme Court of Appeals of West Virginia.

On October 4, 2018, the Supreme Court of Appeals of West Virginia issued an Order refusing Respondent's Motion to Dismiss and Motion to Seal.

After ODC filed a Motion for Reciprocal Discipline pursuant to Rule 3.20(a) of the Rules of Lawyer Disciplinary Procedure, on or about October 2, 2020, Respondent filed a "Response to [ODC's] Motion for Reciprocal Disciplinary and Request to Dismiss Notice of Reciprocal Disciplinary Action and to Seal Record of Proceedings" with the Supreme Court of Appeals of West Virginia.

ODC filed a "Response to 'Respondent's Response to [ODC's] Motion for Reciprocal Disciplinary and Request to Dismiss Notice of Reciprocal Disciplinary Action and to Seal Record of Proceedings'" and "Motion to File Out of Time" with the Supreme Court of Appeals on October 26, 2020.

By Order entered January 28, 2021, the Supreme Court of Appeals of West Virginia granted ODC's Motion to File a response out of time and refused the Motion to Dismiss and the Motion to Seal.

The HPS, comprised of Kelly D. Ambrose, Esquire, Chairperson; Henry W. Morrow, Jr., Esquire; Dr. K. Edward Grose, Laymember, subsequently set a Scheduling Order, including a hearing date in this matter but following a pre-hearing held by video conference, the HPS entered an "Order from Pre-Hearing Conference Held May 26, 2021," wherein the HPS determined that upon review of the record, the Scheduling Order was "improvidently awarded." The HPS also stated that pursuant to Rule 3.20, the HPS has determined that an evidentiary hearing is not necessary. The HPS also found that a "threshold issue to be addressed in these proceedings is whether the HPS, and ... the West Virginia Supreme Court of Appeals, has subject matter jurisdiction of this matter based upon the uncontested record ...." The HPS requested that the parties submit briefs on the "sole issue of subject matter jurisdiction based upon the claim

advanced by the Respondent that under Rules 3.20(b) and 3.20(c), that jurisdiction is only achieved when 'public discipline has been rendered in the foreign jurisdiction."

After briefs were submitted by ODC and Respondent, the HPS issued a Recommended Decision which was filed with the Supreme Court of Appeal on October 4, 2021. The HPS found that the "express language" of Rules 3.20(b) and 3.20(c) of the Rules of Lawyer Disciplinary Procedure "require that a lawyer be publicly disciplined in the foreign jurisdiction in order for proceedings to be instituted under Rule 3.20, RLDP. Inasmuch as Respondent's discipline was a private reprimand and not subject to public disclosure under Pennsylvania law, it is the opinion of the [HPS] that the Panel and the West Virginia Supreme Court of Appeals are without subject matter jurisdiction to hear the matter. Therefore, [the HPS] recommend[ed] that this action be dismissed for lack of subject matter jurisdiction." Furthermore, the HPS recommended that Respondent's Motion to Seal the Record in this matter be granted.

After ODC filed an objection, the Supreme Court issued an opinion on June 10, 2022, wherein the Supreme Court found that the HPS and the Court have the authority to impose reciprocal discipline regardless of whether the underlying discipline imposed is private or public and remanded the matter to the HPS to "proceed with the reciprocal disciplinary process set forth." Lawyer Disciplinary Board v. Doheny, 247 W.Va. 53, 875 S.E.2d 191, 199 (2022). The Supreme Court stated:

> Pursuant to Rule 3.20(a) of the Rules of LDP "[a] final adjudication in another jurisdiction ... of misconduct constituting grounds for disciplinary of a lawyer ... conclusively establish[es] such conduct" for any proceedings under "these rules." Rule 3.20(a) does not simply authorize reciprocal discipline under the restrictions of the remaining subsections of Rule 3.20, but instead authorizes such discipline under the broader term of "these rules." As more fully set forth below, "these rules," namely the Rules of LDP, provide the HPS and this Court broad authority to impose discipline on attorneys

> licensed to practice in West Virginia. [Respondent's] Private Reprimand is a final adjudication in another jurisdiction of misconduct constituting grounds for discipline, and pursuant to Rule 3.20(a) of the Rules of LDP, that final adjudication conclusively establishes such conduct."

Id., 875 S.E.2d at 198.

