IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LAWYER DISCIPLINARY BOARD,

Petitioner,

vs. **No. 20-0233**

GREGORY H. SCHILLACE,

Respondent.

BRIEF OF THE RESPONDENT

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I. STATEMENT OF THE CASE

A. NATURE OF PROCEEDINGS AND RECOMMENDATION OF THE HEARING PANEL SUBCOMMITTEE

Respondent agrees with Chief Lawyer Disciplinary Counsel's rendition of the proceedings in so far as the same is stated; however, Respondent filed on the same date his Consent to the Recommended Sanctions of Hearing Panel and Objections to Certain Findings of Fact of the Hearing Panel Subcommittee Gregory H. Schillace (hereinafter "Respondent") is a lawyer who was admitted to The West Virginia State Bar on November 7, 1990. Respondent is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. Formal charges were filed against Respondent with the Clerk of the Supreme Court of Appeals on or about March 16, 2020, and served upon Respondent via certified mail by the Clerk on March 19, 2020. Chief Lawyer Disciplinary Counsel filed her mandatory discovery on or about May 21, 2020. Respondent filed his Answer to the Statement of Charges on or about April 16, 2020. On or about June 22, 2020, Respondent filed a "Motion to Continue." Chief Disciplinary Counsel (hereinafter "CDC") did not object and the motion was granted. Respondent provided his mandatory discovery on July 24, 2020, with a supplement filed on March 1, 2021. On or about September 17, 2020, Respondent filed a "Motion to Permit Witness, Robert Edmundson, to Testify by Video Conference." On or about September 24, 2020, Respondent filed a "Motion to Continue" and Respondent's Objection to Replacement of Panel Member Elizabeth Layne Diehl." On or about September 28, 2020, CDC filed her "Response to Respondent's Motion to Continue and Respondent's Objection to Replacement of Panel Member Elizabeth Layne Diehl." On or about October I, 2020, Respondent's

"Motion to Continue" was granted and "Respondent's Objection to Replacement of Panel Member Elizabeth Layne Diehl" was denied.

On or about October 14, 2020, Respondent filed a "Motion to Continue" and on or about October 20, 2020, Respondent filed an "Amended Motion to Continue," which was granted. On or about February 17, 2021, CDC filed a "Motion to Continue," which was granted. Except as stated specifically herein, all "Motions to Continue" were based upon COVID related exposures or witness availability.

Thereafter, this matter proceeded to hearing in Bridgeport, West Virginia, on November 24-25, 2020, and on March 2, 2021. The Hearing Panel Subcommittee (hereinafter "HPS") was comprised of Timothy E. Haught, Esquire, Chairperson, Gail Henderson Staples, Esquire, and Rachel Scudiere, Layperson. Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel, appeared on behalf of the Office of Lawyer Disciplinary Counsel. Timothy J. Manchin appeared on behalf of Respondent, who also appeared. The Hearing Panel Subcommittee heard testimony from Joelle Spagnuolo-Loretta; James Loretta; Pamela Logar; the Honorable James A. Matish; Jennifer Staud; Carol Louise Shahan; Ruth Dukich; Jean C. Coger; the Honorable Michael J. Aloi; Carl Hadsell; Robert Edmundson; Dr. Kelly Nelson; and Respondent. In addition, ODC Exhibits 1-62; Respondent's Exhibits 1-4 and Joint Exhibit I, Party Admissions, were admitted into evidence.

On or about January 31, 2022, the HPS issued its recommended decision and filed its "Report of the Hearing Panel Subcommittee" (hereinafter "Report") with the Supreme Court. The HPS found that the evidence established that Respondent committed five (5) violations of Rule1.1 [competence]; six (6) violations of Rule 1.2(a) [failure to abide by

client's objectives]; six (6) violations of Rule 1.3 [diligence]; six (6) violations of Rule 1.4 [communication]; two (2) violations of Rule 1.5 [fees]; two (2) violations of 1.5(b) [failure to reduce scope and basis of fee to writing]; one(1) violation of 1.5(c) [failure to reduce contingency fee agreement to writing]; two (2) violations of Rule 1.15(d) [safekeeping property]; two (2) violations of Rule 1.16(d) [declining or terminating representation] five (5) violations of Rule 3.2 [failure to expedite litigation]; five (5) violations of Rule 3.4 [fairness to opposing party and counsel]; one (1) violation of Rule 3.4(d) [fairness to opposing counsel and opposing party]; five (5) violations of Rule 8.4(c) [dishonesty, fraud, deceit or misrepresentation]; and five (5) violations of Rule 8.4(d) [prejudice to the administration of justice] of the Rules of Professional Conduct (hereinafter "RPC").

The HPS recommended that Respondent's law license be suspended for a period of two (2) years, and recommended that the entirety of the suspension be stayed while Respondent instead serves a period of three (3) years of probation and supervised practice. They further opined that Respondent be ordered to maintain professional liability insurance in the amount of One Million Dollars ($1,000,000.00) per claim and in the aggregate and provide proof of the same upon request of the Office of Disciplinary Counsel. Respondent should be ordered to continue in the therapy regime, but be ordered to undergo an independent psychological evaluation to determine his compliance with this therapy regimen at his expense and at the request of the Office of Disciplinary Counsel. Respondent should undergo an audit of his law office to determine if he is compliant with the prior directives of the retained office consultant, and be ordered to implement any and all additional necessary changes in his law office management procedures to ensure that the pattern of misconduct

is less likely to occur. Finally, the HPS recommended that Respondent be ordered to pay the costs of the disciplinary proceedings.

On or about March 4, 2022, the Office of Lawyer Disciplinary Counsel filed its objection to the Hearing Panel Subcommittee's recommendation. Respondent filed his consent to the recommendation on the same date and objections to certain portions of the HPC's Findings of Fact and Rule Violations.

B. HEARING PANEL SUBCOMITTEE FINDINGS OF FACT AND RULE VIOLATIONS AND RESPONDENT'S OBJECTIONS TO CERTAIN RULE VIOLATIONS AND FAILURE TO ADOPT OTHER FINDINGS OF FACT

1. Complaint of James P. Loretta and Joelle M. Loretta

Respondent agrees to CDC's summary of the Hearing Panel Subcommittee's Findings of Fact and Rule Violations. Respondent has stipulated to violations of Rule 1.3, Rule 1.4, and Rule 3.4(d). Respondent objected to HPS's findings of rule violations of Rule 1.1, Rule 1.2(a), Rule 3.2, Rule 8.4(c), and Rule 8.4(d), and the failure to make the following findings of fact. Based upon review of the record and previous decisions, Respondent withdraws its objections to violations of Rule 1.1, Rule 3.2, and 8.4(d).

James Loretta knew Respondent was an attorney and considered him a friend and had met him on a Sunday prior to March 10. [Transcript, Day 1 at 52 and 53] At that time Respondent advised James Loretta that he would file a lawsuit on their behalf, but it was unlikely there would be insurance coverage. [Transcript, Day 3 at 98] Respondent believed the contract price of the house was $170,000.00 and that the contractor claimed the Lorettas had not paid $40,000.00 of that amount. The Lorettas wanted to sue the contractor for enough money that they did not have to pay anything for the house and Mr. Loretta refused to get a professional estimate of the needed repairs to the faulty work because he intended to fix things himself, which he started doing while the contractor was still on the premises. The

Lorettas moved into the home before it was completed. [Transcript, Day 3 at 98-100] The Lorettas never paid any retainer fee [Transcript, Day 1 at 9] or received any bill. [Transcript, Day 1 at 45-46]

The Lorettas met with Respondent on a Sunday afternoon at which time he admitted that he failed to perform certain services during the litigation and volunteered to put in writing that the case had merit and had a value of $170,000.00 and that he would place his insurance company on notice to handle the claim. [Transcript, Day 1 at 21-22] Respondent advised his insurance carrier to pay whatever they thought was appropriate and believes they paid $242,000.00, $20,000.00 of which was paid to resolve the counterclaim. [Transcript, Day 3 104-105]

Respondent admitted to failing to answer discovery promptly, but did in fact provide discovery close to the deadline. He also admitted to failing to answer discovery responses; however, he believed that an associate had taken care of it. Respondent also filed an appeal but later withdrew it upon demand by the Lorettas that he withdraw from representation [Transcript, Day 3 at 101-104]

Respondent admitted that he did not maintain contact with the Lorettas as required nor did he diligently pursue their claim; however, he never lied to the Lorettas and he never misrepresented anything to them. Respondent never mislead the Lorettas in any way or charged them any money for the filing fee or otherwise. He failed to have a fee agreement because he was not sure he was going to charge them anything, but it would have depended on the circumstances. He was mostly interested in helping them in their case rather than it being a lucrative case. [Transcript, Day 3 at 105-107] Respondent also stated that while there was no excuse for what he did, the Lorettas ended up getting $242,000.00 which they never

would have been able to get from the contractor because of the insufficiency of his assets and lack of insurance to cover that claim. [Transcript, Day 109-110]

Neither Complainant testified to any specific lie that Respondent made to them.

