IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In Re: JEFFERY A. DAVIS, a member of The West Virginia State Bar

Bar No.: 6247
Supreme Court No.: 20-0871
I.D. No.: 18-05-547

REPORT OF THE HEARING PANEL SUBCOMMITTEE

I. PROCEDURAL HISTORY

Formal charges were filed against Jeffery A. Davis (hereinafter "Respondent") with the Clerk of the Supreme Court of Appeals (hereinafter "Supreme Court") on or about November 4, 2020, and served upon Respondent via certified mail by the Clerk on November 12, 2020. Disciplinary Counsel filed her mandatory discovery on or about December 2, 2020. Respondent provided his Answer to the Statement of Charges on or about December 12, 2020[1]. Respondent failed to provide his mandatory discovery, which was due on or before January 4, 2021. Disciplinary Counsel then filed a "Motion to Exclude Testimony of Witnesses And Documentary Evidence or Testimony of Mitigating

[1] On April 7, 2021, Rhonda L. Harsh, Chairperson of the Hearing Panel Subcommittee, advised Office of Lawyer Disciplinary Counsel that she did not have a copy of Respondent's Answer to the Statement of Charges. The hearing assistant checked with the Supreme Court Clerk's Office and was advised that the Answer had not been filed with the Court. Respondent was advised at the April 8, 2021 prehearing that he needed to file his Answer with the Supreme Court. On June 24, 2021, the hearing assistant again checked with the Supreme Court Clerk's Office to see if the Answer had been filed, it had not. It is noted that Respondent was provided with the Prehearing Procedures and Scheduling Notice on November 2, 2020, and it advised that all filings were to be made with the Supreme Court, and copies to be sent to the Hearing Panel Subcommittee and opposing counsel. Further, Rule 2.12 of the West Virginia Rules of Lawyer Disciplinary Procedure states that "pleadings shall be filed by the respondent with the Clerk of the Supreme Court of Appeals and the Office of Disciplinary Counsel . . ."

Factors" on January 27, 2021. On February 10, 2021, Respondent sent his "Response to Motion to Exclude Testimony of Witnesses and Documentary Evidence or Testimony of Mitigating Factors"[2] asserting that his witnesses and evidence was the same as that provided by Office of Lawyer Disciplinary Counsel (hereinafter "ODC"). A telephonic prehearing was held on February 19, 2021, with the following rulings: (1) the Hearing Panel Subcommittee granted ODC's motion, but ruled that Respondent would be allowed to question ODC's witnesses and present his own testimony; and (2) a conflict arose for a Panel member for the March 5, 2021 hearing date, Respondent waived the 120 day deadline to hold the hearing and the hearing was rescheduled for April 14, 2021.

Thereafter, this matter proceeded to hearing in Charleston, West Virginia, on April 14, 2021. The Hearing Panel Subcommittee (hereinafter "HPS") was comprised of Rhonda L. Harsh, Esquire, Chairperson; Gail T. Henderson Staples, Esquire; and Loretta Sites, Layperson. Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel, appeared on behalf of the ODC. Respondent appeared *pro se*. The HPS heard testimony from Luanne Rucker, Denver Rucker and Respondent. In addition, ODC Exhibits 1-21 and Joint Exhibit 1 were admitted into evidence.

Based upon the evidence and the record, the HPS of the Lawyer Disciplinary Board hereby makes the following Findings of Fact, Conclusions of Law and Recommended Sanctions regarding the final disposition of this matter.

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[2] On June 24, 2021, the hearing assistant checked with the Supreme Court Clerk's Office to see if the Response to Motion to Exclude had been filed, it had not.

II. FINDINGS OF FACT

1. Respondent is a lawyer practicing in Spencer, which is located in Roane County, West Virginia. Hrg. Trans.77. Respondent, having passed the bar exam, was admitted to The West Virginia State Bar on May 5, 1993. Hrg. Trans. 76-77. As such, Respondent is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.

