

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

LAWYER DISCIPLINARY BOARD,

Petitioner,

vs.

PATRICK DOHENY, a member of the
West Virginia State Bar,

Respondent.

Supreme Court No.:18-0363

I.D. No. 17-01-439

Bar No.: 8799



BRIEF OF THE RESPONDENT

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I. STATEMENT OF THE CASE

A. Petitioner's Waiver of Issues for Failure to Submit Assignments of Error

In its Brief, Petitioner, the West Virginia Office of Lawyer Disciplinary Counsel (“the ODC”), on behalf of the Lawyer Disciplinary Board, neglected to set forth any “Assignments of Error” with respect to the Recommended Decision of the Hearing Panel Subcommittee (to which the ODC, and not Respondent, had previously objected), as required by W.Va. R.A.P. 10(c)(3). Additionally, in Section VI of its Brief (“CONCLUSION”), the ODC neglected to include, as part of its prayer for relief, any request that the West Virginia Supreme Court of Appeals reject the Conclusion and Recommendation of the Hearing Panel Subcommittee (“HPS”) that the HPS and the Supreme Court of Appeals are without subject-matter jurisdiction to hear this matter based upon the clear and unambiguous language of Rule 3.20 of West Virginia’s Rules of Lawyer Disciplinary Procedure. (*ODC’s Brief*, p. 19, Section VI). Moreover, twice in its Brief the ODC conceded that the HPS’s finding of lack of subject matter jurisdiction, based upon the clear and unambiguous language of W.Va. R.L.D.P. 3.20, “may, in the end, be the correct outcome.” (*ODC’s Brief*, pp. 10, 11). Based upon these submissions in the ODC’s Brief (and the corresponding lack thereof), the Supreme Court of Appeals should deem the ODC to have waived any challenge to the HPS’s conclusion and recommendation that the HPS and the Supreme Court of Appeals lack subject matter jurisdiction to entertain the ODC’s request for “reciprocal discipline” against the Respondent.

B. Procedural History

These lawyer disciplinary proceedings arose out of a “Notice of Reciprocal Disciplinary Action Pursuant to Rule 3.20 of the Rules of Lawyer Disciplinary Procedure” filed by West Virginia’s Office of Lawyer Disciplinary Counsel (“the ODC”) on or about April 24, 2018

(hereinafter “the Notice”). Pursuant to the April 24, 2018 Notice, the ODC seeks to have purportedly “reciprocal discipline” imposed upon Respondent in the form of a “reprimand,” based upon a “PRIVATE REPRIMAND” issued to Respondent by the Disciplinary Board of the Supreme Court of Pennsylvania on January 5, 2017. (ODC’s September 11, 2020 *Motion for Reciprocal Discipline*, p. 6, ¶ 16). There is no disputed issue of fact in these proceedings that Respondent has never been issued any “public” form of attorney discipline; be it in West Virginia, Pennsylvania, or any other foreign jurisdiction.

By letter of February 13, 2013, Respondent self-reported to the ODC that on January 23, 2013 he had been convicted in the Court of Common Pleas of Allegheny County, Pennsylvania of several DUI-related criminal offenses arising out of an October 5, 2011 motor vehicle accident. Between February 2013 and April 2018, Respondent, both of his own volition and in response to certain requests from Andrea J. Hinerman, Esquire (“Hinerman”) of the ODC, provided the ODC with periodic updates concerning the status and progress of Respondent’s ultimately-unsuccessful appeal of his DUI-related criminal convictions, as well as disciplinary proceedings that Pennsylvania’s disciplinary authorities later commenced on the basis of Respondent’s DUI convictions. On February 12, 2015, Hinerman sent Respondent a letter demanding that Respondent produce “a copy of any order or closing document” concluding the Pennsylvania disciplinary proceedings against Respondent, and which further threatened that failure to produce such documentation “may subject [Respondent] to disciplinary action” in West Virginia.” A copy of this February 12, 2015 letter from Hinerman to Respondent was attached to Respondent’s “Response to OLDC’s Motion for Reciprocal Discipline and Request to Dismiss the Notice of Reciprocal Disciplinary Action and to Seal the Record of These Proceedings” as Exhibit “1,” which was filed and/or served on October 2, 2020.

Hinerman's letter of February 12, 2015 was sent to Respondent under ODC Investigation I.D. No. 13-01-081, which the ODC had opened in 2013 in response to Respondent's timely self-report of his DUI-related convictions in Pennsylvania (hereinafter "the Convictions Investigation"). The Convictions Investigation concerning Respondent (ODC I.D. No. 13-01-081) was authorized by West Virginia Rule of Lawyer Disciplinary Procedure 3.19(a) (Conviction of felony that does not reflect adversely on a lawyer's honesty trustworthiness or fitness as a lawyer in other respects). Conviction investigations opened against respondent attorneys pursuant to W.Va. R.L.D.P. 3.19, including the Convictions Investigation the ODC opened against Respondent (I.D. No. 13-01-081), are also subject to the provisions of Rule 2.6 (Confidentiality), which provides that the "details" of investigations conducted by the ODC "shall be confidential." W.Va. R.L.D.P. 2.6.

Once Respondent was issued a *Private* Reprimand by a three-member panel of Pennsylvania's Disciplinary Board on January 5, 2017, pursuant to the strict confidentiality provisions of Pennsylvania's Rules of Disciplinary Enforcement, the fact that Respondent had been issued any discipline whatsoever, and even the very existence of prior Pennsylvania disciplinary proceedings against Respondent, became sealed off from public access, absent the request and/or consent of Respondent. *See* Pa. R.D.E. 402(k) (if a formal proceeding results in the imposition of private discipline, the proceeding shall cease to be open to the public when the decision to impose private discipline becomes final, unless the respondent-attorney requests that the record of the proceeding remain open to the public). In light of Hinerman's February 12, 2015 threat to further discipline Respondent on the basis of alleged "lack of cooperation," by letter dated January 10, 2017, Respondent, in an overabundance of caution with respect to his duty to "cooperate" with the ODC's Conviction Investigation under Rule 3.19, notified Hinerman that he

had been issued a Private Reprimand by the Pennsylvania Disciplinary Board, and provided copies of related documents to Hinerman to assist with the ODC's Conviction Investigation.

Respondent's communications to Hinerman on January 10, 2017, including and especially the disclosure of the "PRIVATE REPRIMAND" issued by Pennsylvania's Disciplinary Board to Respondent only five (5) days earlier, constituted "details" related to the ODC's open Convictions Investigation concerning Respondent (I.D. No. 13-01-081), which, pursuant to W.Va. R.L.D.P. 2.6, the ODC was required to keep "confidential." Moreover, Respondent's communications to Hinerman on January 10, 2017, including and especially the disclosure of Pennsylvania's "PRIVATE REPRIMAND" of Respondent, did not constitute a "notification" or "report" of "reciprocal discipline" to the ODC pursuant to W.Va. R.L.D.P. 3.20 ("Reciprocal discipline"), because Rule 3.20(b) specifically limits the scope of Rule 3.20 to require that West Virginia lawyers only "notify" or report "*public* discipline" imposed by a foreign jurisdiction to the ODC. *See* W.Va. R.L.D.P. 3.20(b) ("[a]ny lawyer who is a member...of the West Virginia State Bar against whom any form of *public* discipline has been imposed by the authorities of another jurisdiction...shall notify the Office of Disciplinary Counsel of such action in writing within ten days thereof.") (emphasis added). Significantly, the ODC has never received a "notification" or "report" of any "public discipline" imposed by a foreign jurisdiction against Respondent that would empower the ODC even to open, let alone prosecute, a "reciprocal" disciplinary proceeding against Respondent pursuant to W.Va. R.L.D.P. 3.20.

Sometime after Respondent's letter to Hinerman of January 10, 2017, the ODC, without providing notice to Respondent of its intent to open a new investigation file number, opened a "new" investigation under a complaint identified as I.D. No. 17-01-439 (hereinafter the "Reciprocity Investigation"), pursuant to which the ODC would seek "reciprocal discipline"

against Respondent pursuant to Rule 3.20, as opposed to criminal conviction-related discipline pursuant to its Convictions Investigation (I.D. No. 13-01-081) pursuant to Rule 3.19. By arbitrarily and capriciously “converting,” behind the scenes, the “Convictions Investigation” of Respondent (I.D. No. 13-01-081) into a “Reciprocity Investigation” of Respondent (I.D. No. 17-01-439), Hinerman and the ODC misappropriated the strictly confidential “details” (i.e., the existence of the PRIVATE REPRIMAND in Pennsylvania) that Respondent had provided the ODC through his cooperation in the Convictions Investigation, then publicized in these proceedings (without ever requesting, let alone obtaining, any “waiver of confidentiality” from Respondent) those misappropriated confidential details and documents on a publicly-accessible court docket, in gross violation of the due process and privacy rights afforded to Respondent pursuant to both Pennsylvania Rule of Disciplinary Enforcement 402 and West Virginia Rule of Lawyer Disciplinary Procedure 2.6.

