

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

LAWYER DISCIPLINARY BOARD,

Petitioner,

vs.

No. 20-0871

JEFFERY A. DAVIS,

Respondent.



---

---

BRIEF OF THE LAWYER DISCIPLINARY BOARD

---

---

Rachael L. Fletcher Cipoletti [Bar No. 8806]  
Chief Lawyer Disciplinary Counsel  
[rfcipoletti@wvdc.org](mailto:rfcipoletti@wvdc.org)  
Office of Lawyer Disciplinary Counsel  
City Center East, Suite 1200C  
4700 MacCorkle Avenue SE  
Charleston, West Virginia 25304  
(304) 558-7999  
(304) 558-4015 – *facsimile*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
I. STATEMENT OF THE CASE .....	1
II. SUMMARY OF ARGUMENT .....	2
III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....	3
IV. FINDINGS OF FACT AND VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT .....	3
V. STANDARD OF REVIEW .....	8
VI. DISCUSSION .....	9
A. Respondent violated duties to his client, to the legal system, and to the legal profession. ....	10
B. Respondent acted knowingly. ....	12
C. The amount of real injury is great. ....	13
D. The existence of any aggravating factors. ....	13
E. The existence of any mitigating factors. ....	15
V. RECOMMENDED SANCTION BY THE HEARING PANEL SUBCOMMITTEE .....	15

## TABLE OF AUTHORITIES

### Cases:

<u>Committee on Legal Ethics v. Blair</u> 174 W.Va. 494, 327 S.E.2d 671 (1984) .....	9
<u>Committee on Legal Ethics v. Karl</u> 192 W.Va. 23, 449 S.E.2d 277 (1994) .....	9
<u>Committee on Legal Ethics v. McCorkle</u> 192 W.Va. 286, 452 S.E.2d 377 (1994) .....	8, 9
<u>Committee on Legal Ethics v. Morton</u> 186 W.Va. 43, 410 S.E.2d 279 (1991) .....	15
<u>Committee on Legal Ethics v. Tatterson</u> 173 W.Va. 613, 319 S.E.2d 381 (1984) .....	15
<u>Committee on Legal Ethics v. Walker</u> 178 W.Va. 150, 358 S.E.2d 234 (1987) .....	16
<u>Daily Gazette v. Committee on Legal Ethics</u> 174 W.Va. 359, 326 S.E.2d 705 (1984) .....	16, 19
<u>Lawyer Disciplinary Board v. Cunningham</u> 195 W.Va. 27, 464 S.E.2d 181 (1995) .....	9
<u>Lawyer Disciplinary Board v. Burgess</u> No. 23030 (W.Va. 4/25/96)( <i>unreported</i> ) .....	16
<u>Lawyer Disciplinary Board v. Davis</u> No. 18-0640 (W.Va. 6/10/19)( <i>unreported</i> ) .....	17
<u>Lawyer Disciplinary Board v. Farber</u> No. 32598 (W.Va. 1/26/06)( <i>unreported</i> ) .....	17
<u>Lawyer Disciplinary Board v. Gerlach</u> No. 14-0725 (W.Va. 4/7/15)( <i>unreported</i> ) .....	18
<u>Lawyer Disciplinary Board v. Gerlach</u> No.17-0869 (W.Va. 4/11/19)( <i>unreported</i> ) .....	18

<u>Lawyer Disciplinary Board v. Grafton</u> No. 33153 (W.Va. 11/20/07)( <i>unreported</i> )	18
<u>Lawyer Disciplinary Board v. Grafton</u> 227 W.Va. 579, 712 S.E.2d 488 (2011)	18
<u>Lawyer Disciplinary Board v. Hardison</u> 205 W.Va. 344, 518 S.E.2d 101 (1999)	16, 19
<u>Lawyer Disciplinary Board v. Hart</u> No. 33328 (W.Va. 9/13/07)( <i>unreported</i> )	18
<u>Lawyer Disciplinary Board v. Hart</u> 235 W.VA. 523, 775 S.E.2d 75 (2015)	18
<u>Lawyer Disciplinary Board v. Hart</u> 241 W.VA. 69, 818 S.E.2d 895 (2018)	18
<u>Lawyer Disciplinary Board v. Holmstrand</u> No. 22523 (W.Va. 5/30/96)( <i>unreported</i> )	16
<u>Lawyer Disciplinary Board v. McGraw</u> 194 W.Va. 788, 461 S.E.2d 850 (1995)	9
<u>Lawyer Disciplinary Board v. Morgan</u> 228 W.Va. 114, 717 S.E.2d 898 (2011)	17
<u>Lawyer Disciplinary Board v. Palmer</u> 238 W.Va. 688, 798 S.E.2d 610 (2017)	17, 18
<u>Lawyer Disciplinary Board v. Phalen</u> No. 11-1746 (W.Va. 11/14/12)( <i>unreported</i> )	17
<u>Lawyer Disciplinary Board v. Rossi</u> 234 W.Va. 675, 769 S.E.2d 464 (2015)	17
<u>Lawyer Disciplinary Board v. Scott</u> 213 W.Va. 209, 579 S.E.2d 550 (2003)	13, 15
<u>Lawyer Disciplinary Board v. Sturm</u> 237 W.Va. 115, 785 S.E.2d 821 (2016)	17, 18