COUNT I
I.D. No. 18-05-547
Complaint of Denver Rucker

2. On or about November 7, 2017, Denver Rucker (hereinafter "Complainant") was indicted for manufacturing a Schedule I controlled substance; three counts wanton endangerment with a firearm; use or presentation of a firearm during commission of a felony; illegal possession of destructive devices, explosive materials or incendiary devices; four counts of causing death or injury; and four counts of wanton endangerment involving destructive devices, explosive materials or incendiary devices in the Clay County Circuit Court Case No. 17-F-44. ODC 15, Bates 151-155.

3. On or about November 14, 2017, an arraignment hearing was held in Complainant's case, and Respondent represented him as his counsel at that hearing. ODC 15, Bates 178-179.

4. On or about February 7, 2018, Complainant entered a guilty plea to manufacturing a Schedule I controlled substance, one count of wanton endangerment with a

firearm, and one count of wanton endangerment involving destructive devices, explosive materials or incendiary devices. ODC 15, Bates 180. The rest of the counts from the indictment were dismissed pursuant to the plea agreement. ODC 15, Bates 181.

5. On or about March 19, 2018, Complainant was sentenced to one to five years for manufacturing a Schedule I controlled substance, five years for wanton endangerment with a firearm, and two to ten years for wanton endangerment involving destructive devices, explosive materials or incendiary devices. Complainant was credited for 580 days. ODC 15, Bates 186-188. The sentencing Order noted that Complainant was advised on his right to appeal. ODC 15, Bates 187.

6. On or about October 16, 2018, Complainant filed a letter with the Clay County Circuit Clerk asking if Respondent had filed a motion for reconsideration and requesting a copy of the motion along with the docket sheet showing the filing. ODC 15, Bates 189. The letter also noted that communication had broken down between Complainant and Respondent. Id.

7. On or about December 6, 2018, Complainant filed an ethics complaint against Respondent. ODC 1, Bates 1-3. Complainant alleged Respondent had failed to provide his client file after Complainant requested the client file. ODC 1, Bates 2-3. Complainant provided a copy of an October 23, 2018 letter from Complainant to Respondent about Respondent's failure to file a motion for reconsideration and to file for the return of Complainant's property and non-contraband items. ODC 1,

Bates 3. Complainant indicated that these requests were not shown on his docket sheet despite the fact that Respondent had told Complainant's wife that the motion for reconsideration had been filed, and had also told Complainant that he was going to file for the return of the property. Id. The letter also requested a copy of the client file. Id.

8. On or about January 14, 2019, Respondent filed a response to the ethics complaint. ODC 3, Bates 6-8. Respondent stated he was retained to represent Complainant for the indictment and that the case was resolved by the plea agreement. ODC 3, Bates 6. Respondent said Complainant was denied any alternative sentence and was sentenced to the penitentiary. Id. Respondent stated that he spoke with Complainant and his wife about a motion for reconsideration and the return of items of personal property that were seized during the arrest. Id. Respondent noted Complainant was in poor health due to the explosion that resulted in some of his felony charges. Id. Respondent said he did not have direct contact with Complainant after the sentencing hearing, but spoke with his wife on a weekly basis about a possible motion for reconsideration and the return of personal property. Id.

9. Respondent stated he received a letter in October of 2018 that was purportedly from Complainant requesting his client file. ODC 3, Bates 6-7. Respondent said he had been in contact with the Clay County Prosecutor's Office about the return of the personal property, and they were trying to correlate the return of the property, but the state police commander was on leave. ODC 3, Bates 7. Respondent stated

that Complainant's wife advised him that Complainant's health had declined and he was in the hospital. Id. Respondent said he "decided that a Motion for compassionate release based upon his health issues was a better option than a Motion to Reconsider." Id. Respondent indicated that he was not in a rush to send Complainant his client file because he wanted to finish the motion and to retrieve Complainant's property. Id.

10. On or about March 5, 2019, Complainant filed a reply. ODC 6, Bates 14. Complainant stated that Respondent was not available when Complainant's wife attempted to return his telephone calls. Id. Complainant said his wife was told that Respondent would return the telephone call, but that never happened. Id. Complainant stated he still had not received his client file, and believed Respondent could make a copy of the client file in order to keep working on the case and return the file to Complainant. Id. Complainant denied being provided a copy of the Motion for Compassionate Release. Id.