The ODC commenced the instant proceedings by filing a Notice of Reciprocal Disciplinary Action against Respondent on April 24, 2018; service of which constituted Respondent’s first formal notice (in the more than five (5) years since Respondent first self-reported his DUI convictions to the ODC) that the ODC had, behind the scenes, opened a new and separate Reciprocity Investigation against Respondent (I.D. No. 17-01-439). In an Order that followed a Prehearing Conference that took place in this matter on May 26, 2021, the Hearing Panel Subcommittee (“the HPS”) directed that Respondent and the ODC submit Briefs concerning whether the HPS and the Supreme Court of Appeals possess subject matter jurisdiction to proceed further in these reciprocal disciplinary proceedings.

On July 12, 2021, Respondent filed and/or served his Brief to the HPS addressing why the HPS and the West Virginia Supreme Court of Appeals, pursuant to the express language of Rules

3.20(b), 3.20(c) and 4.4(8) of the Rules of Lawyer Disciplinary Procedure, lack subject matter jurisdiction to proceed in the absence of any “public discipline” against Respondent, and that therefore, the HPS should recommend that the Supreme Court of Appeals dismiss the ODC’s Notice with prejudice, and seal the record of these proceedings to protect Respondent’s protected privacy rights under both Pennsylvania and West Virginia law.

C. Findings and Recommendations of the Hearing Panel Subcommittee

On October 4, 2021, the HPS, the Members of which consisted of Kelly D. Ambrose, Esquire (Chair – Attorney Member), Henry W. Morrow, Jr., Esquire (Attorney Member) and Dr. K. Edward Grose (Lay Member), issued its Findings and Recommendations. A copy of the HPS’s Findings and Recommendations is attached hereto as Appendix “A.” In its “Conclusion and Recommendation,” the HPS held as follows:

The express language of Rules 3.20(b) and 3.20(c), West Virginia 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 Hearing Panel Subcommittee that the Panel and the West Virginia Supreme Court of Appeals are without subject-matter jurisdiction to hear this matter. Therefore, we recommend that this action be dismissed for lack of subject-matter jurisdiction.

Furthermore, since the record of Respondent’s discipline in Pennsylvania is a private sanction, not subject to public disclosure, and, since in our opinion private discipline fails to meet the requirements within the clear dictates of Rule 3.20, RLDP, we recommend Respondent’s Motion to Seal the Record in this matter be granted.

(HPS’s Conclusion and Recommendation, Appendix “A,” p. 11 of 12).

While noting that these proceedings were initially precipitated by the ODC’s investigation into Respondent having self-reported several DUI-related criminal convictions of January 23, 2013 arising out of an October 5, 2011 motor vehicle accident in Pennsylvania, the HPS concluded that Respondent’s DUI convictions were “irrelevant to the disposition of this specific matter” because

these proceedings were instituted pursuant to Disciplinary Rule 3.20 (“Reciprocal Discipline”), and not Rule 3.18 or 3.19 relating to “Convictions.” (Appendix “A,” p. 4 of 12).

As noted by the HPS, pursuant to Pennsylvania’s Disciplinary Rules, a private reprimand is not public information subject to disclosure except in certain limited circumstances enumerated in Pennsylvania Rule of Disciplinary Enforcement 402, none of which are applicable here. *Id.* However, West Virginia’s Rules of Lawyer Disciplinary Procedure not provide for the same sanction for Respondent’s conduct as does the Commonwealth of Pennsylvania. (Appendix “A,” p. 5 of 12). Moreover, W.Va. R.L.D.P. 3.20(b) and (c) specifically *limit* the imposition of “reciprocal discipline” against respondent attorneys to cases where said respondent attorney has been issued “public discipline” in another jurisdiction. *Id.* (quoting W.Va. R.L.D.P. 3.20(b)-(c)) (emphasis by the HPS).

In response to the ODC’s request that the HPS impose an “admonishment” as a permissible sanction against Respondent in this matter pursuant to W.Va. R.L.D.P. 3.15, the HPA disagreed and refused to do so; noting that the ODC had ignored “the plain language of Rule 3.20(e) and the holding in Syllabus Point 5, *Committee on Legal Ethics of the West Virginia State Bar v. Battistelli* 185 W.Va. 109, 405 S.E.2d 242 (1991).” (Appendix “A,” pp. 5 through 6 of 12). Syllabus Point 5 of this Court’s decision in *Battistelli* provides:

Article VI, Section 28-A(e) of the By-Laws of the West Virginia State Bar [since superseded by Rule 3.20 of the West Virginia Rules of Lawyer Disciplinary Procedure] requires imposition of the identical sanction imposed by a foreign jurisdiction in the absence of one of the enumerated exceptions contained in subsections (1) through (4). If the Committee believes one of these exceptions is applicable, it must make appropriate findings.

Committee on Legal Ethics of the West Virginia State Bar v. Battistelli 185 W.Va. 109, 405 S.E.2d 242 (1991), Syllabus Point 5 (bracketed text added). As this matter is governed by W.Va. R.L.D.P. 3.20, and not Rule 3.15 as posited by the ODC, the HPS concluded that “the resolution to this case

is simple, clear and straightforward”: the Notice of Reciprocal Discipline must be dismissed for lack of subject matter jurisdiction. (Appendix “A,” p. 6 of 12).

The HPS specifically found the language of W.Va. R.L.D.P. 3.20 to be “crystal clear,” and that Rule 3.20 “is a Rule which confers subject-matter jurisdiction and which is not ambiguous or otherwise open to interpretation beyond its plain meaning by the Hearing Panel Subcommittee or the Supreme Court of Appeals.” *Id.* In so finding, the HPS further reasoned:

Rule 3.20(b), RLDP, clearly and without any ambiguity, states that only lawyers that have been publicly disciplined in another jurisdiction are required to self-report the action and discipline from the other jurisdiction. Similarly, Rule 3.20(c), RLDP, requires that Disciplinary Counsel act only when it receives notice that a lawyer has been publicly disciplined. Thus, in the very first instance, the Respondent in this case was **not** required to report the private reprimand he received from Pennsylvania and ODC was not authorized to act because it had not received a notice of public discipline imposed by Pennsylvania against Respondent. The Rule, in our opinion, is clear and we do not find the other arguments presented by the parties applicable for our limited jurisdictional analysis.

(Appendix “A,” p. 7 of 12) (emphasis in original).

Furthermore, the HPS found that Respondent’s reporting of his Private Reprimand to the ODC (under threat that the ODC, if he did not, would attempt to seek aggravated discipline against Respondent for failure to cooperate) did not otherwise confer subject matter jurisdiction to the ODC, HPS or Supreme Court of Appeals because “subject-matter jurisdiction may not be... conferred by consent [of parties] and must exist as a matter of law for the court to act.” (Appendix “A,” p. 8 of 12) (quoting *State ex rel. Smith v. Thornsbury*, 214 W.Va. 228, 233, 588 S.E.2d 217, 222 (2003); *State ex rel. Hammond v. Worrell*, 144 W.Va. 83, 106 S.E.2d 521 (1958), Syllabus Point 4).

The HPS also rejected the ODC’s contention that subject matter jurisdiction exists by virtue of “the general powers vested in ODC and the Supreme Court to investigate and regulate attorney conduct;” noting that the “general powers” of the ODC cannot supersede “a specific, definite and

unambiguous Rule” such as Rule 3.20. (Appendix “A,” p. 8 of 12) (quoting *State ex rel. Myers v. Wood*, 154 W.Va. 431, 175 S.E.2d 637 (W. Va. 1970), Syllabus Point 2) (it is axiomatic that “[a] specific section of a statute controls over a general section of the statute.”).

The HPS also rejected, as being misplaced, the ODC’s reliance upon certain disciplinary rules and an unpublished, nonprecedential decision of the Illinois Supreme Court, finding that West Virginia Rule 3.20 and the Illinois disciplinary rule concerning “reciprocal discipline” against respondent attorneys “are simply not the same,” and that West Virginia has “no comparable rule” to the Illinois reciprocal disciplinary rule. (Appendix “A,” pp. 8 through 9 of 12) (citing *In re: Hittinger*, M.R. 20212, 05 RC 1515 (September 26, 2005) (unreported), and Illinois Supreme Court Rule 763 (“Reciprocal Disciplinary Action”)). Unlike Illinois’ disciplinary system, West Virginia’s disciplinary rules “[do] not have the same flexibility with respect to jurisdiction and sanctions in [reciprocal disciplinary] cases...absent one of the four qualifiers set forth in Rule 3.20(e), RLDP.” (Appendix “A,” p. 9 of 12). The HPS therefore found that the legal authority from Illinois relied upon by the ODC was distinguishable from West Virginia law, and did not support the ODC’s position. (Appendix “A,” p. 10 of 12). Furthermore, the HPS found “that none of the four exceptions [to W.Va. R.L.D.P. 3.20(e)] apply in this case,” and that therefore, no jurisdictional basis to proceed with reciprocal discipline against Respondent existed. (Appendix “A,” p. 10 of 12).