Based upon the above, Respondent objects to the Hearing Panel's findings of a violation of Rule 1.2(a)and Rule 8.4(c).

2. Complaint of Pamela G. Logar

Respondent agrees to CDC's summary of the Hearing Panel Subcommittee's Findings of Fact and Rule Violations. Respondent previously stipulated to violations of Rule 1.3, Rule 1.4, and Rule 3.2. Respondent objected to HPS's findings of rule violations of Rule 1.1, Rule 1.2(a), Rule 3.4, Rule 8.4(c), and Rule 8.4(d). and the failure to make the following findings of fact.

Ms. Logar did not pay Respondent any money. [Transcript, Day 1 at 77] Respondent was not aware that Ms. Logar had already given a deposition in the case. [Transcript, Day 1 at 65] At Mr. Kohout's request, Respondent agreed to speak with a number of clients who had cases against Mon General. [Transcript, Day 3 at 112] He initially believed that some of the cases could be settled, but later found out that Mr. Kohout had violated a confidentiality agreement and Mon General would no longer agree to settle any of the cases. Moreover, Mr. Kohout had received a bad ruling when the judge concluded that the multiple cases could not be considered evidence of a business practice. [Transcript, Day 3 at 115-116] He also learned that Ms. Logar had engaged in a relationship with the Chairman of the Board of Directors, which violated the hospital's fraternization policy. [Transcript, Day 3 at 117]

At the time of the Rule 41(b) dismissal, he advised Ms. Logar it would be best to wait awhile before moving to reinstate with the hopes that Mon General might change its

position. [Transcript, Day 3 at 118] Ms. Logar told Respondent that another attorney said he could settle the case for six figures and Respondent advised her to hire that attorney which she never did. He also advised her that he would refile the case if she wanted but she never advised him that she wanted to do so [Transcript, Day 3 at 119] Respondent agreed that after taking a contract he should have either pursued the case or advised her he would not pursue it at all and that he failed to maintain reasonable communications; however, he never lied to Ms. Logar. [Transcript. Day 3 at 119]

On the basis of the above, Respondent objects to the Hearing Panel's findings of violations of Rule 1.1, Rule 1.2(a), Rule 3.4, Rule 8.4(c), and Rule 8.4(d).

3. Complaint of the Office of Lawyer Disciplinary Counsel

Respondent agrees to CDC's summary of the Hearing Panel Subcommittee's Findings of Fact and Rule Violations. Respondent has stipulated to not appearing at the February 28, 2019, hearing and, despite the Court's representations to ODC, in his verified response, not paying the $5,000.00 sanction. Respondent objects to the HPS's failure to adopt the following findings of fact.

This Count arises out of Respondent's representation of a client employed by Wells Fargo as a financial advisor who was shot outside a bar by his wife and incurred more than $105,000.00 for medical bills for treatment of his extensive injuries. [Transcript, Day 3 at 7] This event was the beginning of a long and tortuous series of litigations including divorce, criminal proceedings, insurance declaratory judgment actions, civil trial for damages, numerous appeals for evaluation of Respondent's client's book of business for equitable distribution purposes, and attempted contempt proceedings during appeals. [Transcript, Day 3 at 8-36] In this case, it is clear that the only relevant testimony from Judge Matish related

to the allegations in the Complaint stemmed from the discussion and refusal by Respondent to pay the fine. The Supreme Court in the case *Robert Nelson Rector v. Kimberly Kay Ross, formerly known as Kimberly Kay Rector, Jaclyn Belcastro, as power of attorney for Kimberly Kay Ross, Thomas G. Dyer, and the Honorable Lori B. Jackson* has ruled in Respondent's favor and found that the fine was issued in contempt and that jury trial was required in order to do so. The case has been remanded; however, no action has been taken by the Honorable James Matish subsequent to the remand.

An oversimplification of the remainder of the charges arises out of the failure of Respondent to appear at a hearing in front of Family Court Judge Jackson after an Order granting a stay in those proceedings was signed by the Honorable James Matish. The Supreme Court parsed out the meaning of "stay" and also refused the writ of prohibition filed against Judge Jackson; however, this contentious litigation in which Respondent was zealously representing his client was the genesis for his failure to follow through after one hearing in front of the Honorable James Matish on December 11, 2017. At that hearing, Respondent was ordered to serve an Amended Complaint upon Judge Jackson, and to prepare an Order reflecting the Court's Order that a hearing be held on February 28, 2018. [Transcript, Day 2 at 26-36]

Respondent admits not preparing the Order but explains that the failure to prepare the Order and schedule the hearing on his calendar was inadvertent. During the two-month time frame, Respondent had a business court case in Wheeling where opposing counsel introduced 1,500 pages of documents on the third day of trial, which had never been produced. The Court granted a mistrial, but reset the trial for approximately 30 to 60 days later. [Transcript, Day 3 at 37-38] During the same time period, Respondent had intense,

debilitating pain below the sternum, vomiting and diarrhea. At one point, he had his gallbladder removed but it did not relieve the pain. His pain was so severe that he went to the emergency room where he was given Maalox and Lidocaine to receive his pain and received CT scans for suspected obstruction. [Transcript, Day 3 at 39-40]

At the July 27th hearing, Respondent believed and told the Court that he believed the sanction was prophylactic to prevent misconduct in the future which was not and is not permitted under West Virginia law. [Transcript, Day 3 at 47] Respondent did not pay the $5,000.00 fine as he had planned because he was required to pay the fine in order to get a hearing on the Rector case. However, it worked out and the only remaining matter was the Writ of Prohibition about the May 2nd hearing, which he had appealed and within which the issue of the sanction was included. [Transcript, Day 2 at 67-68]

4. Complaint of Jennifer D. Staud

Respondent agrees to CDC's summary of the Hearing Panel Subcommittee's Findings of Fact and Rule Violations. Respondent has previously stipulated to violations of Rule 1.3, Rule 1.4 and Rule 3.4(d). Respondent objected to HPS's findings of rule violations of Rule 1.1, Rule 1.2(a), Rule 3.2, Rule 8.4(c), and Rule 8.4(d), and the failure to make the following findings of fact. Based upon review of the record and previous decisions, Respondent withdraws its objections to violations of Rule 1.1, Rule 1.2(a), and Rule 3.2.