11. On or about April 10, 2019, Respondent filed a "Motion," which stated that Complainant was "suffering from AFib, congestive heart failure, and most recently lung cancer. ODC 15, Bates 192-193. Due to the recent diagnosis and treatment for the aforementioned lung cancer, [Complainant] must undergo surgery." ODC 15, Bates 192. The Motion requested the court to reduce or modify the sentence against Complainant. Id.

12. On or about April 11, 2019, the Clay County Circuit Court denied the Motion based upon the motion not being timely filed as required by Rule 35(b)[3] of the West Virginia Rules of Criminal Procedure. ODC 15, Bates 190-191. Further, it stated the Court had previously denied Complainant's motion to reconsider. ODC 15, Bates 190.

13. On or about June 21, 2019, Respondent sent correspondence to Disciplinary Counsel indicating that Complainant's client file had been sent to Complainant. ODC 10, Bates 36. Also, on or about June 21, 2019, Respondent sent correspondence to Complainant informing him that the Clay County Circuit Court had denied his Motion without a hearing. ODC 10, Bates 37. Respondent stated in the letter that he filed the motion due to medical conditions that arose after the 120 day time limit required by Rule 35(b). Id.

14. On or about June 30, 2019, the Clay County Circuit Court entered an Amended Order Denying Motion to Reconsider Sentence, stating that the April 11, 2019 Order "erroneously set forth that a motion to reconsider had been previously filed, . . ." ODC 15, Bates 194-195.

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[3] West Virginia Rules of Criminal Procedure.

Rule 35. Correction or reduction of sentence.

Correction of sentence. – The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time period provided herein for the reduction of sentence.

Reduction of sentence. – A motion to reduce a sentence may be made, or the court may reduce a sentence without motion within 120 days after the sentence is imposed or probation is revoked, or within 120 days after the entry of a mandate by the supreme court of appeals upon affirmance of a judgment of a conviction or probation revocation or the entry of an order by the supreme court of appeals dismissing or rejecting a petition for appeal of a judgment of a conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision

15. On or about July 1, 2019, Disciplinary Counsel sent Complainant a letter asking if he signed a retainer agreement with Respondent and, if so, to provide a copy of the same. ODC 11, Bates 87. Further, Complainant was asked if he received the property and contraband items that he wanted Respondent to file to recover for him. Id.

16. On or about July 17, 2019, Complainant wrote that Respondent was going to file for a return of property and non-contraband motion with the court, but failed to do so. ODC 12, Bates 96.

17. On or about July 22, 2019, Disciplinary Counsel wrote to Complainant asking if he recalled signing a retainer agreement with Respondent. ODC 13, Bates 148. Disciplinary Counsel also wrote Respondent on or about July 22, 2019, asking if he had a written fee agreement with Complainant, and to provide a copy of it if one existed, or to explain why there was not one as it has been required since January 1, 2015. ODC 14, Bates 149.

18. On or about July 24, 2019, Complainant provided receipts for Respondent's representation of him. ODC 16, Bates 196-197. One receipt was dated February 15, 2017, and was for $1,000.00. ODC 16 Bates 197. The second receipt was dated January 11, 2018, and was for $6,000.00. Id. Below the copy of the two receipts was a hand written note saying "no written agreement." Id. Complainant also provided a copy of a recent news article that noted Respondent had been suspended 30 days on June 17, 2019. ODC 16, Bates 198.

19. Respondent failed to respond to Disciplinary Counsel's July 22, 2019 letter. ODC 17, Bates 199. Another letter was sent to Respondent on or about August 27, 2019, by certified and regular mail, asking for him to respond by September 5, 2019. Id. Respondent signed the green card, and it was returned to ODC on August 30, 2019. ODC 17, Bates 200.

20. On or about September 4, 2019, Respondent filed a response, noting that he mailed Complainant the entire client file, less his personal notes. ODC 18, Bates 201. Respondent could not locate an employment contract, even after searching his office. Id. Respondent stated he remembered the contract had been signed by Complainant and his wife while Complainant was hospitalized. Id. Respondent provided a blank contract that he would have used in that kind of case. ODC 18, Bates 202.

III. CONCLUSIONS OF LAW

These conclusions of law are based upon the record presented and are fully supported by the clear and convincing standard. Respondent's misconduct involves several rules set forth in the Rules of Professional Conduct.