The Hearing Panel Subcommittee concluded its analysis of West Virginia’s reciprocal disciplinary rules as follows:

Finally, one cannot escape the fact that in considering this matter we are left with the simple words of Rule 3.20, RLDP, and whether the Court, in adopting the Rule, intentionally included the word “public” as a limit to the jurisdiction the Court could exercise over an attorney who has been privately reprimanded. If so, the Rule established in Syllabus Point 5, *Phalen*, cited *supra*, applies and the Court cannot remove a word intentionally placed in its Rule just as it could not remove a word

intentionally placed by the Legislature in a statute. In our opinion, the word “public” was intentionally placed in this Rule. We believe the fact that West Virginia can only engage in public discipline as decided in the *Dailey Gazette* opinion, cited supra, coupled with the fact that West Virginia does not recognize a “private” reprimand among its permissible sanctions for attorney misconduct, notwithstanding the fact that such discipline likely existed in other jurisdictions prior to our adoption of the Rules, these factors, taken together, evidence an intentional choice of the Court to avoid any involvement in “private” discipline, either in our state or by dealing with any private discipline from any other state or jurisdiction. Certainly, the Court has the authority to change the Rule and to follow the path set by Illinois. Be that as it may, for today, and in our opinion, the rule is clear.

(Appendix “A,” p. 10 through 11 of 12).

II. SUMMARY OF THE ARGUMENT

The express language of Rules 3.20(b) and 3.20(c) of the Rules of Lawyer Disciplinary Procedure require that an attorney be issued “public” discipline in a foreign jurisdiction before the ODC may seek “reciprocal” discipline against an attorney licensed in West Virginia. Rule 4.4(8), concerning the “Authority” of the ODC, further limits the authority of the ODC to seek “reciprocal discipline” against a member of the West Virginia State Bar only where said attorney has been subject to “public” discipline in a foreign jurisdiction. Consistent with Supreme Court of Appeals case law addressing subject matter jurisdiction, the relevant provisions of Rules 3.20 and 4.4 of the Rules of Lawyer Disciplinary Procedure constitute “jurisdictional” rules, and the ODC’s failure and inability to satisfy the prerequisite jurisdictional elements of these Rules deprives the HPS and the Supreme Court of Appeals of jurisdiction to proceed in this matter.

Additionally, the Supreme Court of Appeals should seal the entire record of these proceedings in order to protect the privacy rights of Respondent as protected and provided for under both Pennsylvania and West Virginia law. The Private Reprimand issued to Respondent in Pennsylvania, as well as the records of those proceedings, are protected confidential information under Pennsylvania law, which are not available to the public. *See* Pennsylvania Rule of

Disciplinary Enforcement 402(k); §93.108 of the Pennsylvania Disciplinary Board Rules and Procedures, “Restoration of confidentiality.” Additionally, the confidentiality of the Private Reprimand issued to Respondent by Pennsylvania’s disciplinary authorities is also protected by West Virginia law, including and especially W.Va. R.L.D.P. 2.6, in that the Pennsylvania Private Reprimand constituted a “confidential detail” of the ODC’s Convictions Investigation. Accordingly, the entire record of these proceedings must be sealed in order to restore and protect Respondent’s privacy rights.

Lastly, the Supreme Court of Appeals should also prohibit the ODC from later attempting to seek discipline against Respondent pursuant to Rule 3.18 or 3.19 ("Convictions") because allowing the ODC to do so would further and inevitably violate Respondent's privacy and due process rights. Because the DUI convictions that underpinned the ODC’s Convictions Investigation concerning Respondent were entered more than nine (9) years ago, and because the motor vehicle accident that resulted in these DUI convictions occurred more than a decade ago, it would now be impossible for Respondent to present his case for “mitigation” to a Hearing Panel Subcommittee, as allowed by Rules 3.18 and 3.19, consistent with the tenets of due process. Moreover, because the ODC previously deferred to Pennsylvania’s disciplinary authorities to determine an appropriate disciplinary sanction related to Respondent’s DUI convictions, and because Pennsylvania’s Private Reprimand is the equivalent of “no discipline” under West Virginia law, the ODC should be bound by their decision to defer to Pennsylvania, and be precluded from forcing Respondent to relitigate his case for mitigation.

III. STATEMENT REGARDING ORAL ARGUMENT

After the ODC filed its objection to the HPS’s recommended decision on November 2, 2021, this Honorable Court issued an Order on November 3, 2021 stating that: “[t]he Clerk of

Court will, on a later date, provide the parties with a Notice of Argument under Rule 19(b) containing further information on the date and time of oral argument.” While Respondent has no objection to the Supreme Court of Appeals holding oral argument with ten minutes allotted to each side pursuant to W.Va. R.A.P. 19(b) and (e), given the HPS’s conclusions and recommendation that the record of these proceedings must be sealed in order to preserve Respondent’s protected privacy rights under Pennsylvania law, Respondent requests that any oral argument in this case be specially scheduled and conducted during a closed proceeding, without counsel for any other matters being present in the courtroom and without being broadcast over any live feed, in order to protect Respondent’s privacy rights under Pennsylvania and West Virginia law as specifically recommended by the HPS.

IV. ARGUMENT

A. The Hearing Panel Subcommittee correctly determined that the Office of Lawyer Disciplinary Counsel lacked subject matter jurisdiction to seek “reciprocal discipline” against Respondent because Respondent has never been subject to “public discipline” in any foreign jurisdiction; a jurisdictional prerequisite for the imposition of “Reciprocal Discipline” pursuant to Rule 3.20 of West Virginia’s Rules of Lawyer Disciplinary Procedure.

Under West Virginia law, jurisdiction over a person, among other means, may be conferred by consent; but a tribunal’s jurisdiction over the subject-matter of litigation must exist as a matter of law, and cannot be conferred by consent, waiver, or estoppel. *In re Z.H.*, 859 S.E.2d 399, Syl. Pt. 2 (W.Va. 2021) (citing *Rosen v. Rosen*, 664 S.E.2d 743, 745 (W.Va. 2008); *Ellithorp v. Ellithorp*, 575 S.E.2d 94, 100 (W.Va. 2002)). “Whenever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum must take no further action in the case other than to dismiss it from the docket.” *Holley v. Feagley*, 834 S.E.2d 536, 541 (W.Va. 2019) (quoting *Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.*, 211 S.E.2d 705, Syl. Pt. 1 (W.Va. 1975)). “[I]t is fundamental doctrine that ‘jurisdiction of the subject-matter can only be

acquired by virtue of the Constitution or of some statute.” *State ex rel. Dale v. Stucky*, 752 S.E.2d 330, 334-35 (W.Va. 2013) (quoting *Cruikshank v. Duffield*, 77 S.E.2d 600, 604 (W.Va. 1953)).

As succinctly summarized by the HPS in its Recommended Decision, Findings of Fact and Conclusions of Law:

“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). We believe these statements accurately define the law and our responsibilities with respect to this case.

(Appendix “A,” pp. 6 through 7 of 12).

In *State ex rel. Dale v. Stucky*, the Acting Commissioner of West Virginia’s Division of Motor Vehicles (“the Commissioner”) brought a Petition for Writ of Prohibition in the Supreme Court of Appeals seeking to prohibit the Circuit Court of Kanawha County from accepting jurisdiction over the transfer of an administrative appeal of a driver’s license suspension brought by a driver arrested for driving under the influence of alcohol (“DUI”) in Parkersburg, Wood County, West Virginia. *Stucky*, 752 S.E.2d at 301. The driver, whom at the time of his arrest in Wood County was then also a resident of Wood County, filed an appeal, through counsel, of a final order of the Commissioner, entered following an administrative hearing, affirming the revocation of the driver’s license. *Id.* The appeal was filed in the Circuit Court of Wood County, where the driver resided at the time of his arrest. *Id.* However, after the filing of the driver’s

Petition for Review with the Circuit Court of Wood County, driver's counsel learned that his client had moved to the state of Florida, and no longer resided in Wood County. *Id.* Driver's counsel thereafter requested that the Circuit Court of Wood County transfer the proceeding to the Circuit Court of Kanawha County; given the statutory requirement that a Petition for Review must be filed either in the Circuit Court of Kanawha County or in the Circuit Court of the county in which a petitioner resides. *Id.* at 301-02 (citing West Virginia's Administrative Procedures Act, W.Va. Code § 29A-5-4(b)). Over the Commissioner's objections, the Circuit Court of Wood County granted driver's request, and transferred the matter to the Circuit Court of Kanawha County. *Id.* at 302. Following transfer to Kanawha County, the Circuit Court of Kanawha County denied the Commissioner's motion to dismiss the matter for lack of jurisdiction, and granted the driver's motion to stay the revocation of his driver's license. *Id.* The Commissioner thereafter filed a Petition for Writ of Prohibition with the Supreme Court of Appeals seeking to prohibit the Circuit Court of Kanawha County from accepting jurisdiction of the driver's administrative appeal. *Id.*