The Supreme Court also rejected Respondent's arguments to seal the records in this matter, noted that the Court had refused similar requests to seal the records on two prior occasions, and stated that Respondent had "provided no authority or justification to warrant a different decision at this stage of the proceedings to warrant a different decision with regard to his motion to seal the record in this matter." Id., 875 S.E.2d at 200.

On February 22, 2023, a telephonic status conference was held in the above-referenced matter. Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel, appeared for the Office of Lawyer Disciplinary Counsel. Respondent appeared *pro se*. The HPS, comprised of Kelly D. Ambrose, Esquire, Chairperson, Henry W. Morrow, Jr., Esquire, and Dr. K. Edward Grose, Laymember, presided over this matter. Pending before the Hearing Panel Subcommittee was Respondent's second "Motion in Limine" filed on or about October 10, 2022, which sought to exclude the Office of Disciplinary Counsel's [hereinafter "ODC"] Exhibits Nos. 10, 12, 13 and 16 (Bates Nos. 93-143, 145-157 and 267-277), which Respondent collectively identified as "the Contested Documents." Disciplinary Counsel filed a response on or about November 22, 2022.

The HPS, having fully reviewed Respondent's second *Motion in Limine*, and Disciplinary Counsel's response thereto, denied Respondent's motion as Respondent failed to request a formal hearing and documents were provided to ODC consistent with the applicable Rule of Lawyer Disciplinary Procedure. Whereupon the HPS inquired of Respondent whether he had requested a formal hearing in this matter pursuant to Rule 3.20(d) of the Rules of Lawyer Disciplinary

Procedure. Respondent admitted that he had not requested a hearing pursuant to Rule 3.20(d) of the Rules of Lawyer Disciplinary Procedure and subsequently made an oral motion requesting a hearing. The HPS advised Respondent that his request for a hearing was denied as untimely. A discussion was then held regarding the Supreme Court's ruling in Lawyer Disciplinary Board v. Patrick J. Doheny, 247 W.Va. 3, 875 S.E.2d 191 (2022), application of Rule 3.20(e), and that reciprocal discipline should be imposed consistent with ODC's previous request of admonishment.[3]

II. FINDINGS OF FACT

1. Patrick Doheny (hereinafter "Respondent") is a lawyer who was admitted to the West Virginia State Bar on October 10, 2001, after successful passage of the Bar Exam. As such, he is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. Respondent's West Virginia law license is currently on Active status.

2. On January 5, 2017, Respondent was issued a private reprimand by the Disciplinary Board of the Supreme Court of Pennsylvania. [Attachment A]

3. By Order entered October 19, 2016, the Disciplinary Board of the Supreme Court of Pennsylvania accepted and adopted the findings of the Hearing Committee which had recommended the imposition of a private reprimand. The Hearing Committee also found that Respondent had accepted responsibility for his action "and [found] nothing that would negatively impair Respondent's fitness to continue to practice law. A practice monitor is

[3] See Order for the February 22, 2023 Status Conference.

unnecessary, as there is no indication that Respondent has an alcohol or other substance abuse problem."

4. The Pennsylvania Office of Disciplinary Counsel had previously commenced formal disciplinary proceedings against Respondent based on Respondent's criminal conviction following a non-jury trial in the Court of Common Pleas of Allegheny County, Pennsylvania. On January 23, 2013, Respondent was convicted of (1) Aggravated Assault by Motor Vehicle while Driving Under the Influence, (2) Driving Under the Influence of Alcohol or Controlled Substance, (3) Driving Under the Influence of Alcohol, high rate of alcohol, (4) Driving Under the Influence of Alcohol or Controlled Substance, and (5) Failure to Keep Right. Respondent had also been charged, but was acquitted of, reckless driving. The convictions arose out of a motor vehicle accident that occurred on the night of October 5, 2011, wherein Respondent's vehicle crossed the center line of a roadway and collided with a motorcycle traveling in the oncoming direction. The operator of the motorcycle sustained serious bodily injuries and a civil action was also filed due to the accident and resulted in a settlement.

5. Respondent was sentenced on June 24, 2013, as follows: (1) placement into a county intermediate punishment program (IPP) for a period of eighteen (18) months which consisted of house arrest, work release, and the wearing of an ankle monitoring device; (2) Probation for a period of four years supervised by the Allegheny County Adult Probation Office subject to the following conditions: (a) payment of restitution in the amount of $1.00; (b) have no contact with victim; (c) perform 100 hours of community service; and (d) do not operate a motor vehicle unless and until driver's license is restored; (3) court-ordered drug and alcohol evaluation; (4) safe driving classes; and (5) payment of a $500.00

fine. Respondent's punishment commenced on June 24, 2013, and his probation continued until June of 2017.