21. Respondent failed to timely file a motion for reconsideration and motion to return property for Complainant in violation of Rules 1.3 and 8.4(d) of the Rules of Professional Conduct, which provides as follows:

> **Rule 1.3. Diligence.**
> A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 8.4. Misconduct.
It is professional misconduct for a lawyer to:

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

22. Respondent failed to communicate with Complainant about the Motion to reconsider in violation of Rule 1.4 of the Rules of Professional Conduct, which provides as follows:

Rule 1.4. Communication.
(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0 (e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

23 Respondent failed to have a written fee agreement with Complainant in violation of Rule 1.5(b) of the Rules of Professional Conduct, which provides as follows:

Rule 1.5. Fees.
(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a

> reasonable time after commencing to the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client in writing.

24. Respondent failed to respond to Disciplinary Counsel's letter in violation of Rule 8.1(b) of the Rules of Professional Conduct, which provides as follows:

> **Rule 8.1. Bar Admission and Disciplinary Matters.**
> . . . [A] lawyer . . . in connection with a disciplinary matter, shall not:
> (a) knowingly make a false statement of material fact; or
> (b) . . . knowingly fail to respond to a lawful demand for information from . . . disciplinary authority . . .

IV. DISCUSSION

The Supreme Court of Appeals of West Virginia has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but also to protect the public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard its interests in the administration of justice. Lawyer Disciplinary Board v. Taylor, 192 W.Va. 139, 451 S.E.2d 440 (1994). Factors to be considered in imposing appropriate sanctions are found in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure. These factors consist of: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. *See also*, Syl. Pt. 4, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998).

A. Respondent violated duties to his client, to the legal system, and to the legal profession.

In determining the nature of the ethical duties violated, the standards assume that the most important ethical duties are those obligations which a lawyer owes to clients. Lawyers also owe duties to the legal system. Lawyers are officers of the court, and must abide by the rules of substance and procedure which shape the administration of justice. Lawyers must always operate within the bounds of the law, and cannot engage in any other illegal or improper conduct. Finally, lawyers owe duties to the legal profession. Unlike the obligations mentioned above, these duties are not inherent in the relationship between the lawyer and the community. These duties do not concern the lawyer's basic responsibilities in representing clients, serving as an officer of the court, or maintaining the public trust, but include other duties relating to the profession. The evidence in this case establishes by clear and convincing proof that Respondent violated his duties owed to his clients, the legal system, and the legal profession.

Respondent represented Denver Rucker in a criminal matter that involved several felony charges. After Mr. Rucker entered into the plea agreement and was sentenced, Respondent failed to communicate with the Ruckers about property being returned and a reconsideration motion. Hrg. Trans. 11-13, 53, 55-56. Respondent missed the time frame to file a reconsideration motion, and his failure to communicate with Mr. Rucker left his client without any knowledge of what was going on in the matter. ODC Ex. 15, Bates 194-195. Respondent admitted that he never spoke directly to his client, Mr. Rucker, after sentencing. Hrg. Trans. 112-113. Luanne Rucker, Denver Rucker's wife, testified that she

informed Respondent about the possibility of a compassionate release due to Mr. Rucker's health issues. Hrg. Trans. 17-18, 30. However, Respondent never informed the Ruckers that he filed the motion. Hrg. Trans. 18, 56, 119-120. The "motion for compassionate release" asked the court to reduce or modify the sentence, something that is covered under Rule 35 of the West Virginia Rules of Criminal Procedure. ODC Ex. 15, Bates 192-193. Respondent also failed to inform his client that the motion had been denied by the court. Hrg. Trans. 121. Respondent's testimony that he wanted to wait to file the motion for compassionate release for when Mr. Rucker was "at his worst" was disingenuous, as there is no way to know when Mr. Rucker would be at his worst, which Respondent admitted to at the hearing. Hrg. Trans. 145, 153. Respondent never filed a motion to return personal property to the Ruckers despite numerous requests that he do so. Hrg. Trans. 23, 55. Further, Respondent admitted he received a letter in October of 2018 requesting the client file, but he failed to provide the client file then, and still failed to provide it even after the ethics complaint was filed alleging failure to provide the client file. Hrg. Trans. 115. It took Respondent until June of 2019 to provide the client file. Hrg. Trans. 123.