<u>Lawyer Disciplinary Board v. Sullivan</u> 230 W.Va. 460, 740 S.E.2d 55 (2013) .....	17, 18
<u>Lawyer Disciplinary Board v. Taylor</u> 192 W.Va. 139, 451 S.E.2d 440 (1994) .....	3, 10
<u>Office of Disciplinary Counsel v. Jordan</u> 204 W.Va. 495, 513 S.E.2d. 722 (1998) .....	9, 10
<u>Roark v. Lawyer Disciplinary Board</u> 207 W.Va. 181, 495 S.E.2d 552 (1997) .....	8

**West Virginia Statutes and Rules:**

R. of Appellate Proc.	Rule 19 .....	2, 3
R. of Criminal Proc.	Rule 35(b) .....	6
R. Law Disc. Proc.	Rule 3.7 .....	9
R. Law Disc. Proc.	Rule 3.15 .....	19, 20
R. Law Disc. Proc.	Rule 3.16 .....	9, 10, 13
R. Law Disc. Proc.	Rule 3.28 .....	14, 20
R. Law Disc. Proc.	Rule 3.28(a) .....	15
R. Professional Conduct	Rule 1.3 .....	2, 8, 14, 16, 17
R. Professional Conduct	Rule 1.4 .....	2, 8, 14, 16, 17
R. Professional Conduct	Rule 1.4(a) .....	17
R. Professional Conduct	Rule 1.4(b) .....	17
R. Professional Conduct	Rule 1.5 .....	14
R. Professional Conduct	Rule 1.5(b) .....	1, 8, 17
R. Professional Conduct	Rule 1.8 .....	14

R. Professional Conduct	Rule 1.16	14
R. Professional Conduct	Rule 3.2	17
R. Professional Conduct	Rule 3.3	14
R. Professional Conduct	Rule 4.1	14
R. Professional Conduct	Rule 8.1(b)	2, 8, 14, 17
R. Professional Conduct	Rule 8.4	14
R. Professional Conduct	Rule 8.4(d)	2, 8, 17

**Other:**

ABA Model Standards for Imposing Lawyer Sanctions, § 4.42	16
ABA Model Standards for Imposing Lawyer Sanctions, § 7.2	16
ABA Model Standards for Imposing Lawyer Sanctions, § 9.21	13
ABA Model Standards for Imposing Lawyer Sanctions, § 9.31	15

## I. STATEMENT OF THE CASE

Formal charges were filed against Jeffery A. Davis (hereinafter “Respondent”) with the Clerk of the Supreme Court of Appeals 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<sup>1</sup>. 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 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”<sup>2</sup> asserting that his witnesses and evidence was the same as that provided by Office of Lawyer Disciplinary Counsel. A telephonic prehearing was held on February 19, 2021, wherein the Hearing Panel Subcommittee granted ODC’s motion. However, the HPS ruled that Respondent would be allowed to question ODC’s witnesses and present his own testimony. Lastly, as 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 same was rescheduled for April 14, 2021.

Thereafter, this matter proceeded to hearing in Charleston, West Virginia, on April 14, 2021. The HPS was comprised of Rhonda L. Harsh, Esquire, Chairperson; Gail T. Henderson Staples,

---

<sup>1</sup> On or about April 7, 2021, Chairperson of the HPS, advised ODC that she had not received Respondent’s Answer to the State of Charges. ODC contacted the Clerk of the this Honorable Court, who advised that Respondent had not filed the Answer. Respondent was advised at the April 8, 2021 hearing of his failure to properly file and serve his pleading. On or about June 24, 2021, ODC again contacted the Clerk of this Honorable Court and was again advised that Respondent’s Answer had not been filed.

<sup>2</sup> On June 24, 2021, the Response to Motion to Exclude had not been filed at the Clerk’s Office.

Esquire; and Loretta Sites, Layperson. Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel, appeared on behalf of 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.