6. The Order of the Disciplinary Board of the Supreme Court of Pennsylvania conclusively establishes Respondent's misconduct for the purposes of this reciprocal disciplinary proceeding and is a final adjudication of the matter in Pennsylvania.

7. On April 24, 2018, the Office of Lawyer Disciplinary Counsel (hereinafter "ODC") filed a "Notice of Reciprocal Disciplinary Action Pursuant to Rule 3.20 of the Rules of Lawyer Disciplinary Procedure".

8. Paragraph 9 of that Notice advised Respondent that Disciplinary Counsel will request that the Hearing Panel Subcommittee impose a similar, but not the same sanction as the Disciplinary Board of the Supreme Court of Pennsylvania but that West Virginia Rules of Lawyer Disciplinary Procedure do not provide for a private reprimand as a permissible sanction.

9. In Paragraph 10 of that notice, in accordance with Rule 3.20(d) of the Rules of Lawyer Disciplinary Procedure, ODC advised Respondent of his right to challenge the validity of his Pennsylvania discipline, advised of his right to request a formal hearing and provide a complete copy of the record to the ODC within thirty (30) days.

10. Respondent neither requested a formal hearing nor provided a full copy of the record of the disciplinary proceedings which resulted to the imposition of the disciplinary order pursuant to Rule 3.20(d) of the Rules of Lawyer Disciplinary Procedure.

III. CONCLUSIONS OF LAW

11. Rule 3.20(e) provides that at the conclusion of proceedings brought under Rule 3.20 the Hearing Panel Subcommittee shall refer the matter to the Supreme Court of Appeals with

the recommendation that the same discipline be imposed as was imposed by the foreign jurisdiction unless it is determined by the Hearing Panel Subcommittee that (1) the procedure followed in the foreign jurisdiction did not comport with the requirements of due process law; (2) the proof upon which the foreign jurisdiction based its determination of misconduct is so inform that the Supreme Court of Appeals cannot, consistent with its duty, accept as final the determination of the foreign jurisdiction; (3) the imposition by the Supreme Court of Appeals of the same discipline imposed in the foreign jurisdiction would result in grave injustice; or (4) the misconduct proved warrants that a substantially different type of discipline by imposed by the Supreme Court of Appeals.

12. In this case, the reciprocal discipline notice advised that a different discipline from the foreign jurisdiction would be sought by ODC. Pursuant to the applicable Rules of Lawyer Disciplinary Procedure, the least serious of formal discipline in West Virginia is an admonishment. This level of sanction is applied in cases of minor misconduct and when there is little or no injury to a client, the public, the legal system, or the professional. The ABA Standards for Imposing Lawyer Sanctions states that "admonition" is also known as a "private reprimand" and that as a non-public sanction, it still declares the attorney's conduct to be improper but does not limit the attorney's right to practice. See, ABA Standards for Imposing Lawyer Sanctions, Section 2.6.

13. A different sanction is also sought because there is no *private* discipline in this jurisdiction and no mechanism in the Rules of Lawyer Disciplinary Procedure permit ODC to keep the disposition of Respondent's West Virginia disciplinary proceedings private. All final dispositions of disciplinary proceedings initiated against attorneys in West Virginia are accessible to the public. The Supreme Court of Appeals of West Virginia has held that

"[u]nder the [West Virginia Constitution] art. III, § 17, which provides that 'The courts of this state shall be open," there is a right of public access to attorney disciplinary proceedings." Daily Gazette Co. v. Committee on Legal Ethics, 174 W.Va. 359, 365, 326 S.E.2d 705, 711 (1984). The Daily Gazette Court also found there "[w]here formal disciplinary charges in an attorney disciplinary proceeding are filed, following a determination that probable cause exists to substantiate allegations of an ethical violation, the hearing on such charges shall be open to the public, who shall be entitled to all reports, records, and nondeliberative materials introduced at such hearing, including the record of the final action taken." Daily Gazette, 147 W.Va. at 367, 326 S.E.2d at 713. The Court has also stated that "[t]he right to public access to attorney disciplinary proceedings precludes the utilization of private reprimand as a permissible sanction." Syl. Pt. 7, Daily Gazette Co. v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984).