The Supreme Court of Appeals granted the Commissioner's request for a writ of prohibition, and prohibited the Circuit Court of Kanawha County from accepting the driver's transfer of his administrative appeal from Wood County. *Id.* at 305. Framing the issue as whether the Circuit Court of Kanawha County "exceeded its legitimate powers by accepting the transfer of [the driver's] administrative appeal from the Circuit Court of Wood County," the Supreme Court of Appeals concluded that it had. *Id.* at 302, 305. In analyzing the relevant provisions of the Administrative Procedures Act, the Supreme Court of Appeals focused on W.Va. Code § 29A-5-4(b), which provides that administrative appeals "shall" be instituted in either the Circuit Court of Kanawha County, "or in the circuit court of the county in which the petitioner...resides," "within thirty [30] days after the date upon which such party received notice of the final order or decision

of the agency.” *Id.* at 303 (citing W.Va. Code § 29A-5-4(b)). The Supreme Court of Appeals agreed with and adopted the Commissioner’s “jurisdictional” interpretation of Section 29A-5-4(b), and held that because the driver did not reside or conduct business in Wood County when he filed his petition for review in the Circuit Court of Wood County, the Circuit Court of Wood County “never acquired subject matter jurisdiction of [the driver’s] appeal,” and therefore “lacked the authority for its transfer of the matter to the Circuit Court of Kanawha County.” *Id.*

As noted by the Supreme Court of Appeals in *Stucky*, “[j]urisdiction implies or imports the power of the court.” *Id.* (citing *Hinerman v. Daily Gazette Co.*, 423 S.E.2d 560, 564 (W.Va. 1992)). “Jurisdiction is not related to the rights of the parties but concerns the *power* to decide a justiciable controversy between the parties.” *Stucky*, 752 S.E.2d at 303 (quoting *Hanson v. Board of Educ. of the County of Mineral*, 479 S.E.2d 305, 310, n.3 (W.Va. 1996) (emphasis added)); see, e.g., *Highlands Conservancy, Inc. v. Pub. Serv. Comm’n of W.Va.*, 527 S.E.2d 495, 496 (W.Va. 1998) (“The Public Service Commission of West Virginia has no jurisdiction...except as conferred by statute.”). Because the driver in *Stucky* was living in Florida, and not Wood County, West Virginia, at the time he filed his administrative appeal in Wood County, under the “clear language” of W.Va. Code § 29A-5-4(b), the Circuit Court of Wood County “never acquired subject matter jurisdiction” of the driver’s appeal of the license revocation order, and the lower court’s order transferring the appeal to Kanawha County was “void.” *Stucky*, 752 S.E.2d at 304.

In the present case, the HPS and the Supreme Court of Appeals lack subject matter jurisdiction to proceed in this matter because West Virginia’s Rules of Lawyer Disciplinary Procedure, like the provisions of the Administrative Procedures Act at issue in *Stucky*, are “jurisdictional” in nature, and because Rules 4.4(8), 3.20(b) and 3.20(c) of West Virginia’s Rules of Lawyer Disciplinary Procedure clearly and unambiguously prohibit the ODC from seeking

“reciprocal discipline” against Respondent on the basis of the “Private Reprimand” issued to Respondent by the Pennsylvania Disciplinary Board. West Virginia Rule of Lawyer Disciplinary Procedure 3.20(c), in its entirety, reads as follows:

(c) Upon receiving notice that a lawyer who is a member, active or inactive, has been ***publicly disciplined*** or has voluntarily surrendered his or her license to practice law in another jurisdiction, whether state or federal, Disciplinary Counsel shall, following an investigation pursuant to these rules, refer the matter to a Hearing Panel Subcommittee for appropriate action.

Rule 3.20(c) (boldface, underline and italicized emphasis added). Rule 3.20 does not trigger reciprocal discipline whenever a member of the West Virginia State Bar is merely “disciplined” in another jurisdiction; to the contrary, the mandatory reciprocal disciplinary provisions of Rule 3.20 are triggered only when a member attorney has been ***publicly*** disciplined in a foreign jurisdiction. W.Va. R.L.D.P. 3.20(c). Because Rule 3.20 only mandates that the ODC seek reciprocal discipline upon receipt of notice that a West Virginia attorney has been *publicly* disciplined in another jurisdiction, the mandatory provisions of Rule 3.20(c) were never triggered in this case, as Respondent’s “Private Reprimand” issued in Pennsylvania, by virtue of being *private*, did not constitute the “public discipline” issued by a foreign jurisdiction needed to trigger the mandatory reciprocal disciplinary provisions of Rule 3.20.

The provisions of Rule 3.20(b) are also relevant to the present matter. W.Va. R.L.D.P. 3.20(b) sets forth a reporting requirement, separate and distinct from the reporting requirements of Rules 3.18(a) and 3.19(a) concerning criminal convictions, that requires members of the West Virginia State Bar to report discipline issued to a member attorney in a foreign jurisdiction as follows:

(b) Any lawyer who is a member, active or inactive, of The West Virginia State Bar against whom ***any form of public discipline*** has been imposed by the authorities of another jurisdiction, whether state or federal, or who voluntarily surrenders his or her license to practice law in connection with disciplinary proceedings in another

jurisdiction, whether state or federal, shall notify the Office of Disciplinary Counsel of such action in writing within ten days thereof. Failure to notify the Office of Disciplinary Counsel shall constitute an aggravating factor in any subsequent disciplinary proceeding.

Rule 3.20(b) (emphasis added). Similar to Rule 3.20(c), Rule 3.20(b) limits its own application to cases where a member attorney has been *publicly* disciplined by a foreign jurisdiction, such that West Virginia-licensed attorneys, pursuant to Rule 3.20(b), *are not even required to report* the imposition of discipline in a foreign jurisdiction where such discipline was not “public.” Accordingly, not only was ODC not “required,” pursuant to Rule 3.20(c), to institute the present reciprocal disciplinary proceedings, but Respondent was not even required to report to the ODC that Pennsylvania had issued him a “Private Reprimand” on January 5, 2017, as this discipline was not “public,” as required for Rule 3.20 and its subsections to be triggered.

Moreover, while Rule 3.20 did not “require” the ODC to seek “reciprocal discipline” in this matter (as the mandatory reporting and disciplinary provisions of Rules 3.20(b) and 3.20(c) were never triggered), a careful reading of the entirety of the Rules of Lawyer Disciplinary Procedure confirms that the ODC *was not even authorized*, even on a “discretionary” basis, to commence these reciprocal disciplinary proceedings. Rule 4.4, concerning the “Authority” of the ODC, provides, in relevant part, that: “Disciplinary Counsel shall perform all prosecutorial functions and have the authority to...(8) seek reciprocal discipline when informed of any ***public discipline*** imposed in any other jurisdiction.” W.Va. R.L.D.P. 4.4(8) (emphasis added). Again, similar to the provisions of Rule 3.20, Rule 4.4(8) limits even the *authority* of the ODC to seek reciprocal discipline against member attorneys only to cases where, unlike the present case, a member attorney has received *public* discipline in a foreign jurisdiction. In its Brief to this Honorable Court, the ODC argues that: “Nothing done in the [reciprocity] investigation [into Respondent] has been in violation of the authority provided by this Court.” (*ODC’s Brief*, p. 12).

In light of the clear and unambiguous language of Rule 4.4(8), *supra*, the ODC's argument is demonstrably untrue. As the HPS found, the ODC possesses no "general powers" to seek "reciprocal discipline" against any respondent attorney beyond that which the Rules specifically provide, and the Rules provided no such authority to the ODC to proceed against Respondent in this case. (Appendix "A," p. 8 of 12).

Because Respondent has never been *publicly disciplined* in any foreign jurisdiction (including and especially Pennsylvania), and because Respondent has never surrendered any license to practice law in connection with any disciplinary proceeding in any foreign jurisdiction, West Virginia's ODC lacks any authority whatsoever to seek "reciprocal discipline" against Respondent. These Rules (W.Va. R.L.D.P. 3.20 and 4.4) are *jurisdictional* in nature, in that they go directly to the power and authority of the ODC to bring (and the HPS and Supreme Court of Appeals to hear and decide) an alleged "justiciable controversy." *See Stucky*, 752 S.E.2d at 303 (quoting *Hanson*, 479 S.E.2d at 310, n.3 (emphasis added)) ("Jurisdiction is not related to the rights of the parties but concerns the *power* to decide a justiciable controversy between the parties").

Moreover, Because West Virginia (unlike Pennsylvania and other jurisdictions) has yet to adopt private forms of discipline as part of its own disciplinary system, "private discipline" issued to a member attorney by a foreign jurisdiction, for purposes of "reciprocal discipline" under the clear and unambiguous language of Rules 4.4(8) and 3.20 of West Virginia's Rules of Lawyer Disciplinary Procedure, is the functional equivalent of "no discipline whatsoever" having been issued to the respondent attorney. A cursory review of Pennsylvania's disciplinary rules, and a comparison of them to those of West Virginia, confirms this to be true.