The legal system requires attorneys to not engage in conduct that is prejudicial to the administration of justice. By failing to timely file a motion for reconsideration and a motion to return property, Respondent engaged in conduct that was prejudicial to the administration of justice. The motions were never properly file, and the ruling thereon was not based on the merits. The "motion for compassionate release" was denied without a hearing because the court took it as a motion for reconsideration and found it to be filed

outside the time frame to file such a motion. The possible return of property was never addressed by the court because Respondent failed to file this motion. The failure to properly bring these motions before the court, either timely or even at all, deprived Mr. Rucker of the opportunity to have his issues fully heard. There certainly can be no justice when the matters are not properly brought before the court.

Respondent also failed to have the Ruckers sign a fee contract with him. Hrg. Trans. 10-11, 5821. Mrs. Rucker testified that she paid Respondent a total of $10,000.00. Hrg. Trans. 39, 58. While Mrs. Rucker has receipts for $7,000.00 of the money that was paid to Respondent, she failed to get a receipt for the remaining $3,000.00 she paid him in court one day. Hrg. Trans. 39-40. Respondent testified that he never put into writing a fee agreement with Mr. Rucker, but said he recalled doing so with Mrs. Rucker. Hrg. Trans. 96-97. However, Respondent did not have a copy of the written fee agreement. Hrg. Trans. 98. While Respondent did not recall receiving the $3,000.00 from Mrs. Rucker, he did not dispute it and acknowledged the receipts showing he was also paid $7,000.00. Hrg. Trans. 99-100.

ODC did send Respondent one additional letter to get him to respond to a demand for information. ODC Ex. 7, Bates 15-17. Lawyers are required to respond timely to Disciplinary Counsel, and Respondent had to be sent additional letters to get a response to questions about his misconduct. The legal profession suffers when lawyers fail to timely participate in a disciplinary investigation properly.

B. Respondent acted knowingly.

The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his conduct, but without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

Respondent acted knowingly in failing to diligently file pleadings, failing to communicate with Mr. Rucker, failing to obtain a written fee agreement, and failing to respond to disciplinary counsel. The testimony and evidence provided in this matter show that while Respondent continually indicated that he would file the pleadings, he did not do so. Respondent should have filed the pleadings the first time that Mr. Rucker brought up the issue, but he failed to do so. His failures continued even after Mrs. Rucker questioned him about the motions on different occasions. The failure to respond to Disciplinary Counsel had to be knowingly, as Respondent has a documented history of failing to respond to Disciplinary Counsel. Regarding his failure to have a written fee agreement, it has been a requirement in the Rules of Professional Conduct since January of 2015 to have a written fee agreement. Respondent could not produce a written fee agreement when ODC requested a copy, and both of the Ruckers denied ever signing a fee agreement with Respondent. Lastly, Respondent has been sanctioned with multiple

admonishments from the Investigative Panel of the Lawyer Disciplinary Board, and suspended for thirty days for failing to respond to ODC by the Supreme Court, so Respondent is well aware of his requirement and duty to respond to ODC.

C. The amount of real injury is great.

Injury is harm to a client, the public, the legal system, or the legal profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury. A reference to "injury" alone indicates any level of injury greater than "little or no" injury. "Potential injury" is the harm to a client, the public, the legal system or legal profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

Mr. Rucker was injured because he never had the opportunity for the merits of a reconsideration motion to be considered by the court because Respondent improperly filed a motion, which was denied without hearing due to it being filed beyond the time frame required by the Rules of Criminal Procedure. Also, as the motion to return property was never filed and, again, Mr. Rucker never had the opportunity to present his arguments of the merits of that motion.

The legal profession was also injured by Respondent's misconduct. Mrs. Rucker testified that she was at her lowest point going through the criminal and medical issues with her husband, and she needed to rely on Respondent. Hrg. Trans. 22-23. However, Respondent never gave Mrs. Rucker the support she needed to see the light at the end of the tunnel. Id. Mrs. Rucker was at a loss as to what was going on in the case until she

hired new counsel. Hrg. Trans. 24. Mr. Rucker stated his experience with Respondent left "a bad taste in [his] mouth." Hrg. Trans. 59. Clearly, Respondent's client, the legal system, and the legal profession were injured by Respondent's misconduct.