14. The Order of the Disciplinary Board of the Supreme Court of Pennsylvania conclusively establishes Respondent's misconduct for the purposes of this reciprocal disciplinary proceeding. Lawyer Disciplinary Board v. Doheny, 247 W.Va. 53, 875 S.E.2d 191, 198 (2022).

15. The Supreme Court of Appeals of West Virginia held that "[t]he provisions of Rule 3.20 of the West Virginia Rules of Lawyer Disciplinary Procedure require the imposition of the identical sanction imposed by [Pennsylvania] unless one of the four grounds provided for challenging the discipline imposed by a foreign jurisdiction is both asserted and established." Lawyer Disciplinary Board v. Post, 219 W.Va. 82, 631 S.E.2d 921 (2006).

16. Respondent has not established that any of the four (4) exceptions to Rule 3.20(e) exist in this reciprocal proceeding.

IV. DISCUSSION

The Order of the Disciplinary Board of the Supreme Court of Pennsylvania wherein Respondent was issued a private reprimand conclusively establishes the misconduct for the purposes of this reciprocal disciplinary proceeding. Lawyer Disciplinary Board v. Doheny, 247 W.Va. 53, 875 S.E.2d 191, 198 (2022). See also, Lawyer Disciplinary Board v. Post, 219 W.Va. 82, 631 S.E.2d 921 (2006). Rule 3.20(e) of the Rules of Lawyer Disciplinary Procedure provides that the Hearing Panel Subcommittee shall refer the matter to the Supreme Court of Appeals with the recommendation the same discipline be imposed as imposed by the foreign jurisdiction unless it is determined by the Hearing Panel Subcommittee: "(1) the procedure followed in the foreign jurisdiction did not comport with the requirements of due process of law; (2) the proof upon which the foreign jurisdiction based its determination of misconduct is so infirm that the Supreme Court of Appeals cannot, consistent with its duty, accept as final the determination of the foreign jurisdiction; (3) the imposition by the Supreme Court of Appeals of the same discipline imposed in the foreign jurisdiction would result in grave injustice; or (4) the misconduct proved warrants that a substantially different type of discipline be imposed by the Supreme Court of Appeals." In Post, the Supreme Court stated that "[t]he provisions of Rule 3.20 of the West Virginia Rules of Lawyer Disciplinary Procedure require the imposition of the identical sanction imposed by the foreign jurisdiction unless one of the four grounds provided for challenging the discipline imposed by a foreign jurisdiction is both asserted and established." Syl. pt. 4, Post, 219 W.Va. 82, 631 S.E.2d 921 (2006).

Pursuant to Rule 3.20(d) of the Rules of Lawyer Disciplinary Procedure, Respondent was advised of his right to challenge the validity of his Pennsylvania discipline and advised of his right to request a formal hearing and provide a complete copy of the record to ODC. Respondent

admitted that he neither requested a formal hearing nor provided a full copy of the record of the disciplinary proceedings. Furthermore, Respondent has not asserted, and no argument has been presented that the procedures followed in Pennsylvania did not comport with requirements of due process of law. No evidence was presented demonstrating that the proof upon which Respondent's disciplinary action was based was so infirm as to taint the final disposition of the case. While Respondent argued orally at the February 23, 2023, scheduling conference, the imposition of the same discipline would result in a grave injustice. The reciprocal discipline notice filed by ODC on April 24, 2018, however, advised that a different discipline from the foreign jurisdiction would be sought.

The WV_Supreme Court of Appeals in its recent ruling has made clear that the Lawyer Disciplinary Board has the authority to impose reciprocal discipline regardless of whether the underlying discipline imposed from a different jurisdiction is private or public. Lawyer Disciplinary Board v. Doheny, 247 W.Va. 53, 875 S.E.2d 191, 199 (2022).

Pursuant to the applicable Rules of Lawyer Disciplinary Procedure, the least serious of formal discipline in West Virginia is an admonishment. This level of sanction is applied in cases of minor misconduct and when there is little or no injury to a client, the public, the legal system, or the professional. The ABA Standards for Imposing Lawyer Sanctions states that "admonition" is also known as a "private reprimand" and that as a non-public sanction, it still declares the attorney's conduct to be improper but does not limit the attorney's right to practice. See, *ABA Standards for Imposing Lawyer Sanctions*, Section 2.6.