Pennsylvania Rule of Disciplinary Enforcement 204(a) provides for both “private” and “public” forms of attorney discipline; with “private” discipline, under any provision (*see* Pa. R.D.E. 204(a)(6)-(7), concerning private reprimands and admonitions, respectively), being a lesser form of discipline than any form of “public” discipline. (*See* Pa. R.D.E. 204(a)(1)-(5), which includes “public” reprimands pursuant to Rule 204(a)(5)). Any attempt to translate “private” discipline in Pennsylvania (such as a “private reprimand” pursuant to Pa. R.D.E. 204(a)(5)) into “public” discipline in West Virginia can never be deemed “reciprocal” discipline; it would be, to the contrary, constitute *aggravated* discipline. “Public reprimands” in Pennsylvania are a “greater” or “higher” form of discipline as compared to “private reprimands,” such that a “public reprimand” will be issued in Pennsylvania only where the underlying circumstances and alleged misconduct are *aggravated* as compared to mitigating circumstances where a “private” reprimand would be appropriate. Accordingly, in cases where West Virginia’s ODC becomes aware of a member attorney having been issued “private discipline” in Pennsylvania (which respondent attorneys have no duty even to report pursuant to Rule 3.20(b)), the only fair, reasonable, and indeed, legal result, out of deference to and respect for the disciplinary procedures of Pennsylvania where the alleged misconduct occurred, is for the West Virginia ODC to close its complaint and investigation and to proceed no further for lack of subject matter jurisdiction; unless and until it “public” discipline is ever reported. *See* W.Va. R.L.D.P. 3.20(b)-(c), 4.4(8).

Accordingly, the ODC’s attempt in this case to translate, through operation of Rule 3.20, Respondent’s “Private Reprimand” in Pennsylvania into a “Public Reprimand” in West Virginia, has resulted from the ODC’s failure to read all of the provisions of Rule 3.20 in their entirety, and far from constituting “reciprocal” discipline, only constitutes *aggravated* discipline against Respondent. W.Va. R.L.D.P. 4.4(8), which specifically limits the “Authority” of the ODC to

proceed only in instances where “public” discipline in a foreign jurisdiction has been reported, deprived the ODC of any authority to file its Notice that commenced these reciprocal disciplinary proceeds, and deprives the HPS and the Supreme Court of Appeals from proceeding any further in this matter. W.Va. R.L.D.P. 4.4(8).

By instituting these proceedings, the ODC has taken the position that the word “Reprimand” is the only operative word in the phrase “Private Reprimand,” thereby ignoring, and defying, the clear and unambiguous language of Rules 4.4(8) and 3.20 requiring that a “Reprimand” be “*Public*” in nature before the mandatory, and even discretionary, provisions of Rules 4.4(8) and 3.20 (pertaining to “reciprocal” discipline) are triggered. This “interpretation” of the Rules by the ODC appears to be nothing more than an internal policy preference adopted by the ODC, that is unsupported by, and is directly contrary to, any binding or even persuasive legal authority (hence, it was rejected by the HPS).

If the Supreme Court of Appeals were to adopt the ODC’s “interpretation” of the Rules in this case, out-of-state attorneys licensed in West Virginia, who are issued private discipline in their home jurisdictions, would face the unpredictable prospect that West Virginia’s Lawyer Disciplinary Board and ODC will decline to enforce the Rules of Lawyer Disciplinary Procedure as actually written, and will simply make up their own Rules, as a means of seeking and obtaining whatever form of discipline that comports with their own subjective whims, even where the discipline sought is contrary to that allowed by the Rules themselves. In that event, it would be impossible for out-of-state attorneys to know, just from reading the Rules as written and published by the Supreme Court of Appeals, that West Virginia’s disciplinary authorities may hold out-of-state attorneys responsible for reporting matters that are not even reportable under the language of the Rules themselves (such as private discipline), and will attempt to institute reciprocal

disciplinary proceedings against out-of-state attorneys even where the Rules prohibit the issuance of such discipline. This would create a due process nightmare (relating to the lack of adequate notice of the disciplinary standards actually being applied to out-of-state attorneys) by subjecting out-of-state attorneys to the undue burden and expense of having to defend against even frivolous disciplinary proceedings across state lines, and if unsuccessful, possibly even being assessed payment of significant “taxable costs” and other fees at the conclusion of proceedings that should never have even been commenced.

Significantly, the ODC conceded twice in its Brief to this Court that the HPS’s finding of lack of subject matter jurisdiction, based upon the clear and unambiguous language of W.Va. R.L.D.P. 3.20, “may, in the end, be the correct outcome.” (*ODC’s Brief*, pp. 10, 11). Accordingly, the Supreme Court of Appeals should accept and adopt the Recommendations and Findings of the Hearing Panel Subcommittee (Appendix “A”), and dismiss these reciprocal disciplinary proceedings with prejudice.

B. The Hearing Panel Subcommittee correctly determined that the Supreme Court of Appeals should also seal the record of these proceedings to protect Respondent's privacy rights that are protected under Pennsylvania law.

When the ODC filed its Notice that instituted the present reciprocal disciplinary proceedings, the ODC referenced the fact that Respondent had been issued a “Private Reprimand” by Pennsylvania’s Disciplinary Board on January 5, 2018 (*ODC’s Notice*, ¶¶ 2-3), and attached, as Exhibits to their Notice, copies of the Private Reprimand and related documents that were generated during, and which were part of the record of, Respondent’s disciplinary proceedings in Pennsylvania. (*ODC’s Rule 3.20 Notice*, Attachments “A” and “B”). The very fact that Pennsylvania’s Disciplinary Board even issued a Private Reprimand to Respondent on January 5, 2018, as well as the records of those proceedings (including but not limited to the Private

Reprimand itself, and the Report of Findings of the Hearing Committee), are protected confidential information under Pennsylvania law, which are not available to the public. *See* Pennsylvania Rule of Disciplinary Enforcement 402(k); §93.108 of the Pennsylvania Disciplinary Board Rules and Procedures, “Restoration of confidentiality” (while the record of disciplinary proceedings in Pennsylvania remain opened from the time formal charges are filed, once the proceedings conclude with the imposition of private discipline, the confidentiality of respondent’s disciplinary proceedings is fully restored).

In the present case, when Respondent provided the ODC with copies of his Private Reprimand from Pennsylvania and other related documents, he did so pursuant to his reporting and cooperation requirements under Rule 3.19, with the reasonable expectation and understanding that said disclosures were made pursuant to the ODC’s Conviction Investigation concerning Respondent’s DUI-related convictions of January 23, 2013, and that the “details” of said investigation (including, and especially, the private and confidential documents that Respondent was submitting from his Pennsylvania disciplinary proceedings) would remain “confidential” in West Virginia pursuant to Rule 2.6 of West Virginia’s Rules of Lawyer Disciplinary Procedure. However, the ODC, notwithstanding the provisions of Pennsylvania law and W.Va. R.L.D.P. 2.6, and without notifying Respondent that it was doing so, arbitrarily changed the Conviction Investigation (I.D. No. 13-01-081) into a Reciprocity Investigation (I.D. No. 17-01-439) behind the scenes, then filed copies of Respondent’s confidential records of private discipline in Pennsylvania on the public docket of these proceedings, without ever requesting and obtaining a required waiver from Respondent of the confidentiality of the Pennsylvania proceedings.

In doing so, the ODC has remained in violation of both West Virginia Rule 2.6 (mandating the confidentiality of “details” of disciplinary investigations), and the Pennsylvania disciplinary

system's confidentiality protections afforded to respondent attorneys who are not publicly disciplined. (*see* Pa. R.D.E. 402(k); *see also* Pa. Disc. Bd. Rule of Proc. § 93.108). Accordingly, in addition to recommending dismissal of the ODC's Notice of Reciprocal Disciplinary Action with prejudice for lack of subject matter jurisdiction, the HPS also recommended that Supreme Court of Appeals seal the docket for these proceedings in order to restore and protect the confidentiality (afforded by both West Virginia and Pennsylvania law) of Respondent's Pennsylvania disciplinary proceedings, which resulted in private discipline. (Appendix "A," p. 11 of 12).

In its Brief, the ODC, in opposing the sealing of the docket and record of these proceedings, only argues generally that "all final dispositions of attorney disciplinary proceedings in West Virginia are public." (*ODC's Brief*, pp. 18-19). However, the ODC apparently fails to apprehend that in the event this Court adopts the Recommendation and Findings of the HPS, there will be no "final disposition" of any "discipline" against Respondent. To the contrary, if the Findings and Recommendation of the HPS are adopted and this matter is dismissed for lack of subject matter jurisdiction, the result will be the equivalent of this matter never having been filed in the first place, and therefore never having even existed. There would therefore be no "disposition" requiring that the record of these proceedings remain "public." The ODC, in its Brief to this Court, has not set forth any basis to conclude that Respondent's "Private Reprimand" issued in Pennsylvania is now "public" (it is not), and accordingly, the Supreme Court of Appeals should also accept and adopt the HPS's recommendation that the docket and record of these proceedings be sealed to restore and protect Respondent's privacy rights.

C. The Supreme Court of Appeals should also prohibit the ODC from later attempting to seek discipline against Respondent pursuant to Rule 3.18 or 3.19 ("Convictions") because allowing the ODC to do so would further and inevitably violate Respondent's privacy and due process rights.