On or about July 22, 2021, the HPS filed its “Report of the Hearing Panel Subcommittee” with the Supreme Court. The HPS properly found that the evidence established that Respondent violated Rules 1.3, 1.4, 1.5(b), 8.1(b) and 8.4(d) of the Rules of Professional Conduct, and recommended amongst other sanctions that Respondent’s license to practice law be suspended for six (6) months. On about August 16, 2021, Respondent filed an objection to the HPS recommendation.

By Order entered August 17, 2021, the Court set forth a briefing schedule and ordered this matter set for oral argument pursuant to Rule 19 of the Rules of Appellate Procedure.

## **II. SUMMARY OF ARGUMENT**

The HPS correctly found that Respondent violated Rules 1.3, 1.4, 1.5(b), 8.1(b) and 8.4(d) of the Rules of Professional Conduct, and recommended amongst other sanctions that Respondent’s license to practice law be suspended for six (6) months. There is no error in the HPS’s findings of fact or conclusions of law and ODC agrees with the recommendation by the HPS as to the sanction. The ODC asserts that the sanction proposed by the HPS are adequate considering the clear and convincing evidence against Respondent, and the injury created by the misconduct of Respondent. In ordering such a sanction in this lawyer disciplinary proceeding, this Honorable Court will serve its goals of protecting the public, reassuring the public as to the reliability and integrity of attorneys,

and safeguarding the administration of justice; and not just as punishment to Respondent. *See Lawyer Disciplinary Board v. Taylor*, 192 W.Va. 139, 451 S.E.2d 440 (1994).

### **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 and will be heard in the January 2022 Term of Court.

### **IV. FINDINGS OF FACT AND VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT**

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 Exhibit 15 Bates 151-155]

On or about November 14, 2017, an arraignment hearing was held in Complainant's case, and Respondent represented him as his counsel. [ODC Exhibit 15 Bates 178-179] 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. The remaining counts were dismissed pursuant to the plea agreement.

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's time served at sentencing was 580 days. The sentencing Order noted that Complainant was advised on his right to appeal.

On or about October 16, 2018, Complainant sent a letter to the Clay County Circuit Clerk and asked if Respondent had filed a motion for reconsideration and requested a copy of the motion, along with the docket sheet. [ODC Exhibit 15 Bates 189] The letter also noted that communication had broken down between Complainant and Respondent.

On or about December 6, 2018, Complainant filed an ethics complaint against Respondent and alleged Respondent had failed to provide his client file after Complainant requested the client file. [ODC Exhibit 1 Bates 2-3] Complainant provided a copy of an October 23, 2018 letter from Complainant to Respondent about his failure to file a motion for reconsideration and to file for the return of Complainant's property and non-contraband items. [ODC Exhibit 1 Bates 3] Contrary to Respondent's representations to Complainant's wife, the docket sheet did not reflect that Respondent had filed the motions. The letter also requested a copy of the client file.

On or about January 14, 2019, Respondent filed a response to the ethics complaint and stated he was retained to represent Complainant for the indictment and that the case was resolved by the plea agreement. Respondent said Complainant was denied any alternative sentence and was sentenced to the penitentiary. 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. Respondent noted Complainant was in poor health due to the explosion that resulted in some of his felony charges. 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. [ODC Exhibit 3]

Respondent stated he received a letter in October of 2018 that was purportedly from Complainant requesting his client file. [ODC Exhibit 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. Respondent stated that Complainant's wife advised him that Complainant's health had declined and he was in the hospital. Respondent said he "decided that a Motion for compassionate release based upon his health issues was a better option than a Motion to Reconsider." 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.

On or about March 5, 2019, Complainant filed a reply and stated that Respondent was not available when Complainant's wife attempted to return his telephone calls. Complainant said his wife was told that Respondent would return the telephone call, but that never happened. 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. Complainant denied being provided a copy of the Motion for Compassionate Release. [ODC Exhibit 6 Bates 14]

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. Due to the recent diagnosis and treatment for the aforementioned lung cancer, [Complainant] must undergo surgery." The Motion requested the court to reduce or modify the sentence against Complainant. [ODC Exhibit 15 Bates 192-193]

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)<sup>3</sup> of the West Virginia Rules of Criminal Procedure. Further, it stated the Court had previously denied Complainant's motion to reconsider. [ODC Exhibit 15 Bates 190]

On or about June 21, 2019, Respondent sent correspondence to Disciplinary Counsel indicating that Complainant's client file had been sent to Complainant. 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. 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). [ODC Exhibit 10 Bates 36-37]