A different sanction was also sought because there is no private discipline in this jurisdiction and no mechanism in the Rules of Lawyer Disciplinary Procedure which would have permitted ODC to keep the disposition of Respondent's West Virginia disciplinary proceedings

private. All final dispositions of disciplinary proceedings initiated against attorneys in West Virginia are accessible to the public. The Supreme Court of Appeals of West Virginia has held that "[u]nder the [West Virginia Constitution] art. III, § 17, which provides that 'The courts of this state shall be open," there is a right of public access to attorney disciplinary proceedings." Daily Gazette Co. v. Committee on Legal Ethics, 174 W.Va. 359, 365, 326 S.E.2d 705, 711 (1984). The Daily Gazette Court also found there "[w]here formal disciplinary charges in an attorney disciplinary proceeding are filed, following a determination that probable cause exists to substantiate allegations of an ethical violation, the hearing on such charges shall be open to the public, who shall be entitled to all reports, records, and nondeliberative materials introduced at such hearing, including the record of the final action taken." Daily Gazette, 147 W.Va. at 367, 326 S.E.2d at 713. The Court has also stated that "[t]he right to public access to attorney disciplinary proceedings precludes the utilization of private reprimand as a permissible sanction." Syl. Pt. 7, Daily Gazette Co. v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984).

RECOMMENDED DISCIPLINE

Based on the foregoing, the Hearing Panel Subcommittee hereby recommends to the West Virginia Supreme Court of Appeals, that Respondent be admonished. Finally, the Hearing Panel Subcommittee would also recommend the imposition of costs associated with this proceeding. A concurring opinion was submitted by two panel members and is attached herein to this final recommended report.

Respectfully submitted

Kelly D. Ambrose, Esquire, Chairperson
Hearing Panel Subcommittee
Lawyer Disciplinary Board
Date: July 14, 2023

/s/ Henry W. Morrow, Jr.
Henry W. Morrow, Jr., Esquire
Hearing Panel Subcommittee
Lawyer Disciplinary Board
Date: 14 July 2023

/s/ K. Edward Grose
Dr. K. Edward Grose, Laymember
Hearing Panel Subcommittee
Lawyer Disciplinary Board
Date: 14 July 2023

CERTIFICATE OF SERVICE

This is to certify that I, Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 25th day of July, 2023, served a true copy of the foregoing **"RECOMMENDED REPORT OF THE HEARING PANEL SUBCOMMITTEE"** and **"CONCURRING OPINION"** upon Respondent Patrick Doheny by mailing and e-mailing the same via United States Mail, with sufficient postage, to the following address:

Patrick Doheny, Esquire
Post Office Box 23354
Pittsburgh, Pennsylvania 15222
patrick.j.doheny@gmail.com

Notice to Respondent: for the purpose of filing a consent or objection hereto, pursuant to Rule 3.11 of the Rules of Lawyer Disciplinary Procedure, either party shall have thirty (30) days from today's date to file the same.

Andrea J. Hinerman

CONCURRING OPINION

Morrow, Lawyer Disciplinary Board Subcommittee Attorney Member, concurring:

Reluctantly, I must concur with the result reached in this case only because the Rules of Lawyer Disciplinary Procedure, as presently interpreted by the Supreme Court, compels such a result. I write separately to emphasize what I believe is the need for the Court to revisit and reconsider its prior rulings in this case.

I write separately to express my profound disagreement with the majority opinion in ***Lawyer Disciplinary Board v. Patrick Doheny***, 247 W.Va. 53, 875 S.E.2d 191(2022) (hereinafter ***Doheny)***, and the Pandora's Box it has opened with the precedent it has set. In doing so, I wish to make it clear that I have no disagreement with each of the six numbered syllabus points set out in the majority opinion; rather, it is the application of those settled principles that is of serious concern and consequence.

As framed by the majority in ***Doheny***, "[t]he central issue in the instant matter is whether Rule 3.20 of the Rules of LDP permits reciprocal discipline in cases where the respondent attorney was subject to private discipline from a foreign jurisdiction . . . ." **Id.** 875 S.E.2d at 197. Rule 3.20 states quite clearly that reciprocal discipline applies when " . . . any form of *public* discipline has been imposed . . ." Rule 3.20(b), ***Rules of Lawyer Disciplinary Procedure***. (Emphasis Added.) Thus, the issue is whether the Office of Disciplinary Counsel (ODC), the Hearing Panel Subcommittee (HPS) and the West Virginia Supreme Court of Appeals may