D. The existence of any aggravating factors.

Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Court to examine when considering the imposition of sanctions. Elaborating on this rule, the Scott Court held "that aggravating factors in a lawyer disciplinary proceeding 'are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.'" Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E. 2d 550, 557 (2003) *quoting ABA Model Standards for Imposing Lawyer Sanctions*, 9.21 (1992). The aggravating factors present in this case are 1) prior disciplinary offenses; 2) pattern of misconduct; 3) vulnerability of victim; and 4) substantial experience in the practice of law.

Respondent has been practicing law since 1993, which gives him twenty-eight years of experience in the practice of law. Respondent has continued to fail to respond to Disciplinary Counsel on numerous occasions, thereby forming a pattern and practice of misconduct. Respondent's client, Mr. Rucker, was incarcerated and in poor health during the entirety of Respondent's representation of him, and Respondent failed to properly represent him. Hrg. Trans. 13-16, 46-48. Finally, regarding his prior disciplinary offenses, Respondent has been sanctioned in the following seven (7) prior disciplinary cases:

1) Respondent was suspended for thirty (30) days by the Supreme Court on June 10, 2019. ODC 21, Bates 207-208. Respondent was found in violation of Rules 1.4 and 8.1(b). ODC 21, Bates 217. It was noted in the Hearing Panel Recommendation that Respondent had prior discipline of five (5) admonishments for failure to respond to ODC, as well as failing to provide documents as ordered by the Hearing Panel. ODC 21, Bates 217-218.

2) He was admonished for inaccurate billing to the Public Defender Services in violation of Rules 3.3, 4.1, and 8.4 in April of 2018 (ODC 21, Bates 254-258);

3) He was admonished for not responding to ODC in violation of Rule 8.1(b) in April of 2013 (ODC 21, Bates 267-272);

4) He was admonished for not responding to ODC in violation of Rule 8.1(b) in April of 2013 along with being directed to update his phone number with the State Bar (ODC 21, Bates 275-280);

5) He was admonished for not responding to ODC in violation of Rule 8.1(b) and warned regarding his fees pursuant to Rule 1.5 in October of 2008 (ODC 21, Bates 289-294);

6) He was admonished for not responding to ODC in violation of Rule 8.1(b) and warned regarding being diligent and communicating with clients involving Rules 1.3 and 1.4 in October of 2008 (ODC 21, Bates 297-300); and

7) He was admonished for not responding to ODC in violation of Rule 8.1(b) and a conflict issue in violation of Rule 1.8, and was also warned regarding client

communication, fees, and terminating client representation involving Rules 1.4, 1.5, and 1.16 in May of 2007. ODC 21, Bates 304-310.

In addition, Respondent failed to file an affidavit pursuant to Rule 3.28 of the Rules of Lawyer Disciplinary Procedure in his suspension case. ODC 20, Bates 205-206. Rule 3.28(a) notes that "[f]ailure of a disbarred or suspended lawyer to notify all clients of his or her inability to act as a lawyer shall constitute an aggravating factor in any subsequent disciplinary proceeding."

E. The existence of any mitigating factor.

In addition to adopting aggravating factors in Scott, the Scott court also adopted mitigating factors in a lawyer disciplinary proceeding 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)[4]. It should be clear that mitigating factors were not envisioned to insulate a violating lawyer from discipline. There are no mitigating factors present in this case.

[4] The *Scott* Court held that mitigating factors which may be considered in determining the appropriate sanction to be imposed against a lawyer for violating the Rules of Professional Conduct include: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses.

V. SANCTION

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

> In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.

Moreover, a principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999). The American Bar Association has recognized that suspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or (b) a lawyer engages in a pattern of neglect causes injury or potential injury to a client; and when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. *See* ABA

Standards for Imposing Lawyer Sanctions, 4.42, 7.2. The evidence presented in this case shows that Respondent violated his duties to his client, the legal system, and the legal profession, thereby causing injury to his client, legal system, and the legal profession.