Jennifer and Joe Staud had known Respondent for some time prior to 2014 and they or their corporate entities had been represented by him other cases that had resulted in other settlements. [Transcript, Day 1 at 157] This suit centered around the delivery of equipment in an untimely fashion and that certain equipment was not new and did not function properly. [Transcript, Day 1 at 158]

Ms. Staud believes the Respondent lied to her to cover what he did not do; however, she did not cite any specific example in her testimony. [Transcript, Day 1 at 186]

Respondent testified that he never misrepresented anything to Ms. Staud and did not charge them anything for services in this case; however, he did have a history in that he represented Joe Staud in a DUI matter in Marion County and had a case for Mr. Staud about an appellate ruling against him over a coal delivery contract as well as a matter to pursue a legal malpractice case against McNeer, Highland, McMunn and Varner. [Transcript, Day 3 at 121-122] Respondent was meeting with Joe Staud regarding these other matters when Mr. Staud showed him the Barilla Complaint and asked him to file an Answer in order to give Mr. Staud more time to get money to pay the bills. At that time, Joe Staud did not request a Counterclaim to be filed. Respondent had explained that if he was going to push the case, it would cost Mr. Staud more money. [Transcript, Day 3 at 124] Most of Respondent's meetings were with Mr. Staud because it was his deal. He had negotiated the purchase of the equipment, the building, and he was actually running the restaurant. Jennifer Staud had little involvement. [Transcript, Day 3 at 125]

Right before the case was transferred from Judge Janes to Judge Wilson, Judge Janes ordered mediation. This was when Jennifer Staud first spoke of equipment problems, after which Respondent filed a Counterclaim. No objections to the Counterclaim were made in front of Judge Janes during a hearing. Mediation was held and an agreement was reached that Barilla would service the equipment if Mr. Staud paid the money. The agreement was supposed to be written up by the mediator, but Mr. Staud stopped paying the money. [Transcript, Day 3 at 128]

Respondent investigated the claims underlying the Counterclaim and determined that the dripping cabinet had been delivered damaged but was immediately replaced and that the equipment they said was not working was the result of using the incorrect cups. Moreover, Respondent verified that the equipment Ms. Staud claimed was used was actually new merchandise. [Transcript, Day 3 at 129-130] Respondent had taken the deposition of Mr. Barilla. [Transcript, Day 3 at 135]

The case was scheduled for trial, at which time Respondent advised the Jury that both of the Stauds would be witnesses. No objection was made; however, immediately prior to trial, at a later date, opposing counsel filed an objection, which Judge Wilson refused because it was not timely. [Transcript, Day 3 at 132] Respondent called Mr. Staud first because he was the more involved party and he testified on cross examination that they could make everything on the menu and said the machines worked most of the time. Respondent then called Ms. Staud, but Judge Wilson ruled she could not testify because Respondent had not filed a witness list. [Transcript, Day 3 at 132-133] Judge Wilson refused to allow the Counterclaim to proceed because, even though Respondent felt Judge Janes had recognized the Counterclaim prior to transferring it, Respondent had not made a motion to allow the same. [Transcript, Day 3 at 134]

The Jury awarded $32,000.00, which was the outstanding balance on the purchase of the equipment. [Transcript, Day 3 at 135] Respondent believes that Mr. Staud told the truth in the Barilla case. [Transcript, Day 3 at 144] While considering filing an appeal, Respondent determined that the Counterclaim actually belonged to Pufferbelly's Ice Cream Station, LLC, which had not been sued in the other case. Respondent then advised Ms. Staud that she could sue Barilla for damages and that he would do so for her, but she elected not to do

so. He did not file the appeal because he did not think there was any recourse on appeal since Mr. Staud agreed in trial that he owed them the money. [Transcript, Day 3 at 136-137]

Ms. Staud sued Respondent for malpractice. The insurance company resolved it for $90,000.00. Respondent did not do anything to keep that case from resolving. [Transcript, Day 3 at 138]

Respondent stated that he did have a written contract with the Stauds on the initial matter for which he was representing them, but he does not believe he had a contract on this matter because he was doing several different things for them. He did keep hours on everything. The primary contract was a contingency fee contract against McNeer, Highland, McMunn and Varner, which resolved favorably. [Transcript, Day 3 at 138] In this case, Respondent kept his hours but did not charge them anything and they did not pay anything. [Transcript, Day 3 at 130] Mr. Staud was supposed to settle up with him on another case, but that never happened and, because of Mr. Staud's financial circumstances, Respondent actually deferred fees in other cases that he had settled for them. [Transcript, Day 3 at 140]

Respondent agrees that he failed to communicate and failed to diligently pursue the case by failing to engage in discovery as required by the Rules of Professional Conduct. Respondent denies that he lied to the Stauds at any point or misrepresented anything to them. [Transcript, Day 3 at 143]

On the basis of the above, Respondent objects to the Hearing Panel's findings of violations of Rule 8.4(c) and Rule 8.4(d).

5. Complaint of Ruth A. Dukich and Carol L. Shahan

Respondent agrees to CDC's summary of the Hearing Panel Subcommittee's Findings of Fact and Rule Violations. Respondent has previously stipulated to violations of

Rule 1.2(a), Rule 1.3, Rule 1.4, Rule 1.16(d), Rule 3.2, and Rule 3.4. Respondent objected to HPS's findings of rule violations of Rule 1.1, Rule 1.5, Rule 1.15(d), Rule 8.4(c), and Rule 8.4(d), and the failure to make the following findings of fact.

Ms. Shahan and her sister owned a combined one-sixth interest in approximately 148 acres in Monongalia County, West Virginia. The other heir owning the property filed a partition suit in or around October, 2016, to have the property divided. [Transcript, Day 1 at 197] When Respondent was hired, a cousin of the two sisters had acquired the remaining interest in the unimproved property. Additionally, the cousin owned property that was adjacent to that which was ultimately received in the partition suit. [Transcript, Day 3 at 145-146]

Respondent met with the two sisters on a Sunday and agreed to represent them on an hourly basis to be credited towards a retainer. [Transcript, Day 3 at 147] Ms. Shahan wanted a particular portion of the property, upon which a camper stood where she said her boys stayed to hunt on the property. [Transcript, Day 1 at 203]

Respondent wrote to inform them that they did not need to be at an initial scheduling conference call, which Attorney Post from Respondent's office attended in person on December 12, 2016. [Transcript Day 1, 203]

Respondent went to a hearing in Morgantown to select partition commissioners, at which time the sisters were adamant that they did not want the property sold. [Transcript, Day 3 at 147] The camper that the sisters claimed their family frequently used for hunting had a tree growing up through the center of the camper. [Transcript, Day 3 at 149] The sisters told Respondent that oil and gas wells would be drilled on the property but the records could not be found to substantiate that claim. [Transcript, Day 3 at 151]

Respondent had suggested and obtained an agreement that everyone would pay a proportionate share of the property survey and emphasized the parts of the property the sisters wanted and the camper. Ultimately, the sisters got the property that they had asked for from the beginning. [Transcript, Day 3 at 149] The sisters ended up with the 36 acres they requested and the right of way was exactly where the surveyor had placed it. [Transcript, Day 3 at 150]

Ms. Shahan retained an attorney who filed a legal malpractice suit against Respondent, out of which she got $150,000.00 and got to keep the 36 acres plus two other acres. [Transcript, Day 1 at 236] Ms. Shahan agreed that she and her sister got more than one-sixth of the 146-acre property when they received 36 acres. [Transcript, Day 1 at 236]

Respondent admits that he did not maintain communication with them and did not pursue their interests in the litigation in certain ways. [Transcript, Day 3 at 152] Respondent did perform work on the case and the survey was substantially more than they were charged. Respondent never misrepresented anything to them, but did have trouble getting them to understand that they could not get all of the property from the other heirs without paying for it. [Transcript, Day 3 at 153] Respondent specifically recalls having a conversation with the sisters where he told them they could not get more of the property without paying for it and they had gotten the portion they said they wanted. [Transcript, Day 3 at 154]

Respondent testified that the case file was given to the lawyer for the insurance company hired for him and that it was eventually given to the sisters' lawyer. [Transcript, Day 3 at 154]

Although both Complainants indicated in their testimony that Respondent had lied to them, neither of them pointed to a specific lie or misrepresentation other than the fact that

he said he was going to perform certain acts in the future and failed to do so. [Transcript, Day 1 at 229; 249]

On the basis of the above, Respondent objects to the Hearing Panel's findings of violations of Rule 1.1, Rule 1.5, Rule 1.15(d), Rule 8.4(c), and Rule 8.4(d).