exercise subject matter jurisdiction over a lawyer who, in another jurisdiction has been *privately* reprimanded instead of publicly disciplined. The Court held in ***Doheny*** that subject matter jurisdiction over an attorney could be exercised in a reciprocal proceeding notwithstanding the express language of Rule 3.20 (b) and (c) which requires that the discipline from the foreign jurisdiction be "public." Justice Walker filed a concurring opinion "to emphasize that [the] Court's authority in lawyer disciplinary matters is broad and that [the Court] established the West Virginia Office of Disciplinary Counsel to zealously prosecute attorney misconduct." **Id.** 875 S.E.2d at 200., Walker J., concurring (footnote and citations omitted). Justice Wooton filed a dissent stating: "It is simply unnecessary to torturously read our own Rules of Disciplinary Procedure in order to hold respondent to account in West Virginia. Accordingly, I respectfully dissent to the majority's remand for further proceedings and would adopt the Hearing Panel Subcommittee's recommendation to dismiss the proceedings." **Id.** 875 S.E.2d at 206, Wooton, J., dissenting.

As Justice Wooton's dissent points out, the majority opinion "torturously" reads our own Rules of Disciplinary Procedure in order to "hold respondent to account in West Virginia." **Id.** But it goes much further than simply holding the respondent to account. The majority opinion and the concurring opinion both ignore the simple, plain, understandable and practical rules of law which should have governed the decision in this case. As we wrote in our recommended decision of this matter:

> "'Where the language of a statute is plain and unambiguous, there is no basis for application of rules of statutory construction; **but courts must apply the statute** according to the legislative intent **plainly** expressed therein.' Syllabus Point 1, *Dunlap v. State Compensation Director*, 149 W. Va. 266, 140 S.E.2d 448 (1965)." Syl. Pt. 7, *State v. Mills*, 243 W. Va. 328, 844 S.E.2d 99 (2020)."

> Syllabus Point 3, ***State ex rel Phalen v. Roberts***, No. 20-1023, January 2021 Term, Filed June 16, 2021."'**Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.**' Syllabus Point 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970)." Syllabus Point 4, ***Phalen***, Id. "'It is not for this Court arbitrarily to read into a statute that which it does not say. ***Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.***' Syl. Pt. 11, *Brooke B. v. Ray C.*, 230 W.Va. 355, 738 S.E.2d 21 (2013)." Syllabus Point 5, ***Phalen***, Id (emphasis added).

Recommended Decision of the Hearing Panel Subcommittee of the West Virginia Lawyer Disciplinary Board Findings of Fact, Conclusions of Law and Recommended Decision, Pages 6 and 7 (Emphasis Added) (HPS Recommended Decision). Even after ***Doheny*** was decided, and as recently as March 27, 2023, the Court has held: "'A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given ***full force and effect***' Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951)" Syllabus Point 4, ***War Memorial Hospital, Inc. v. The West Virginia Health Care Authority***, No. 21-0901, January 2023 Term, Filed March 27, 2023 (emphasis added). Furthermore, "'if the language of an enactment is clear and within the constitutional authority of the law-making body which passed it, courts must read the relevant law according to is [sic] unvarnished meaning, ***without any judicial embroidery.***' Syl. Pt. 3, in part, *W.Va. Health Care Cost Rev. Auth. v. Boone Mem'l Hosp., 196 W. Va. 326, 472 S.E.2d 411 (1996).*" **Id.,** Syllabus Point 5 (emphasis added). Finally, and to put a finer point on it, in an opinion and dissent filed on April 24, 2023, the Court ruled that "'"'In the absence of any specific indication to the contrary, words used in a statute will be given their ***common, ordinary and accepted meaning***.' Syl. pt. 1, *Tug Valley v. Mingo Cty. Comm'n*, 164 W.Va. 94, 261 S.E.2d 165 (1979)." Syllabus Point 7,

Wheeling Park Commission v. Dattoli, 237 W. Va. 275, 787 S.E.2d 546 (2016)." Syllabus Point 3, ***City of Wheeling v. Public Service Commission of West Virginia and The City of Benwood***, No. 21-1001, January 2023 Term (emphasis added) (hereinafter ***Wheeling)***. Even the dissent in ***Wheeling*** (ironically penned and joined by justices in the majority in ***Doheny***) cites existing law which should have been controlling in ***Doheny***:

> "This Court has held that in deciding the meaning of a statutory provision, '[w]e look first to the statute's language. ***If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed***.' *Appalachian Power Co. v. State Tax Dep't of W. Va.*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995). Further, this Court has held that '[a] statute is open to construction ***only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning***.' *Sizemore v. State Farm Gen. Ins. Co.*, 202 W. Va. 591, 596, 505 S.E.2d 654, 659 (1998) (internal quotations and citation omitted)."