Case law in West Virginia concerning such misconduct has resulted in attorneys receiving suspensions. *See* Lawyer Disciplinary Board v. Burgess, No. 23030 (WV 4/25/96) (unreported) (two year suspension with one year suspension deferred while respondent undergoes a one-year period of supervision following reinstatement for violation of Rules 1.3, 1.4, 8.1(b), 8.4(d) and other violations); Lawyer Disciplinary Board v. Holmstrand, No. 22523 (WV 5/30/96) (unreported) (one year suspension and psychiatric evaluation ordered for violation of Rules 1.3, 1.4, 8.4(d) and other violations); Lawyer Disciplinary Board v. Farber, No. 32598 (WV 1/26/06) (unreported) (indefinite suspension and a psychological counseling ordered to determine fitness to practice law for violation of Rules 1.3, 1.4, 8.1(b), and another violation); Lawyer Disciplinary Board v. Morgan, 228 W.Va. 114, 717 S.E.2d 898 (2011) (one year suspension for violation of Rules 1.3, 1.4, 8.1(b), 8.4(d), and other violations); Lawyer Disciplinary Board v. Phalen, No. 11-1746 (WV 11/14/12) (unreported) (one year suspension for violation of Rules 1.3, 1.4, and other violations); Lawyer Disciplinary Board v. Sullivan, 230 W.Va. 460, 740 S.E.2d 55 (2013) (suspension for thirty days and two years supervised practice for violation of Rules 1.3, 1.4, and another violation); Lawyer Disciplinary Board v. Rossi, 234 W.Va. 675, 769 S.E.2d 464 (2015) (three year suspension for violation of Rules 1.3, 1.4, 8.1(b) and 8.4(d) and other violations); Lawyer Disciplinary Board v. Sturm, 237 W.Va. 115, 785 S.E.2d 821 (2016) (suspension for ninety days and two years supervised

practice for violation of Rules 1.3, 1.4, 8.1(b), 8.4(d), and other violations); Lawyer Disciplinary Board v. Palmer, 238 W.Va. 688, 798 S.E.2d 610 (2017) (suspension for thirty days and six months probation and supervised practice for violation of Rules 1.3, 1.4, 3.2, and 8.4(d)); and Lawyer Disciplinary Board v. Davis, No. 18-0640 (W.Va. June 10, 2019) (unreported order) (suspension for thirty days, additional CLE hours, and two years of probation with supervised practice for Rule 1.4 and 8.1(b)).

The Office of Lawyer Disciplinary Counsel has proven by clear and convincing evidence that Respondent violated Rules 1.3, 1.4(a), 1.4(b), 1.5(b), 8.1(b), and 8.4(d) of the West Virginia Rules of Professional Conduct. That misconduct on its own is enough to warrant a sanction, but with Respondent's disciplinary history, it is clear that a suspension is appropriate in this case. There are several cases in West Virginia wherein the Respondent faced a harsher penalty for the aggravating factor of prior discipline. *See* Lawyer Disciplinary Board v. Grafton, 227 W.Va. 579, 712 S.E.2d 488 (2011) (attorney received a two year suspension after receiving a prior reprimand in Lawyer Disciplinary Board v. Grafton, No. 33153 (W.Va. 11/20/07) (unreported)); Lawyer Disciplinary Board v. Sullivan, 230 W.Va. 460, 740 S.E.2d 55 (2013) (attorney suspended for thirty days after previously receiving five admonishments); Lawyer Disciplinary Board v. Sturm, 237 W.Va. 115, 785 S.E.2d 821 (2016) (attorney suspended for ninety days after previously receiving two admonishments); Lawyer Disciplinary Board v. Palmer, 238 W.Va. 688, 798 S.E.2d 610 (2017) (attorney suspended for thirty days after previously receiving three admonishments); Lawyer Disciplinary Board v. Hart, 241 W.Va. 69, 818 S.E.2d 895 (2018) (attorney annulled after previously receiving a three year suspension in

Lawyer Disciplinary Board v. Hart, 235 W.Va. 523, 775 S.E.2d 75 (2015) and receiving a reprimand in Lawyer Disciplinary Board v. Hart, No. 33328 (W.Va. 9/13/07) (unreported)); and Lawyer Disciplinary Board v. Gerlach, No. 17-0869 (W.Va. 4/11/19) (unreported) (attorney received a ninety days suspension after receiving a prior reprimand in Lawyer Disciplinary Board v. Gerlach, No. 14-0725 (W.Va. 4/7/15) (unreported)). From 2007 onward, Respondent has continued to commit misconduct, and his thirty day suspension in 2019 did nothing to stop the misconduct. Respondent has an issue following the Rules of Professional Conduct, and a lengthy suspension is required to protect the public and the legal profession.