6. Complaint of Jean C. Cogar

Respondent agrees to CDC's summary of the Hearing Panel Subcommittee's Findings of Fact and Rule Violations. Respondent has previously stipulated to the violation of Rule 1.5(b). Respondent objected to HPS's findings of rule violations of Rule 1.2(a), Rule 1.3, Rule 1.4, Rule 1.5, Rule 1.15(d), Rule 1.16(d), Rule 8.4(c), and Rule 8.4(d), and the failure to make the following findings of fact. Based upon review of the record and previous decisions, Respondent withdraws its objections to violations of Rule 1.4 and Rule 1.5.

Jean Cogar was a nurse anesthetist who retained Respondent because she had water issues at her house and believed the house had been misrepresented to her by the real estate company and the inspectors. [Transcript, Day 1 at 225] Ms. Cogar stated that when she paid $40,000.00 for the excavation before she hired Respondent, she thought her water problem would be fixed, but it was not. [Transcript, Day 1 at 280] Ms. Cogar stated that she hired Respondent in December 2018 after her first meeting with him. [Transcript, Day 1 at 256] Ms. Cogar agreed that Respondent did not tell her that she had a good case. [Transcript, Day 1 at 257] Ms. Cogar admitted that her assistant (who did not testify) contacted Respondent 80% of the time. [Transcript, Day 1 at 282] Respondent told them initially he could not do the case on a contingency fee basis because it was the type of case where there would likely be no insurance coverage, but that if they wanted to hire him on an hourly basis, he could

research the potential for suing and which parties they could pursue. [Transcript, Day 3 at 156]

Ms. Cogar had a second meeting with Respondent in January of 2019, at which time Respondent asked Ms. Cogar to hire an engineer to do a survey of her property. [Transcript, Day 1 at 259-262] Respondent told her he had to have an engineer look at it and testify about the cost to correct the problems and who had caused the problems. [Transcript, Day 3 at 157] Ms. Cogar and her assistant were present when Respondent contacted a couple engineers to survey the property. Ms. Cogar agreed she was aware the engineer was not only hired to do a survey of the property, but to study where the water was coming from, what the problem was, and what it would take to correct the problem. [Transcript, Day 1 at 283-285] Even though the engineer charged $2,700.00, Ms. Cogar refused to pay more than $500.00 for his services. [Transcript, Day 1 at 264]

Ms. Cogar's assistant brought in thumb drives with hours of footage and wanted to quiz him about the same when it was not necessary to review the footage. [Transcript, Day 3 at 158] When Respondent advised Ms. Cogar that they had a potential claim against the seller and the neighbor who was putting the water over onto their house, Ms. Cogar did not want to sue the neighbor. [Transcript, Day 3 at 158]

After a third meeting with Respondent in April of 2019, Ms. Cogar called the Circuit Clerk and, since nothing had been filed, she sent a letter terminating Respondent's service. [Transcript, Day 1 at 265-266] At the time of termination, she requested the return of her retainer fee and the return of her file. Ms. Cogar acknowledges that she received some of her file. [Transcript, Day 1 at 267]

After the termination letter, Ms. Cogar met with Respondent again. [Transcript, Day 1 at 268] Respondent had drafted a complaint but they chose not to review the complaint when he advised that the $3,500.00 retainer had been used up. Ms. Cogar told Respondent she could not afford to pay anymore to proceed in the case. [Transcript, Day 1 at 286] When she said she had no more money, he offered to take the case on a contingency fee basis, but she declined. [Transcript, Day 3 at 159]

Ms. Cogar filed an ethics complaint against Respondent on June 26, 2019, at which time she received some of her documentation but had not received an itemization of services. [Transcript, Day 1 at 272]

Ms. Cogar does not believe Respondent lied to her. [Transcript, Day 1 at 275] Ms. Cogar has not hired another lawyer to review the case. [Transcript, Day 1 at 277] Ms. Cogar does not have a bad taste for lawyers. [Transcript, Day 1 at 274]

Based upon the above, Respondent objects to the Hearing Panel's findings of violations of Rule 1.2(a), Rule 1.3, Rule 1.15(d), Rule 1.16(d), Rule 8.4(c), and Rule 8.4(d).

7. Complaint of James P. Moyle

Respondent agrees to CDC's summary of the Hearing Panel Subcommittee's Findings of Fact and Rule Violations. Respondent has previously stipulated to violations of Rule 1.3, Rule 1.4, Rule 3.2, and Rule 3.4(d). Respondent objected to HPS's findings of rule violations of Rule 1.1 and Rule 1.2(a), and the failure to make the following findings of fact. Based upon review of the record and previous decisions, Respondent withdraws its objections to violations of Rule 1.1 and Rule 1.2(a).

James Moyle worked for Patton Janitorial Services and had a Worker's Compensation discrimination claim, which Respondent filed in Harrison County, but was

subsequently moved to Monongalia County. Eventually, the Judge dismissed the case without prejudice and Respondent had failed to take any action to reinstate the same. Respondent agreed that he failed to pursue Mr. Moyle's claim. [Transcript, Day 3 at 162] Respondent further agreed that he did not maintain communication with Mr. Moyle and failed to advocate his interests in litigation; however, he did not lie to Mr. Moyle or engage in any dishonesty. He never misrepresented anything to Mr. Moyle. [Transcript, Day 3 at 163-164]

Mr. Moyle filed a legal malpractice claim, which was settled in excess of $100,000.00. [Transcript, Day 3 at 163]

II. SUMMARY OF ARGUMENT

The HPS found that the Respondent committed 53 violations of the Rules of Professional Conduct with regards to six of the counts; however, the same failures to act constituted multiple violations. Moreover, the HPS found that the ODC had not established by clear and convincing evidence that the Respondent acted in an intentional, willful or malicious manner. The HPS determined that the Respondent's actions were clearly negligent but that his course of conduct occurred during a time when the Respondent suffered a series of medical and mental health issues which were temporary in nature and for which he has taken substantial steps to correct and that he did not act with the intention of harming any of his clients, the legal system or the profession. The HPS's findings of fact correctly determined that the mitigating factors significantly outweighed any aggravating factors and that the public's interest in the administration of justice would be appropriately safeguarded with a two-year suspension with the imposition of that suspension stayed while the Respondent be placed on a period of three years of probation and supervised practice, including the maintenance of a $1,000,000.00 professional liability insurance policy,

continued therapy with an independent psychological evaluation, and that he undergo an audit of his law office. Moreover, while the HPS found several violations of Rule 8.4(c) and Rule 8.4(d), none of the Complainants testified about specific false statements or lies that Respondent made to them; but rather, that they felt Respondent's failure to keep them updated on the status of the case or to carry out certain obligations that he intended to do constituted a lie. The failure to accomplish that which one intends to do does not constitute a lie.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 19 of the Rules of Appellate Procedure, this Honorable Court's Order set this matter for oral argument to take place during the September 2022 Term of Court.

IV. ARGUMENT

A. STANDARD OF PROOF

Respondent agrees with CDC's statement regarding the standard of proof.

B. ANALYSIS OF SANCTION UNDER RULE 3.16 OF THE RULES OF LAWYER DISCIPLINARY PROCEDURE

Rule 3.16 of the Rules of Lawyer Disciplinary Procedure states when imposing sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court of Board shall consider the following factors: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors.