Wheeling, supra, Armstead, Justice, dissenting (emphasis added).

These longstanding precedents should have controlled the outcome of ***Doheny***, but they didn't. In fact, these cases were not even discussed or distinguished by the Majority at all in ***Doheny***. Simply put, the majority overlooks the plain meaning of Rule 3.20, as well as the apparent meaning when the rule is read *in pari materia* with the whole of Rule 3.20,[1] and simply holds that the rule doesn't mean what it clearly says.

The fallacy of this argument lies in the **repeated use** of the word "public" together with a recognition that inasmuch as West Virginia has no private discipline, only public discipline would be required in Rule 3.20 and private reprimands would be exempted. The Majority's

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[1] See: ***Lawyer Disciplinary Board v. Patrick Doheny***, No. 18-0363, Wooton J., dissenting, for a more detailed discussion of this point.

argument would be strengthened if, in fact, when these rules were first adopted, there was no such concept as "private" discipline existing in other jurisdictions. Clearly, our Court at the time, decided that private discipline would remain just that, private, between the attorney and the jurisdiction imposing the private discipline. This was the clear scheme adopted by this Court and clearly evident by its language when the Rules of Lawyer Disciplinary Procedure were instituted; but more than this, the Rule is explicit, plain and clear.

It is clear that in West Virginia, interpretation and construction of the Rules of Lawyer Disciplinary Procedure are governed by the Rules of Strict Construction. Rule 3.30 and other like rules are part of a penumbra of rules designed to impose and regulate the imposition of discipline and, as such, must be interpreted under a strict construction interpretation. "'Statutes imposing restrictions on trade or occupation are strictly construed.' Syllabus point 5 *West Virginia Bd. of Dental Examiners v. Storch*, 146 W. Va. 662, 122 S.E.2d 295 (1961)." Syllabus point 5, ***Martin v. West Virginia Division of Labor Contractor Licensing Board***, 199 W.Va. 613, 486 S.E.2d 782 (1997).

The question we find ourselves asking after ***Doheny*** is: what other rules contain words without meaning that can be cast aside through judicial opinion instead of by express amendment and how do we interpret them as we go forward?

In ***Doheny***, the Court's resolution of the central issue presented has certainly reaffirmed the Court's power and authority over attorney disciplinary matters, but at what cost? In its rush to assert its jurisdiction it has ignored and cast aside settled legal principles and created far more serious problems and repercussions not only for ODC and the Lawyer Disciplinary Hearing Panel

Subcommittees, but for attorneys and judges in other matters since this ruling could seriously impact decisions in other cases not even remotely related to lawyer discipline.

For example and to demonstrate but a few of the possible problems going forward, inasmuch as the plain language of Rule 3.20(e) requires imposition of "the same discipline," since we cannot recommend imposition of a private reprimand, what discipline can disciplinary counsel request and what can a hearing panel subcommittee recommend under Rule 3.20(e)? Are the subcommittee's hands tied or can suspension or annulment be sought or recommended? Is a hearing now required under Rule 3.3 or can the matter proceed without a hearing? And if a hearing is not required, then if Disciplinary Counsel seeks a different discipline than a private reprimand (which Counsel *must* do) is the respondent now entitled to a mitigation hearing since the respondent can only request a hearing under Rule 3.20(d) to challenge the validity of the disciplinary order entered in the foreign jurisdiction? When Rule 3.20 was originally written, it was fashioned to harmonize its varying provisions with each other and with existing West Virginia law. Now, those same provisions exist but due to the opinion in ***Doheny*** are no longer in harmony with themselves or existing West Virginia law.

And what of the attorneys who either in the past or in the future are the subject of a private reprimand in another jurisdiction? Must they now report the same under Rule 3.20(b) or does their failure to rely on the plain meaning of Rule 3.20 constitute a ground for discipline under Rule 3.14? And how many attorneys admitted and currently authorized to practice in the State of West Virginia have received a private reprimand in another jurisdiction which they have not reported and are now at risk of being disciplined as a result of this opinion?