In its Brief to this Honorable Court, the ODC admits that after receiving Respondent's self-report of his DUI-related criminal convictions in 2013, the ODC "monitored the status of the Pennsylvania proceedings and did wait for the Pennsylvania disciplinary proceedings to conclude with a final adjudication." (*ODC's Brief*, p. 13). The ODC further admits in its Brief that had the ODC proceeded to seek discipline against Respondent on the basis of his DUI convictions pursuant to Rule 3.19 prior to the conclusion of the Pennsylvania disciplinary proceedings, "then Respondent would have been in the position of defending himself in parallel disciplinary proceedings in two jurisdictions based upon the same Pennsylvania criminal conviction." *Id.* The ODC further posits that if this had been done, "Respondent could have possibly been in an untenable position of having to notify Pennsylvania disciplinary authorities of West Virginia discipline based upon the same Pennsylvania criminal conviction for which he had already been disciplined in Pennsylvania." (*ODC's Brief*, pp. 13-14). However, the ODC neglects to mention in its Brief to this Court that Respondent is already confronted with this possibly "untenable position," in that Hinerman and the ODC have previously threatened to proceed with new disciplinary proceedings against Respondent pursuant to Rule 3.19 ("Convictions") in the event they fail to obtain any issuance of discipline against Respondent in these Rule 3.20 proceedings ("Reciprocal Discipline"). The Supreme Court of Appeals should prohibit the ODC from doing so for the following reasons.

Initially, the ODC did more than just "wait" for the Pennsylvania disciplinary proceedings against Respondent to conclude before the ODC commenced the present reciprocal disciplinary proceedings. To the contrary, the ODC *deferred* to the Pennsylvania disciplinary authorities to

determine what level of discipline, if any, should have been issued to Respondent on the basis of his DUI-related criminal convictions from 2013. Such deference by West Virginia's ODC was more than reasonable and proper, in that all of the witnesses, testimony and evidence that might be considered by any disciplinary tribunal at any mitigation hearing requested by Respondent were located in Pennsylvania. However, when the Pennsylvania disciplinary proceedings concerning Respondent's convictions resulted in a "Private Reprimand," which under West Virginia law is the equivalent of "no discipline whatsoever" (*See Respondent's Brief*, pp 18-19, *supra*), West Virginia's ODC was dissatisfied, and has since tried to backpedal from its previous deference to the Pennsylvania proceedings.

Because the motor vehicle accident that precipitated Respondent's DUI convictions occurred in Pennsylvania, there is no jurisdictional nexus between the alleged underlying misconduct (the actions that led to Respondent's DUI convictions) and any forum in West Virginia. Only a Pennsylvania forum was capable of holding a mitigation hearing, consistent with the tenets of due process, concerning what, if any, discipline should have been issued to Respondent on the basis of his DUI convictions, given that Respondent would only be able to compel the attendance and presentation of witnesses, testimony and other evidence in a Pennsylvania forum. Now, with the additional passage of more than a decade's time since the accident that precipitated Respondent's DUI convictions, where the memories of witnesses have undoubtedly faded and evidence relevant to possible mitigation has no doubt dissipated, it would be impossible for Respondent to conduct a mitigation hearing, especially across state lines, where Respondent would be deprived of a full and fair opportunity to present his case for mitigation pursuant to Rule 3.18 or 3.19.

Additionally, the ODC should not be allowed “another bite at the proverbial apple,” where to ODC previously deferred to Pennsylvania’s disciplinary authorities to determine the appropriate level of discipline, if any, to be issued to Respondent on the basis of his DUI convictions. The only purpose for conducting a *second* mitigation hearing in West Virginia concerning possible convictions-related discipline would be for West Virginia’s ODC, which cannot possibly claim to be in a better position than Pennsylvania’s disciplinary counsel to prosecute such a case, to reach a result that is inconsistent with and contrary to proceedings that were already fully and fairly conducted in Pennsylvania. As the ODC noted in its own Brief (*ODC’s Brief*, pp. 13-14), this would place Respondent in an “untenable position,” and the Supreme Court of Appeals should prohibit the ODC from proceeding in such a fashion.

Persuasive authority from other jurisdictions confirms that the ODC should be prohibited from proceeding with a second convictions-related proceeding against Respondent in West Virginia because the result reached in the Pennsylvania proceedings was entirely correct. The decision of the Supreme Court of Wisconsin in *Office of Lawyer Regulation v. Johns (In re Johns)*, 847 N.W.2d 179 (Wis. 2014), the only published case from any jurisdiction in the country that Respondent was able to find that was factually similar to his own case, provides strong persuasive authority in support of the correctness of no discipline whatsoever being issued to Respondent on the basis of Respondent’s DUI convictions.

In *In re Johns*, Wisconsin’s Office of Lawyer Regulation sought to discipline the respondent attorney, in the form of a private or public reprimand, solely on the basis of respondent’s DUI-related felony conviction, which arose out of a motor vehicle accident in which the respondent’s drunk driving resulted in the death of a passenger that was ejected from respondent’s vehicle. *In re Johns*, 847 N.W.2d 179, 180-182 (Wis. 2014). The Supreme Court of

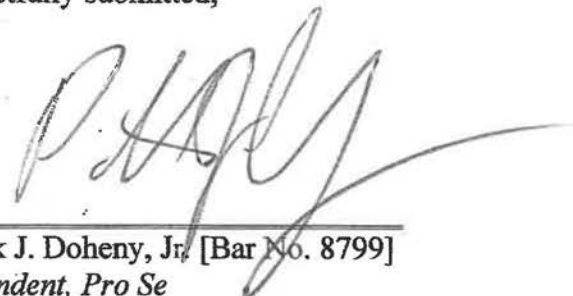
Wisconsin concluded that the respondent's alleged violation of the disciplinary rules, based solely on a felony homicide by vehicle while DUI conviction, did "not reflect adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects," *Id.* at 188, "was too technical to justify the imposition of legal consequences," *Id.* at 181, and ordered that the complaint against the respondent attorney be "dismissed," with "no costs" assessed. *Id.* at 188.

In re Johns provides extremely persuasive legal authority for the correctness of the "Private Reprimand" issued to Respondent in Pennsylvania, which under West Virginia law, is the equivalent of "no discipline." The Supreme Court of Appeals should hold the ODC to its previous deference to Pennsylvania's disciplinary authorities for the determination of the appropriate level of discipline, if any, to be issued to Respondent on the basis of his DUI convictions. Moreover, in the event the ODC were to proceed against Respondent with a second convictions-related disciplinary proceeding, Respondent would be forced to request that the West Virginia Supreme Court of Appeals "unseal" these proceedings (the result of which Respondent would have to present at any mitigation hearing pursuant to Rule 3.18 or 3.19); thereby only further violating Respondent's protected privacy rights under both West Virginia and Pennsylvania law. Accordingly, the Supreme Court of Appeals, in addition to dismissing the ODC's Notice of Reciprocal Discipline against Respondent with prejudice and sealing the record of these proceedings, should also prohibit the ODC from later proceeding against Respondent pursuant to W.Va. R.L.D.P. 3.18 or 3.19 ("Convictions").

IV. CONCLUSION

For the foregoing reasons, Respondent attorney, Patrick J. Doheny, Jr., Esquire, respectfully requests that the West Virginia Supreme Court of Appeals accept, affirm and adopt the Recommended Decision of the Hearing Panel Subcommittee of the West Virginia Lawyer Disciplinary Board, and dismiss, with prejudice, the Office of Lawyer Disciplinary Counsel's Notice of Reciprocal Discipline against Respondent pursuant to W.Va. R.L.D.P. 3.20 on the basis of lack subject matter jurisdiction, and that Respondent not be assessed any costs relating to this proceeding. Respondent further requests that the Supreme Court of Appeals accept, affirm and adopt the recommendation of the Hearing Panel Subcommittee that the record of these proceedings be sealed to restore and protect Respondent's protected privacy rights under Pennsylvania law. Lastly, Respondent respectfully requests that the Supreme Court of Appeals prohibit the ODC from later attempting to seek discipline against Respondent pursuant to Rule 3.18 or 3.19 ("Convictions") because allowing the ODC to do so would further and inevitably violate Respondent's privacy and due process rights.

Respectfully submitted,


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APPENDIX “A”

**RECOMMENDED DECISION OF THE
HEARING PANEL SUBCOMMITTEE OF THE WEST VIRGINIA
LAWYER DISCIPLINARY BOARD, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED DECISION**

October 4, 2021

**BEFORE THE SUPREME COURT OF APPEALS
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 DECISION OF THE HEARING PANEL SUBCOMMITTEE
OF THE WEST VIRGINIA LAWYER DISCIPLINARY BOARD
FINDINGS OF FACT, CONCLUSIONS OF LAW AND
RECOMMENDED DECISION**

I. PROCEDURAL HISTORY

On or about April 24, 2018, the Office of Disciplinary Counsel (hereinafter "ODC") filed its Notice of Reciprocal Disciplinary Action Pursuant to Rule 3.20 of the Rules of Lawyer Disciplinary Procedure. On or about September 10, 2020, ODC filed its Motion for Reciprocal Discipline against the Respondent Patrick Doheny. The basis for the motion arose from a Private Reprimand which had been issued in a lawyer disciplinary proceeding against the Respondent by the Disciplinary Board of the Supreme Court of Pennsylvania thus, in ODC's view, invoking Rule 3.20 of the West Virginia Rules of Lawyer Disciplinary Procedure (hereinafter "RLDP").