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

Respondent has admitted prior to the HPS hearings, during those hearings, and after those hearings that he has violated certain ethical duties to his clients, the legal system, and to the profession.

ii. Respondent acted negligently

CDC had the burden of proving by clear and convincing evidence that the Respondent acted knowingly with a conscious awareness of the nature or intendant circumstances of his conduct. It is not the burden of Respondent to prove that his actions were negligent. The HPS found insufficient evidence that Respondent acted in any manner other than that he was negligent and the HPS specifically found that he did not act with the intention of harming any of his clients, the legal system, or the profession. CDC argues that the HPS conflated the existence of Respondent's mental health issue with whether the repeated conduct was intentional or knowing; however, CDC failed to offer any evidence on this issue. In the absence of such evidence, it was entirely appropriate for the HPS to find that Respondent's course of conduct occurred during a time when Respondent suffered a series of medical and mental health issues which were temporary in nature and for which he has taken substantial steps to correct. In the absence of evidence to the contrary, this Court should give substantial deference to the HPS's finding. [Report of the Hearing Panel Subcommittee at 48]

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

Clearly this is a finding of fact and great deference should be shown to the HPS's findings. While the HPS did find that Respondent's conduct caused real, significant financial damage together with significant anxiety, worry, and aggravation, the Respondent assisted and/or cooperated with his malpractice carrier to satisfy Respondent's financial

responsibility to those clients who were financially harmed by reaching settlements with those that pursued financial claims against him. [Report of the Hearing Panel Subcommittee at 49] The HPS rejected CDC's claim that the misconduct caused "tremendous damage" to the legal system and to the reputation of the legal profession. Beyond the negative opinion of the specific Complainants, the HPS found no evidence to suggest that any damage was made to the legal system or the profession as a result of Respondent's actions. The HPS pointed out that there was no evidence of any widespread outrage, media coverage, theft, deceit, or willful malicious misconduct that caused the public in general to call into question the integrity of the legal system or the legal profession. [Report of the Hearing Panel Subcommittee at 49] Once again, CDC failed to meet its burden to prove resultant serious financial injury to the Complainants or serious injury to the legal system or the profession.

iv. Mitigating factors

The Scott court adopted mitigating factors in disciplinary proceedings and stated that mitigating factors "are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E.2d 550, 557 (2003) *quoting ABA Model Standards for Imposing Lawyer Sanctions,* 9.31 (1992). In Lawyer Disciplinary Board v Hart, 241 W.Va 69, 818 S.E.2d 895 (2018), the Court adopted the mitigating factors which may be considered in determining the appropriate sanction to be imposed against a lawyer for violating the Rules of Professional Conduct ABA Model Standards for Imposing Lawyer Sanctions, 10 (2020): (1) absence of a prior disciplinary record; (2) absence of dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or rectify consequences of misconduct; (5) full and free disclosure to the disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8)

physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of penalties or other sanctions; (12) remorse; and (13) remoteness of prior offenses. Lawyer Disciplinary Board v Hart, 241 W.Va. 69, 818 S.E.2d 895 (2018),

Respondent elicited testimony and evidence establishing eleven of thirteen mitigating factors. More particularly, Respondent demonstrated both a physical and mental disability or impairment.

(1) Absence of a Prior Disciplinary Record

Although there was an unspecified Investigative Panel admonition in 2015, which arose out of Respondent and the opposing attorney each paying eighty-dollars (80.00) out of pocket to Respondent's client in order to avoid a continuing fight over whether the terms of mediation head been carried out which resulted in a Rule 1.8(e) violation. HPS did not find this circumstance to outweigh the mitigating factors that are present in the case.

(2) Absence of Dishonest or Selfish Motive

Although the HPS failed to address this factor, there was credible evidence in the transcript which supports that Respondent was not acting with dishonest or selfish motive with reference to the particular counts of the complaint: (a) in the Loretta case, the clients did not pay a retainer, filing fee, or any other litigation fees. [Transcript, Day 1 at 14] Respondent did not know whether he would charge them anything, but was mostly trying to help the client. [Transcript, Day 3 at 107]; (b) in the Logar case, Respondent did not charge anything and was trying to help the client whose case was already filed by a disbarred lawyer. [Transcript, Day 1 at 21]; (c) in the Staud case, Respondent deferred payment of the $40,000.00 fee owed to him by the Stauds, which was never paid and did not charge them anything for the costs of transcripts in the case. [Transcript, Day 3 at 139]; (d) in the

Dukich/Shahan case, Respondent performed work that far exceeded the $3,500.00 he was paid. [Transcript Day 3, 253]; and (e) in the Cogar case, Respondent offered to take the case under a contingency fee after the client advised that she could not pay any more than the $3,500.00 retainer. [Transcript, Day 3 at 159]

In addition to the above, Judge Michael Aloi testified that Respondent pursued many cases that were not cases anyone else wanted or not monetarily rewarding. [Transcript Day 2 at 33] Finally, not one witness ever testified to a specific lie or misrepresentation that Respondent made to them. Respondent's failure to accomplish acts which he intended is not evidence of dishonesty. Further citations from the transcript to support this mitigating factor are in Respondent's Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions, filed with the Supreme Court on November 19, 2021, pages 41-46.

(3) Personal or Emotional Problems

In addition to the personal or emotional problems considered by HPS, there is credible evidence in the transcript which establishes that Respondent was laboring under personal and emotional problems during this brief period of his career. Judge Michael Aloi, Robert Edmundson, Dr. Kelly Nelson, and Respondent testified to various observations, facts, and feelings which established that Respondent was experiencing a significant change in personality and stress in dealing with increased physical pain, unwilling dissolution of his first marriage and recent second marriage with teenage children problems, along with unresolved grief from the death of his mother and the last close member of his family, all of which combined to cause him to feel overwhelmed, cynical, irritable, and emotionally detached while also developing a capacity to avoid and become less productive, which was a significant impairment. Citations from the transcript to support this mitigating factor are

in Respondent's Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions, filed with the Supreme Court on November 19, 2021, pages 46-50.

(4) Timely Good Faith Effort to Make Restitution of Rectify Consequences of Misconduct

There is credible evidence within the transcript to support the HPS's finding that Respondent had made timely good faith efforts to make restitution and/or rectify consequences of his misconduct. In the Loretta construction case, Respondent helped the clients obtain a $242,000.00 settlement, which exceeded the $170,000.00 they paid for the home in a claim against an uninsured contractor with limited assets. [Transcript, Day 1 at 21-39] [Transcript, Day 3 at 104 and 110] In the Staud case, Respondent cooperated with his malpractice insurance paying $90,000.00 for very limited damages. [Transcript, Day 3 at 137-138] In the Shahan/Dukich case, the client received $150,000.00 from Respondent's malpractice carrier and kept more than one-sixth of the acreage. [Transcript, Day 1 236] In the Cogar case, Respondent offered to take the case on a contingency fee basis after the client said she could not afford to pay more than the $3,500.00 retainer. [Transcript, Day 3 at 159] In the Moyle case, Respondent's malpractice carrier paid in excess of $100,000.00 for a Worker's Compensation discrimination case that was questionable. [Transcript, Day 3 at 163] Further citations from the transcript to support this mitigating factor are in Respondent's Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions, filed with the Supreme Court on November 19, 2021, pages 51-54.

(5) Full and Free Disclosure to the Disciplinary Board or Cooperative Attitude Towards Proceedings

Respondent willingly sought help through counseling and obtaining law office management assistance. Additionally, Respondent and Counsel have worked amiably and cooperatively with Counsel for the Office of the Lawyer Disciplinary Counsel in the

exchange of discovery materials and reaching an agreement on the admissibility of voluminous exhibits and in admitting and stipulating significant factual assertions and numerous violations thereby significantly reducing work for counsel for the Office of Lawyer Disciplinary Counsel and hearing time for the HPS. Further citations from the transcript to support this mitigating factor are in Respondent's Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions, filed with the Supreme Court on November 19, 2021, pages 54-56.

(7) Character or Reputation

There is credible evidence in the transcript to support the HPS's findings regarding Respondent's good character and reputation. Judge James Matish, Judge Michael Aloi, Carl Hadsell, Robert Edmundson, and Dr. Kelly Nelson established in whole or in part that Respondent was and is an excellent attorney who took on many difficult cases that other lawyers would not touch. He took cases regardless of whether they would be financially rewarding because he felt the clients needed help, even though the cases were outside of his field of expertise, the problems that Respondent had were limited to a short period of years, and that he has made a remarkable turnaround since seeking help and rehabilitation. Respondent enjoys a good reputation in the community and provides much needed services to clients whose cases would most likely not be pursued. Further citations from the transcript to support this mitigating factor are in Respondent's Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions, filed with the Supreme Court on November 19, 2021, pages 56-61.