And for the broader implications of the impact upon the legal community, what of that long citation of authority with regard to statutory construction? Are those cases now meaningless? Have they been overruled, *sub silentio*? What do we, as attorneys, tell our clients when they want to know what a statute means? Do we counsel "It means what it says?" Or do we counsel "It means what it says, until it doesn't?" The words used in rules all have meaning and are supposed to provide guidance and protection to those affected by those rules. When the Court deviates from the clear, reasonable, sensible and protective meaning of a rule or standard and applies a standard no one could reasonably anticipate, an atmosphere of uncertainty, distrust and chaos results.

And as for the Hearing Panel Subcommittees, how can we make reasonable recommendations and do the job that is expected of us when the Court decides that the rules we apply to our cases do not mean what they clearly say they mean? There has to be predictability in the work we do and we don't have predictability when the Court refuses not only to apply the rules as written, but issues an opinion that requires us to provide recommendations without rules or guidance.

Our duty and purpose is to assist the Court in deciding lawyer disciplinary matters. And we take our responsibilities seriously and labor long hours to do what is asked of us in a fair, just and reasonable manner. And while I recognize, acknowledge and respect that the role and authority of the Court is as final arbiter of legal ethics issues and the Court is the ultimate decision maker in this regard, if the work of the Board is to be so easily cast aside for whatever reason it sees fit to change the rules, then perhaps these cases need to go directly to the Court and the Lawyer Disciplinary Board disbanded.

It is often said that hard cases make bad law. In a perfect world, this case would have started as a case brought under the provisions of Rule 3.18 or 3.19 instead of Rule 3.20, and would have proceeded normally through the channels until disposition. But that is not what happened. For whatever reason, Disciplinary Counsel brought this case as a reciprocal case knowing full well what the language of Rule 3.20 required. " . . .[T]he Hearing Panel Subcommittee correctly found this matter could not proceed against respondent who was *privately* reprimanded. Before this Court, counsel for the Lawyer Disciplinary Board effectively conceded as much." ***Doheny***, 875 S.E.2d at 204, Wooton J., dissenting. The concurring opinion takes the HPS to task at length for our "erroneous and unprecedented belief that Rule 3.20 (b) and (c) represent subject matter jurisdiction parameters." **Id**, 875 S.E.2d at 201, Walker, J., concurring. If those rules do not represent subject matter jurisdiction parameters, then what do they represent? Is the power of ODC and the Court over attorney disciplinary matters simply unlimited? And, if not, what are those limits?

I fully understand and concur with the ***Doheny*** Majority's desire and need to protect the public from improper and sometimes illegal and criminal acts of attorneys as well as the role of disciplinary counsel in that process. That said, however, the majority decision in ***Doheny***, and the conclusions and suggestions offered in the concurring opinion are not the way this case should have been decided and may result in unintended consequences and needless litigation on down the road. If a majority of the Court wishes to amend Rule 3.20, it certainly has the unquestioned authority to amend the rule and adopt a rule much like ***Illinois Supreme Court Rule 763(a)***, cited in our prior recommended decision, rather than interpreting the present rule in a published opinion without public comment and without reconciling its various provisions. This would

allow the ODC, the Lawyer Disciplinary Board Subcommittees and the Court more flexibility in such cases while at the same time providing the necessary notice to attorneys as to what will be required of them. Of course, that doesn't decide this case.

This case has its problems and some may believe that it is relatively unimportant. My concern and reason for penning this lengthy concurrence stems from the obvious abandonment of the rule of law in deciding this case by the Majority of the Supreme Court and the effects of doing so on future cases coming before the Lawyer Disciplinary Board and the Court in this and other areas. We are now in an era where the Rule of Law is being questioned at every turn all across this country with not an insignificant segment of our society advocating open rebellion and civil war. Public confidence in the judiciary appears to be at an all time low. But for a few procedural words, The Vice President of the United States could have overturned an election, thwarted the will of the people and effectively ended our experiment in democracy (or plunged us into a civil war). Aside from the Civil War, there has never been another time in our history when the Rule of Law has taken on such urgency and importance. While this case may seem unimportant to most, the clear implications, in today's jurisprudence, are immense and should not be discounted.

For the foregoing reasons I respectfully but reluctantly concur in the recommendation of the Hearing Panel Subcommittee but also must state that I respectfully disagree with the majority opinion of the Court and concurring opinion of Justice Walker in ***Doheny*** and respectfully request that the Court revisit and review the decision handed down therein for the various reasons stated herein.

I am authorized to state that Dr. K. Edward Gross joins in this concurring opinion.

/s/Henry W. Morrow, Jr.

/s/Dr. K. Edward Gross