On or about October 8, 2020, the Respondent filed a Motion to Dismiss and a Motion to Seal the Record, both of which were filed with the West Virginia Supreme Court of Appeals. It

should be noted that a prior Motion to Dismiss the reciprocal disciplinary action and a Motion to Seal the Record had been filed with the Court on May 25, 2018, prior to the filing of the Motion for Reciprocal Discipline, which was provisionally refused by Order entered on October 4, 2018. On January 28, 2021, the Court once again refused, without comment, Respondent's 2020 motions to dismiss and to seal the record.

On or about February 4, 2021, ODC filed a "Renewed Request for a Scheduling Conference" which was granted and held on February 22, 2021, before the Hearing Panel Subcommittee (hereinafter "HPS") comprised of Kelly D. Ambrose, Esquire, Chair, Henry W. Morrow, Jr., Esquire, and Dr. K. Edward Grose, Laymember. It must be noted that up to this point, none of the parties had requested a formal hearing in this matter and no hearing is required under Rule 3.20, RLDP. The Hearing Panel Subcommittee is permitted to take action without conducting a formal hearing under Rule 3.20(a).

Nevertheless, and without addressing the need for a hearing, a schedule for a prehearing conference and hearing on the Motion was established. The prehearing conference was scheduled for May 26, 2021, via Microsoft teams, and the hearing scheduled for June 8, 2021, in person, in Morgantown, West Virginia.

At the prehearing conference held on May 26, 2021, the Hearing Panel Subcommittee subsequently determined and thereafter ordered that the established schedule previously ordered was improvidently awarded and directed the parties to file briefs on the issue of subject matter jurisdiction of the HPS and Supreme Court of Appeals and continued indefinitely the hearing on the Motion until the issue of subject-matter jurisdiction could be decided.

Pursuant to Rule 3.20(a), RLDP, this Hearing Panel Subcommittee “. . .may take action with conducting a formal hearing.” At this time, and based upon the record before it, the Hearing Panel Subcommittee elects to file its findings and recommendations without conducting a formal hearing. The basis for taking this action is that the questions presented are questions of law and not questions of fact as the relevant facts are not in dispute.

The Findings and Recommendations made herein are entered as a result of the Prehearing Conference conducted on May 26, 2021 and the briefs and responses filed by the parties following the prehearing conference.

FINDINGS AND RECOMMENDATIONS

On January 13, 2013, Respondent was convicted in the State of Pennsylvania of multiple criminal offenses arising from a motor vehicle accident, and while the record is not clear, presumably one or more of these offenses constituted a felony for which either Rule 3.18 or Rule 3.19 of the *West Virginia Rules of Lawyer Disciplinary Procedure* would apply. As required by those Rules, Respondent self-reported his conviction to ODC on February 13, 2013. On January 10, 2017, Respondent self-reported the issuance of a private reprimand issued by the Disciplinary Board of the Supreme Court of Pennsylvania. Notwithstanding the foregoing, on April 24, 2018, ODC filed a “Notice of Reciprocal Disciplinary Action Pursuant to Rule 3.20 of the Rules of Lawyer Disciplinary Procedure.” [ODC Brief - Pages 1-3]

It is critical to the disposition of this case to note that ODC's action against the Respondent is a proceeding pursuant to Rule 3.20, RLDP, and is not a proceeding under either Rule 3.18, RLDP, or Rule 3.19, RLDP. Therefore, the threshold issue before us is whether the private reprimand issued to the Respondent in Pennsylvania satisfies the subject-matter jurisdictional requirements of Rule 3.20, RLDP. The Respondent's criminal conviction is irrelevant to the disposition of this specific matter.

As stated earlier, the facts of this case are not in dispute. The Respondent was issued what is defined as a "private" reprimand by order of the Supreme Court of Pennsylvania. Under the Pennsylvania disciplinary scheme, a private reprimand is one of several sanctions that can be levied against an attorney who violates the Rules of Professional Conduct. See: 204 *Pennsylvania Code* § 83.204, Rule 204(a)(6). Under the Pennsylvania Rules, a private reprimand is not public information subject to disclosure except in certain enumerated circumstances. See: 204 *Pennsylvania Code* § 83.402, Rule 402. None of those exceptions apply here. It is not disputed that in the State of Pennsylvania the public is not entitled to information regarding the Respondent's disciplinary action and that Respondent's disciplinary file is not public information subject to disclosure except under those limited circumstances set forth in Rule 402.

West Virginia does not have a complementary disciplinary rule which allows for the imposition of a "private" reprimand. See: Rule 3.15, RLDP. Indeed, all proceedings under the West Virginia Rules of Disciplinary Procedure are public and the public is entitled to information regarding disciplinary matters. See Rule 2.6, RLDP, and *Dailey Gazette Company, Inc., v.*

Committee on Legal Ethics of the West Virginia State Bar, 174 W.Va. 359, 326 S.E.2d 705 (1984). Simply put, the State of West Virginia does not have the same sanction for Respondent's conduct as does the State of Pennsylvania.

Notwithstanding the foregoing, ODC brought this matter under the provisions of Rule 3.20 RLDP. That rule provides, in pertinent part:

Any lawyer who is a member, active or inactive, of the West Virginia State Bar against whom any form of *public* discipline has been imposed by the authorities of another jurisdiction, whether state or federal, . . . shall notify the Office of Disciplinary Counsel of such action in writing within ten days thereof.

Rule 3.20(b), RLDP, (emphasis added). Once such a report has been received Disciplinary Counsel is required to act:

Upon receiving notice that a lawyer who is a member, active or inactive, has been *publicly* disciplined . . . Disciplinary Counsel shall, following an investigation pursuant to these rules, refer the matter to a Hearing Panel Subcommittee for appropriate action.

Rule 3.20(c), RLDP, (emphasis added). Furthermore, Rule 3.20(e) provides that 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 the Subcommittee determines one of four other possible findings as set forth in the Rule are applicable. Neither the Respondent or Disciplinary Counsel has suggested or sought an alternative finding under Rule 3.20(e). Instead, Disciplinary Counsel has argued that even though West Virginia does not include a private reprimand in its scheme of permissible sanctions, West Virginia can still impose any of the sanctions set forth in Rule 3.15, RLDP, suggesting that an "admonishment" might be the most appropriate sanction West Virginia could impose. [ODC Brief, pages 9 - 11]

We disagree. Counsel ignores the plain language of Rule 3.20(e) and the holding in Syllabus Point 5, *Committee on Legal Ethics of the West Virginia State Bar v. Battistelli* 185 W.Va. 109, 405 S.E.2d 242 (1991).

This matter is governed by Rule 3.20, RLDP, not by rule 3.15, RLDP, as suggested by ODC. We believe the resolution to this case is simple, clear and straightforward without any of the ambiguity and confusion raised by both parties in their briefs and responses and the voluminous record in this case, most of which is irrelevant to our disposition of this matter. In its argument, Disciplinary Counsel contends that Rule 3.20, RLDP is not a jurisdictional rule [ODC Response Brief, Page 2], and even more confusingly suggests that the language of Rule 3.20(a), RLDP, somehow changes the meaning of Rules 3.20 (b) and (c), RLDP [ODC Response Brief, Page 3]. We, however, find the language to be crystal clear that Rule 3.20, RLDP, is a Rule which confers subject-matter jurisdiction and which is not ambiguous or otherwise open to interpretation beyond its plain meaning by the Hearing Panel Subcommittee or the Supreme Court of Appeals.

“‘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). We believe these statements accurately define the law and our responsibilities with respect to this case.

Rule 3.20(a), RLDP, merely establishes that the adjudication in another jurisdiction of misconduct conclusively establishes that conduct without the need for evidence and proof of such conduct in any proceeding brought in West Virginia, thus permitting the Hearing Panel Subcommittee to act without a formal hearing and the production of evidence which would ordinarily be required under any other circumstance. While the last sentence is a rule of procedure, the main body and import of the Rule is a rule of evidence.

Rule 3.20(b), RLDP, clearly and without any ambiguity, states that only lawyers that have been publicly disciplined in another jurisdiction are required to self-report the action and discipline from the other jurisdiction. Similarly, Rule 3.20(c), RLDP, requires that Disciplinary Counsel act only when it receives notice that a lawyer has been publicly disciplined. Thus, in the very first instance, the Respondent in this case was **not** required to report the private reprimand he received from Pennsylvania and ODC was not authorized to act because it had not received a notice of public discipline imposed by Pennsylvania against Respondent. The Rule, in our opinion, is clear and we do not find the other arguments presented by the parties applicable for our limited jurisdictional analysis.

Does the fact that Respondent self-reported discipline which he was not required to report otherwise grant subject-matter jurisdiction to ODC, the Hearing Panel Subcommittee and Supreme Court of Appeals? We think not.