(8) Physical or Mental Disability or Impairment

There is credible evidence in the transcript to support HPS's finding of a physical or mental disability or impairment.

A mental disability is considered mitigating when: (1) there is medical evidence that the attorney is affected by a mental disability; (2) the mental disability caused the misconduct; (3) the attorney's recovery from the mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely. Lawyer Disciplinary Board v Hart, 241 W.Va. 69, 818 S.E.2d 895 (2018)

(1) there is medical evidence that the attorney is affected by a mental disability

Robert Edmundson, Dr. Kelly Nelson, and Respondent all provided testimony that Respondent was suffering from depression and an adjustment disorder that has features of depression and anxiety. Additionally, Respondent was suffering from a progressive debilitating ankle injury that took a toll on him physically and emotionally. Respondent had suffered a smashed ankle and a compound fracture of the left knee as well as a separation of his pelvis in three places after being struck by a drunk driver around the time of his high school graduation. These injuries have produced progressive and debilitating life-long pain. Additionally, beginning in 2012, Respondent suffered two rotator cuff injuries that required surgery. Further citations from the transcript to support this mitigating factor are in Respondent's Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions, filed with the Supreme Court on November 19, 2021, pages 61-66.

(2) the mental disability caused the misconduct

There is credible evidence in the transcript to support HPS's finding that Respondent's mental disability caused the misconduct. Robert Edmundson and Respondent supplied testimony that Respondent had not engaged in this activity before the combination of all the factors combined over a couple year period. These factors and some of the

individuals in some cases he was involved with and how he reacted to those individuals just contributed to a degree of impairment to him, causing him to do things differently than he had done or was used to doing. [Transcript, Day 2 at 3-12]

Respondent's stresses, depression and big work load combined so that it was more difficult for him to react, handle and communicate with difficult clients/cases. [Transcript, Day 2 at 133] He did a lot of avoiding, which is one of the features of burnout, depression, and grief. [Transcript, Day 2 at 129] Compassion fatigue has many features of what Robert Edmundson saw in Respondent from being overworked. Burnout causes people to lose resilience and makes it hard to push through some things, causing a sense of being overwhelmed. [Transcript, Day 2 at 142-143] [See Respondent's Exhibits 1, 2, 3 and 4] Robert Edmundson felt that there was a period of acuteness that Respondent ran through where he was not able to follow through and it was a manner of avoiding unpleasant things. [Transcript, Day 2 at 154]

During this period, Respondent stated that if he did not believe in somebody and their sincerity then it became difficult for him to function. [Transcript, Day 2 at 237] With regards to the Loretta case, Respondent simply felt like no matter what he did, he was not able to get anything sorted out. [Transcript, Day 3 at 102] In general, he said that it was "too hard to do this if you don't have some empathy for the people that you represent, and you've got to feel like they – at least to some extent – reciprocate that." [Transcript, Day 3 at 167]

The testimony and exhibits demonstrated that the combined effects of unresolved grief, worsening physical condition, change in family circumstances, and loss of empathy for clients with questionable sincerity produced depression, PTSD, and compassion fatigue, all of which caused Respondent to avoid the clients in whom he had lost faith, resulting in

the violations to which he has stipulated. Further citations from the transcript to support this mitigating factor are in Respondent's Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions, filed with the Supreme Court on November 19, 2021, pages 66-68.

(3) the attorney's recovery from the mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation

Respondent attended counseling with Robert Edmundson on a weekly basis. Additionally, he hired an outside consultant, Carl Hadsell, to evaluate his office processes in order to distribute some responsibilities to others in order for him to process his client's cases. Moreover, calendaring and other processes have been improved to ensure hearings and other deadlines are not missed. Mr. Hadsell indicated that the office has improved in the area of keeping track of times and deadlines and certainly thinks Respondent has improved in being aware of time and meeting deadlines. [Transcript, Day 2 at 85] Mr. Hadsell has also seen changes in Respondent in terms of paying attention to meeting deadlines. [Transcript, Day 2 at 102] Respondent continues to see Robert Edmundson every week. [Transcript, Day 2 at 164] Dr. Kelly Nelson has seen a big change since Respondent began counseling with Robert Edmundson in that Respondent has become more engaged, more social, less irritable and more focused. Respondent testified that he is now able to deal with different expectations from people. [Transcript, Day 2 at 169] More specific excerpts from the transcripts are in Respondent's Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions, filed with the Supreme Court on November 19, 2021, pages 69-71.

(4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely

There is credible evidence in the transcript to support HPS's finding that the misconduct has been arrested and reoccurrence is unlikely. Mr. Hadsell stated that the office is continuing to make improvements and that he has no reservations at all about Respondent being able to handle Vince D'Annunzio's work (one of Mr. Hadsell's clients). [Transcript, Day 2 at 65] Mr. Hadsell has also seen Respondent moving towards being more selective in choosing clients and that he really wants to make changes. [Transcript, Day 2 at 66-68] They have been able to transfer more responsibilities away from Respondent and they have instituted a number of processes for record management. [Transcript 2 at 71-72] Mr. Hadsell indicated that he would be able to perform an audit of his suggestions and recommendations regarding law office management in the future to report what has and has not been implemented. [Transcript, Day 2 at 75-76]

Robert Edmundson stated that Respondent is committed to scrutinizing the cases that are presented to him before he commits himself and that they are identifying and eliminating cases that have the potential to trigger grief and depression. [Transcript, Day 2 at 147-148] Robert Edmundson continues to treat Respondent to deal with stress and feels that his progress is very, very good and that the odds of him falling back into his behaviors is much less. [Transcript, Day 2 at 149] Dr. Kelly Nelson stated that he sees focus, sharpness, interaction and timeliness, and believes the Respondent is capable of professionally serving the public. [Transcript, Day 2 at 182-183]

Respondent testified that he is significantly more selective with clients and has developed better support and is in a much better place emotionally. [Transcript, Day 3 at 169-170] Respondent has not missed any hearings or failed to respond to discovery requests, to file answers to complaints, or to file any counterclaims in the last year and a half.

[Transcript, Day 3 at 170] He now has a weekly calendar that he sees every day to manage deadlines. [Transcript, Day 3 at 171-172] Respondent is getting better at getting back to clients in a timely manner. Instead of just having messages, he has a list that he goes through the next day. [Transcript, Day 3 at 172] Respondent has also been trying to manage client expectations of what he can reasonably do and get done. [Transcript, Day 3 at 174] He now has every file on his iPad and he has much more peace of mind and a much better grip on what's there. [Transcript, Day 3 at 187] Further citations from the transcript to support this mitigating factor are in Respondent's Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions, filed with the Supreme Court on November 19, 2021, pages 71-74.

(10) Interim Rehabilitation

There is credible evidence in the transcript to support HPS's finding that Respondent has successfully engaged in interim rehabilitation. Judge Michael Aloi testified that once Respondent completed his evaluation, he became a real student and started watching and studying things about mental health. [Transcript, Day 2 at 26; 28] He also stated that Respondent was going in the right direction on a number of levels and wanted to continue to do so and that he felt that Respondent was genuine in wanting to do it. [Transcript, Day 2 at 29] Judge Aloi also felt that Respondent had a genuine commitment to making people happy and doing the right thing. [Transcript, Day 2 at 39; 41] Mr. Carl Hadsell also testified that there has been substantial improvement in office procedures and they are continuing to evaluate and improve the same. Further citations from the transcript to support this mitigating factor are in Respondent's Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions, filed with the Supreme Court on November 19, 2021, pages 74-77.