In this case, it is clear that Respondent failed to communicate with his client and failed to be diligent by failing to file motions in a timely manner. Respondent also failed to have a written fee agreement, and as he has done multiple times before, he failed to respond to disciplinary counsel. Further, Respondent even failed to follow the Rules of Lawyer Disciplinary Procedure in this matter by failing to file his Answer and his Response to Motion to Exclude with the Supreme Court. Respondent continues to fail in following basic requirements of being an attorney by failing to properly represent clients, and continuing to fail in following requirements of the disciplinary process, which also includes a failure to file an affidavit under Rule 3.28 of Rules of Lawyer Disciplinary Procedure after his last suspension. For the public to have confidence in our State's disciplinary and legal systems, lawyers who engage in this type of continuous misconduct exhibited by Respondent must be disciplined. Therefore, Respondent should be suspended for his misconduct, as a license to practice law is a revocable privilege, and

when such privilege is abused, the privilege should be revoked. Such a sanction is also necessary to deter other lawyers from engaging in similar conduct and to restore the faith of the victim in this case, and of the general public, in the integrity of the legal profession. While it is clear from case law that Respondent's misconduct should result in a suspension, this HPS recommends that the length of the suspension should be six months with an additional one year of supervised practice. Respondent has seven aggravating factors, and no mitigating factors, and this is the eighth time he was found to have violated the Rules of Professional Conduct. The suspension and supervised practice as recommended herein should serve the dual purpose of both sanctioning Respondent for his misconduct, and demonstrating to other attorneys that such continued misconduct will result in suspension.

VI. RECOMMENDED SANCTIONS

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

A principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999).

For the reasons set forth above, the HPS recommends the following sanctions:

A. That Respondent's law license be suspended for six (6) months;

B. That upon Respondent's reinstatement, he be placed on one (1) year of supervised practice by an active attorney in his geographic area in good standing with the West Virginia State Bar and agreed upon by the ODC.

C. That Respondent take an additional twelve (12) hours of Continuing Legal Education classes focusing on office management within a year from the date of his suspension;

D. That as Respondent was dilatory in filing post-trial motions, he did represent Complainant by appearing at hearings and negotiating a plea, with dismissal of certain charges, he shall refund $3,000.00 (of the $10,000.00 allegedly paid to him) to Complainant and his wife;

E. That Respondent comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure: and

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

Accordingly, the Hearing Panel Subcommittee recommends that the Supreme Court of Appeals adopt these findings of fact, conclusions of law, and recommended sanctions as set forth above. Both the Office of Disciplinary Counsel and Respondent have the right consent or object pursuant to Rule 3.11 of the Rules of Lawyer Disciplinary Procedure.

Rhonda L. Harsh

Rhonda L. Harsh, Esq., Chairperson
Hearing Panel Subcommittee

Date: 7-15-2021

Gail T. Henderson Staples

Gail T. Henderson Staples, Esquire
Hearing Panel Subcommittee
WITH PERMISSION GIVEN 7-15-2021

Date: 7-15-2021

Loretta Walker Sites

Loretta Walker Sites, ACP
Hearing Panel Subcommittee
WITH PERMISSION GIVEN 7-15-2021

Date: 7-15-2021

CERTIFICATE OF SERVICE

This is to certify that I, **Rachael L. Fletcher Cipoletti**, Chief Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 22nd day of July, 2021, served a true copy of the foregoing **"REPORT OF THE HEARING PANEL SUBCOMMITEE"** upon Respondent Jeffery A. Davis, by mailing the same via United States Mail, with sufficient postage, to the following address:

Jeffery A. Davis, Esquire
225 Main Street
Spencer, West Virginia 25276

Rachael L. Fletcher Cipoletti