Unlike personal jurisdiction, subject-matter jurisdiction may not be waived or conferred by consent and must exist as a matter of law for the court to act. For this reason, lack of jurisdiction of the subject matter may be raised for the first time in this Court and even upon this Court's own motion. Syl. Pt. 6, *State ex rel. Hammond v. Worrell*, 144 W.Va. 83, 106 S.E.2d 521 (1958), citing Syl. Pt. 3, *Charleston Apartments Corp. v. Appalachian Electric Power Co.*, 118 W.Va. 694, 192 S.E. 294.

State ex rel. Smith v. Thornsbury, 214 W.Va. 228, 233, 588 S.E.2d 217, 222 (2003). The Supreme Court has also held:

“Consent of parties cannot confer upon a court jurisdiction which the law does not confer, or confers upon some other court, although the parties may by consent submit themselves to the jurisdiction of the court. In other words, consent cannot confer jurisdiction of the subject-matter, but it may confer jurisdiction of the person.’ *Yates v. Taylor County Court*, 47 W.Va. 376, Syl. 2 [35 S.E. 24].”

Syllabus Point 4, *State ex rel. Hammond v. Worrell*, 144 W.Va. 83, 106 S.E.2d 521 (1958).

Disciplinary Counsel also argues at various points throughout its brief and subsequent response brief that jurisdiction exists by virtue of the general powers vested in ODC and the Supreme Court to investigate and regulate attorney conduct while avoiding any substantive discussion about the specific limitations and precise wording of Rule 3.20. Can the general powers of the Court and ODC supercede a specific, definite and unambiguous Rule? Again, we think not. It is axiomatic that “[a] specific section of a statute controls over a general section of the statute.” Syllabus Point 2, *State ex rel. Myers v. Wood*, 154 W.Va. 431, 175 S.E.2d 637 (W. Va. 1970).

We also believe that Disciplinary Counsel’s reliance upon an Illinois disciplinary case to be misplaced. Disciplinary Counsel cites *In re: Hittinger*, an unreported State of Illinois

disciplinary case, in support of ODC's contention that the Court has the authority to impose alternative discipline notwithstanding the fact that the sanction imposed by Pennsylvania is not available under our disciplinary rules in West Virginia. [ODC Brief, Page 10] A close examination of the Petition filed in that case [filed with ODC's Brief] as well as the Illinois Rule upon which the discipline was based, Illinois Supreme Court Rule 763, and a comparison of the Illinois Rule with Rule 3.20, RLDP, reveals that the two rules are simply not the same. Illinois Rule 763 provides, in pertinent part:

If an attorney licensed to practice law in Illinois and another jurisdiction is disciplined in the other jurisdiction, the attorney may be subjected to the same *or comparable discipline in Illinois*, upon proof of the order of the other jurisdiction imposing the discipline. For purposes of this rule, "other jurisdiction" is defined as the District of Columbia; a country other than the United States; a state, province, territory, or commonwealth of the United States or another country.

Illinois Supreme Court Rule 763(a) (emphasis added). West Virginia has no comparable rule. Not only does Illinois permit the imposition of "comparable" discipline in a reciprocal disciplinary proceeding, the Illinois Rule also permits an independent investigation and independent award of sanctions without regard to the sanctions imposed by the other jurisdiction:

Nothing in this rule shall prohibit the institution of independent disciplinary proceedings in this State against any attorney based upon his conduct in another jurisdiction, and, in the event the Administrator elects to proceed independently, any discipline imposed in this State shall not be limited to the discipline ordered by the other jurisdiction. ***Illinois Supreme Court Rule 763(e)***.

West Virginia Rule 3.20 is not comparable to Illinois Rule 763, the Rule upon which the decision in the *Hittinger* case derives. West Virginia does not have the same flexibility with respect to jurisdiction and sanctions in such cases under our rules absent one of the four qualifiers set forth in Rule 3.20(e), RLDP. The Supreme Court has held:

Article VI, Section 28-A(e) [now Rule 3.20(e)] of the By-Laws of the West Virginia State Bar requires imposition of the identical sanction imposed by a foreign jurisdiction in the absence of one of the enumerated exceptions contained in subsections (1) through (4). If the Committee believes one of these exceptions is applicable, it must make appropriate findings

Syllabus Point 5, *Committee on Legal Ethics of the West Virginia State Bar v. Battistelli* 185 W.Va. 109, 405 S.E.2d 242 (1991).¹ Neither ODC nor Respondent has argued or recommended that one of the four exceptions contained in Rule 3.20(e) applies in this case and the Subcommittee hereby finds that none of the four exceptions apply in this case. Thus, the *Hittinger* decision does not support Disciplinary Counsel's position in this case and is distinguishable from the case at bar.

Finally, one cannot escape the fact that in considering this matter we are left with the simple words of Rule 3.20, RLDP, and whether the Court, in adopting the Rule, intentionally included the word "public" as a limit to the jurisdiction the Court could exercise over an attorney who has been privately reprimanded. If so, the Rule established in Syllabus Point 5, *Phalen*, cited supra, applies and the Court cannot remove a word intentionally placed in its Rule just as it could not remove a word intentionally placed by the Legislature in a statute. In our opinion, the word "public" was intentionally placed in this Rule. We believe the fact that West Virginia can only engage in public discipline as decided in the *Dailey Gazette* opinion, cited supra, coupled with the fact that West Virginia does not recognize a "private" reprimand among its permissible sanctions for attorney misconduct, notwithstanding the fact that such discipline likely existed in other jurisdictions prior

¹ Article VI of the By-Laws of the West Virginia State Bar were superceded by the Rules of Lawyer Disciplinary Procedure by Order of the Supreme Court of Appeals effective July 1, 1994. While Article VI, Section 28-A(e) and Rule 3.20, RLDP, are not entirely identical, the substantive provisions were retained unchanged in Rule 3.20, RLDP, and any differences between the two rules are largely stylistic and not applicable to our discussion.

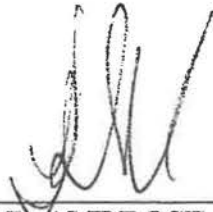
to our adoption of the Rules, these factors, taken together, evidence an intentional choice of the Court to avoid any involvement in “private” discipline, either in our state or by dealing with any private discipline from any other state or jurisdiction. Certainly, the Court has the authority to change the Rule and to follow the path set by Illinois. Be that as it may, for today, and in our opinion, the rule is clear.

CONCLUSION AND RECOMMENDATION

The express language of Rules 3.20(b) and 3.20(c), West Virginia 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 Hearing Panel Subcommittee that the Panel and the West Virginia Supreme Court of Appeals are without subject-matter jurisdiction to hear this matter. Therefore, we recommend that this action be dismissed for lack of subject-matter jurisdiction.

Furthermore, since the record of Respondent’s discipline in Pennsylvania is a private sanction, not subject to public disclosure, and, since in our opinion private discipline fails to meet the requirements within the clear dictates of Rule 3.20, RLDP, we recommend Respondent’s Motion to Seal the Record in this matter be granted.

Respectfully Submitted.



KELLY D. AMBROSE, ESQUIRE, CHAIR
Attorney Member

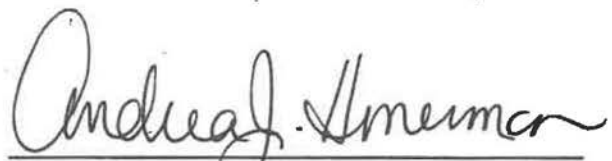
/s/ HENRY W. MORROW, JR
HENRY W. MORROW, JR., ESQUIRE
Attorney Member

/s/ DR K. EDWARD GROSE
DR. K. EDWARD GROSE
Lay Member

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 4th day of October, 2021, served a true copy of the foregoing "**RECOMMENDED DECISION OF THE HEARING PANEL SUBCOMMITTEE OF THE WEST VIRGINIA LAWYER DISCIPLINARY BOARD FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED DECISION**" upon Respondent Patrick Doheny by mailing the same via United States Mail, with sufficient postage, to the following address:

Patrick Doheny, Esquire
Post Office Box 23354
Pittsburgh, Pennsylvania 15222



Andrea J. Hinerman

CERTIFICATE OF SERVICE

This is to certify that I, Patrick J. Doheny, Jr., Esquire, on February 3, 2022, served a true copy of the foregoing **“BRIEF OF THE RESPONDENT”** upon Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel, by mailing the same, U.S. Mail with sufficient postage, to the following address:

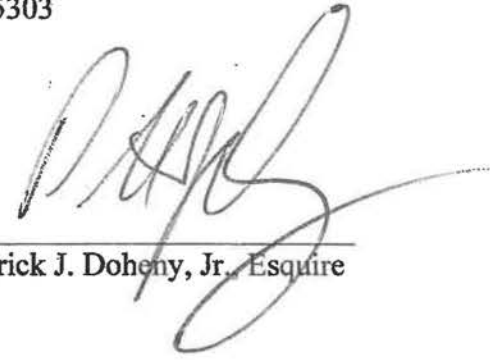
Andrea J. Hinerman, Esquire
Senior Lawyer Disciplinary Counsel
Office of Disciplinary Counsel
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Charleston, WV 25304

And upon the designated Hearing Panel Subcommittee at the following addresses:

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