(11) Imposition of Other Penalties or Sanctions

All of the Complainants who suffered financial loss and pursued claims have settled. Dukich and Shahan received $150,000.00 as well as more than one-sixth of the acreage. [Transcript, Day 1 at 236] The Lorettas received $242,000.00. [Transcript, Day 3 at 105] The Stauds received $90,000.00. [Transcript, Day 3 at 138] Mr. Moyle received in excess of $100,000.00. [Transcript, Day 3 at 163]

(12) Remorse

There is credible evidence in the transcript to support HPS's finding that Respondent is remorseful. Judge Michael Aloi, Robert Edmundson, and Respondent all testified to Respondent's expression and feelings of remorse. Specifically, Respondent has said, "I didn't do the order. I should have done the order. I missed the hearing. Those – it shouldn't have happened. It shouldn't have happened. So those are my fault, and they're on me. They're my responsibility." [Transcript, Day 3 at 73] Respondent also stated, "I'm troubled with myself that I would have to be in a position to consider that about myself ... it was never my intent to misrepresent by omission or to lie by omission." [Transcript, Day 3 at 236]

v. Aggravating factors

The HPS did not find any substantial evidence of aggravating factors, even though there is a vague reference to a prior disciplinary offense (2015 investigative panel admonishment). Although, CDC references factor number two (dishonest or selfish motive), Respondent has dealt with the absence of such factor within this brief. [See *Supra* at 22] Interestingly, CDC makes no reference to any citations from the transcript in support of finding such to be an aggravating factor. Although HPS seems to have considered that there

might be a pattern of misconduct, they found that "while these incidents may be characterized as a pattern, it is also clear that they occurred during a time when he was suffering from physical and mental health issues, which he has made substantial strides in overcoming and correcting." The HPS was also "convinced by the evidence that these incidents are not characteristic of his practice but are the exception rather than the rule and that his substantial experience and positive record of performance as an attorney outweigh these incidents, which when put in perspective of his overall career are anomalous." [Report of the Hearing Panel Subcommittee at 53-54] Therefore, although there may be something of a pattern, it has been limited in duration by the time period in which he was suffering from physical and mental impairment.

CDC makes several references to the 53 violations; however, it should be noted that these occurred within six cases, notably, all of these were in litigation. Unfortunately, for those lawyers with an active litigation practice, the same act of failing to comply with a discovery deadline constitutes a violation of Rule 1.1 competence, Rule 1.2(a) diligently pursuing the complainant's case in accordance with stated objectives, Rule 1.3 failure to diligently pursue the case, Rule 1.4 failure to maintain reasonable communication with the client, Rule 3.2 failing to expedite the litigation, Rule 3.4 failure to make reasonable diligent efforts to comply with a legally proper discovery request, and arguably Rule 8.4(d) misconduct that is prejudicial to the administration of justice.

It is not Respondent's intention to minimize the gravity of his misconduct; but rather, to put the same in perspective. Indeed, due to his physical and mental impairment, Respondent failed miserably to represent the client such as in the Loretta and Moyle cases; however, in several of the other cases, Respondent performed substantial work, but

extenuating circumstances and dropping the ball in certain circumstances led to bad results, such as in the Staud, Logar, and Dukich/Shahan cases. In at least one of the cases, the client's expectations for the timely performance of research and due diligence for filing a complicated action were somewhat unreasonable. Nevertheless, in all of these cases, Respondent's failure to communicate with the client was a common thread that could not be justified, but only explained by the mitigating circumstances of his mental and physical impairment.

For all these reasons, the Court should agree with the HPS's conclusion that aggravating factors should not weigh heavily in determining the sanctions for the rule violations.

V. SANCTIONS

The Hearing Panel Subcommittee, which listened to three days of testimony for approximately twelve witnesses has recommended: (a) that Respondent's law license be suspended for a period of two years, provided that the imposition of that suspension is stayed and Respondent placed on a period of three probation and supervised practice; (b) that Respondent must maintain professional liability insurance in the amount of $1,000,000.00; (c) that Respondent should continue in the therapy regime and undergo an independent psychological evaluation to determine his compliance with his therapy regime; (d) that Respondent undergo an audit of his law office to determine if he is compliant with prior directives of the retained office consultant and be ordered to implement any and all additional and necessary changes to his law office management procedures to ensure that the pattern of misconduct is less likely to incur; and (e) that Respondent be ordered to pay for the cost of these proceedings.

The primary difference between the HPS's recommendation and that of CDC's is that the suspension should not be stayed and the Respondent should not be placed on a period of three years' probation and supervised practice. CDC rests its argument that there is a presumption for suspension upon a finding that Respondent "knowingly" violated his duty to his clients, even though it has failed to prove by clear and convincing evidence that Respondent "knowingly violated his duties." The HPS, based upon this failure, concluded that the Respondent's actions were clearly negligent. Further, the HPS did not find Respondent had any intention of harming any of his clients, the legal system, or the profession. Nevertheless, Respondent has consented to the recommended sanctions by the HPS. However, CDC completely ignores the mitigating factors in this case after not having contested those findings by HPS. Nor did CDC present any evidence to challenge the evidence upon which the HPS based its findings of mitigation. The ABA Model Standards recognize that there will be particular cases of lawyer misconduct that are not easily categorized and that the standards are not designed to impose a specific sanction for each of the myriad of fact patterns in cases of lawyer misconduct. More particularly, they state "the ultimate sanction imposed will depend on the presence of any aggravating and mitigating factors in that particular situation. The standards thus are not analogous to criminal determinate sentences, but are guidelines to give courts the flexibility to select the appropriate sanction in each particular case of lawyer misconduct." [ABA Model Standards for Imposing Lawyer Sanctions, preface approved February 1986 and as amended, February 1992] Therefore, it is clear that once an initial sanction is determined based upon the conduct, consideration of mitigating factors should be applied to determine the ultimate sanction.

There can be no question that based upon the uncontroverted evidence, the HPS correctly concluded that in addition to the many other mitigating factors established in favor of the Respondent, that Respondent has a mental health condition that, when untreated, could impair and or impact his ability to practice law and the evidence established that this condition was a substantial cause of the misconduct. Moreover, if the Respondent continues with his course of treatment, his prognosis is good and as such, the recurrence of the pattern of misconduct attributable to his impairment will be unlikely. These are the elements required by the Scott and Hart decisions. [Report of the Hearing Panel Subcommittee at 52]

These findings of fact should be given great deference by this Court in determining the ultimate sanction. The HPS's recommendation for a stay of the suspension conditioned upon three years of successful probation is supported by ABA Model Rule 10, which states that probation is the appropriate sanction when the Respondent can perform legal services, but has problems that require supervision. Probation should be used only in those cases where there is little likelihood that the Respondent will harm the public during the period of rehabilitation and the conditions of probation can be adequately supervised. HPS recommended the conditions of supervision in terms of therapy, evaluation, office auditing and supervision that will ensure that there is little likelihood that the public will be harmed during the period of rehabilitation. CDC has not challenged that finding and, indeed, has adopted most of it in its recommendations, albeit, during or after the suspension.

Of course, being a sole practitioner, the Respondent will have no law office after a two-year suspension. He will be forced to find other employment to support his wife and child. His clients, many of whom are paying for representation in litigation on an hourly basis, will be forced to procure legal representation in pending cases which in and of itself

will be extraordinarily difficult and, depending on the type of case, may be impossible. If they are able to procure legal representation, they will be forced to pay substantial sums so that new counsel can get up to speed on their case. Contrary to CDC's assertions, the granting of three-year supervised probation will not cause any public outcry, nor will it harm the legal profession or the administration of justice. Everyday abuse and neglect cases cause far more difficulty for the administration of justice than do these matters.

CDC tries to surreptitiously avoid the mitigating factors analysis by arguing that there must be continuity with the Court's prior administration of sanctions, yet it ignores one of the few cases decided on very similar circumstances. Lawyer Disciplinary Board v Dues 218 W.Va. 104, 624 S.E.2d 125 (2005)

The main mitigating factor considered by the HPS in recommending sanctions was Respondent's mental disability. "In a lawyer disciplinary proceeding, a mental disability is considered mitigating when: (1) there is medical evidence that the attorney is affected by a mental disability; (2) the mental disability caused the misconduct; (3) the attorney's recovery from the mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely. Syl. pt. 3., Lawyer Disciplinary Board v. Dues, 218 W. Va. 104, 105, 624 S.E.2d 125, 126 (2005).

In Dues, the Court determined the suspension of an attorney's law license was not appropriate in a situation very similar to Respondent where the attorney's mental disability was considered a mitigating factor. The Dues case involved 39 violations of the Rules of Professional Conduct relating to Eleven Charges (as compared to Seven for Respondent) for similar conduct to Respondent. Mr. Dues had physical problems that led to severe

depression, for which he engaged in psychiatric treatment, and the severe depression "interfered with his functioning as an attorney during the times in question of most of the complaints." *Id.* at 111, 132.

Just like Dues, Respondent established by medical evidence that he has a mental disability that, when untreated, could impair and/or impact his ability to practice law, and his legal deficiencies were directly connected to his mental disability. Respondent was diagnosed with adjustment disorder with features of depression and anxiety, along with chronic pain. Respondent obtained treatment for his mental disability, including work with a therapist that has made a "significant difference," and he retained a consultant to assist with improving the operation of his law practice. According to the HPS, "[a] substantial time has passed since [the filing of the complaints] with corrective actions and treatment on his part and we find that he is a good candidate for a period of probation and supervised practice." [Report of the Hearing Panel Subcommittee at 54]

Like in Dues, the Court should afford the greatest weight to Respondent's mental disability as a mitigating factor, and follow the sanction recommendation of the HPS. Mr. Due's mental disability was afforded the "greatest weight" where he presented "unchallenged medical evidence that his legal deficiencies were directly connected to the serious depression that flowed from his physical problems." *Id.* at 113, 134. The Court stated that Mr. Dues was "the victim of a mental disease that 'the legal community has been slow to recognize . . . as a legitimate disease that merits attention.'" *Id.* (citing Todd Goren & Bethany Smith, "Depression as a Mitigating Factor in Lawyer Discipline," 14 Geo. J. Legal Ethics 1081, 1082 (2001)).

CDC does not challenge or object to the medical evidence presented by Respondent, or the finding of mental disability by the HPS, when opposing the HPS's recommendation of a sanction less severe than suspension. CDC simply downplays the mitigating effect of Respondent's mental disability, stating that the HPS's recommendation "does nothing to encourage our fellow bar members to seek help at the earliest possible moment for conditions that may cause impairment." [Brief of the Office of the Lawyer Disciplinary Counsel at 51] This argument fails to account for the Court's proactive policy in dealing with mental health, as stated in Dues, and is at odds with the HPS's finding about Respondent's substantial corrective action and treatment for his mental disability.

CDC also argues that the mitigation factor of mental disability should be given "great weight," but not "the greatest weight" because the HPS described the mental disability as "a substantial cause of the misconduct." In making this distinction, the CDC relies on the text of the ABA Model Rules instead of the manner in which the Court interpreted how Mr. Dues mental disability was directly connected to his legal deficiencies. The circumstances under which the mental disability affected the misconduct is the same with Mr. Dues as it is with Respondent, and there is no reason to diminish the mitigation findings of the HPS based on the particular phrases it used to show that the mental disability was connected to the misconduct. Regardless of "great weight" or "the greatest weight" the HPS's recommendation was consistent with Dues.

Furthermore, CDC fails to cite any West Virginia case law in which the Court imposes a suspension of the attorney's license for similar violations of the Rules of Professional Conduct where it finds a mental disability as a mitigating factor. In its brief, the Office of Disciplinary Counsel argues that a litany of cases "concerning such misconduct

have resulted in the suspension of an attorney's license" even though these cases differ from the circumstances and mitigating factors at issues with Respondent. [Brief of the Office of the Lawyer Disciplinary Counsel at 49-50]; See Lawyer Disciplinary Board v. Sirk, 240 W. Va. 274, 282, 810 S.E.2d 276, 284 (2018) (three-year suspension where attorney misused client funds, engaged in subsequent misconduct, and had no mental disability mitigation); see Lawyer Disciplinary Board v. Morgan, 228 W. Va. 114, 717 S.E.2d 898 (2011) (one-year suspension where attorney knowingly commingled funds and had no mental disability mitigation); see Lawyer Disciplinary Board v. Aleshire, 230 W. Va. 70, 736 S.E.2d 70 (2012) (three-year suspension where attorney knowingly accepted money for the purchase of property and failed to deliver the deed due to a dispute over legal fees, where the complaints involved aggravating factors including dishonesty, selfish motives, failure to cooperate and refusal to acknowledge wrongdoing, and no mental disability mitigation); see Lawyer Disciplinary Board v. Sullivan, 230 W. Va. 460, 740 S.E.2d 55 (2013) (30-day suspension where public defender failed to respond to client to correct a criminal sentencing order date, had been reprimanded five previous times for similar conduct, and no mental disability mitigation); see Lawyer Disciplinary Board v. Rossi, 234 W. Va. 675, 769 S.E.2d 464 (2015) (three-year suspension where attorney failed to follow investigative panel's directive that he contact the Lawyer Assistance Program to address depression issue and the Court determined depression was not a mitigating factor where it was not supported by medical evidence); see Lawyer Disciplinary Board v. Hart, 235 W. Va. 523, 538, 775 S.E.2d 75 (2015) (three-year suspension where aggravating factors including lack of remorse and indifference to making restitution, failure to cooperate in disciplinary proceedings, and no evidence of mental disability or that the disability caused the misconduct because "it appears

that Mr. Hart never sought treatment"); see Lawyer Disciplinary Board v. Sturm, 237 W. Va. 115, 785 S.E.2d 821 (2016) (90-day suspension for failure to file habeas petition and failure to file a criminal appeal where there was no mental disability as a mitigating factor); see Lawyer Disciplinary Board v. Palmer, 238 W. Va. 688, 798 S.E.2d 610 (2017) (30-day suspension for failure to file timely habeas petition and Losh checklist where conduct was knowing, prior misconduct occurred, and no mental disability as a mitigating factor).

Simply put, the most applicable case law is the Dues case, and its analysis of mental disability as a mitigating factor. The Dues case is consistent with the recommendation of the HPS that the sanction not include suspension of Respondent's law license.

As stated by CDC, "Discipline is imposed not to punish, but to safeguard the administration of justice, protect the public, the courts, the profession, and deter future misconduct." [Brief of the Office of the Lawyer Disciplinary Counsel at 49]

In closing, this Court should give substantial deference to and adopt the findings of the HPS wherein it states,

> The Respondent has a long history of being able competently practice law. He has contributed much more to the practice of law and to the profession than he has harmed it and he has been practicing law since the filing of these complaints without incident. While these incidents may be characterized as a pattern, it is also clear that they occurred during a time when he was suffering from physical and mental health issues which he has made substantial strides in overcoming and correcting. We are convinced by the evidence that these incidents are not characteristic of his practice but are the exception rather than the rule. In fact, his substantial experience and positive record of performance as attorney out way these incidents which when put in perspective of his overall career are anomalous. Nor are we convinced that a suspension of his license is necessary in order to correct his behavior or protect the public at this time. We find little utility in suspending his license to practice law when he has taken substantial steps to correct the problems which led to these incidents and has been actively and successfully practicing law since the filing of these complaints. A substantial time has passed since then with corrective actions and treatment on his part and

we find that he is a good candidate for a period of probation and supervised practice.

[Report of the Hearing Panel Subcommittee at 53-54]

Respectfully submitted,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LAWYER DISCIPLINARY BOARD,

Petitioner,

vs. **No. 20-0233**

GREGORY H. SCHILLACE,

Respondent.

CERTIFICATE OF SERVICE

I, Timothy J. Manchin, Counsel for Respondent, Gregory H. Schillace, do hereby certify that I have this 3rd day of June, 2022, served a copy of the foregoing "Brief of the Respondent" by forwarding the same via U.S. Mail, First class to the following address:

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