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 Exhibit 15 Bates 194-195]

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. Further, Complainant

---

<sup>3</sup> 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.

was asked if he received the property and contraband items that he wanted Respondent to file to recover for him. [ODC Exhibit 11 Bates 87]

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

On or about July 22, 2019, Disciplinary Counsel wrote to Complainant asking if he recalled signing a retainer agreement with Respondent. [ODC Exhibit 13 Bates 148] On the same date, ODC also inquired of Respondent 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 a fee agreement. [ODC 14 Exhibit 14 Bates 149]

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

Respondent failed to respond to Disciplinary Counsel's July 22, 2019 letter. [ODC Exhibit 17 Bates 199] Another letter was sent to Respondent on or about August 27, 2019, by certified and regular mail, and requested a response by September 5, 2019. Respondent signed the green card, and it was returned to ODC on August 30, 2019. [ODC Exhibit 17 Bates 200]

On or about September 4, 2019, Respondent filed a response, noting that he mailed Complainant the entire client file, less his personal notes. Respondent could not locate an

employment contract, even after searching his office. Respondent stated he remembered the contract had been signed by Complainant and his wife while Complainant was hospitalized. Respondent provided a blank contract that he would have used in that kind of case. [ODC Exhibit 18 Bates 202]

After an evidentiary hearing, the HPS properly found that Respondent's conduct violated the Rules of Professional Conduct. The HPS conclusions of law are based upon the record presented and are fully supported by the clear and convincing standard. The HPS found that 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. The HPS found that Respondent failed to communicate with Complainant about the Motion to reconsider, in violation of Rule 1.4 of the Rules of Professional Conduct. The HPS found that Respondent failed to reduce his fee to writing in violation of Rule 1.5(b) of the Rules of Professional Conduct. Respondent failed to respond to ODC, in violation of Rule 8.1(b) of the Rules of Professional Conduct. [HPS Report 9-11]

## V. STANDARD OF REVIEW

In lawyer disciplinary matters, a *de novo* standard of review applies to questions of law, questions of application of the law to the facts, and questions of appropriate sanction to be imposed. Roark v. Lawyer Disciplinary Board, 207 W. Va. 181, 495 S.E.2d 552 (1997); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994). The Supreme Court of Appeals gives respectful consideration to the Lawyer Disciplinary Board's recommendations as to questions of law and the appropriate sanction, while ultimately exercising its own independent judgment. McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381.

Substantial deference is to be given to the Lawyer Disciplinary Board's findings of fact unless the findings are not supported by reliable, probative, and substantial evidence on the whole record.

McCorkle, Id.; Lawyer Disciplinary Board v. Cunningham, 195 W. Va. 27, 464 S.E.2d 181 (1995). At the Supreme Court level, “[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board.” Cunningham, 464 S.E.2d at 189; McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381.

The charges against an attorney must be proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. *See*, Syl. Pt. 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995).

The Supreme Court of Appeals is the final arbiter of formal legal ethic charges and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law. Syl. Pt. 3, Committee on Legal Ethics v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984); Syl. Pt. 7, Committee on Legal Ethics v. Karl, 192 W.Va. 23, 449 S.E.2d 277 (1994).

## VI. DISCUSSION

Rule 3.16 of the Rules of Lawyer Disciplinary Procedure provides that when imposing a sanction after a finding of lawyer misconduct, the Court shall consider: (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* Syl. Point 4 of Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998). A review of the extensive record in this matter indicates that Respondent has transgressed all four factors set forth in Jordan.

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 regarding their property and reconsideration. [Transcript 11-13, 55-56] Respondent failed to timely file the reconsideration and did not advise the Ruckers of the same. Respondent admitted that he never spoke directly to his client, Mr. Rucker, after sentencing. [Transcript 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. [Transcript 17-18, 30] However, Respondent never informed the Ruckers that he filed the motion. [Transcript 18, 56, 119-120] The "motion for compassionate release" is addressed under Rule 35 of the West Virginia Rules of Criminal Procedure. Respondent also failed to inform his client that the motion had been denied by the court. [Transcript 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. [Transcript 145, 153] Respondent never filed a motion to return personal property to the Ruckers, despite numerous requests that he do so. [Transcript 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. [Transcript 115] It took Respondent until June of 2019 to provide the client file. [Transcript 123] The record is replete with evidence to establish that Respondent violated his duties of communication and diligence, both basic duties owed to clients.

Additionally, clients are not the only ones impacted by Respondent's failure to diligently act. 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 filed, 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. The system of justice can't function when its lawyers fail to properly follow the procedural rules promulgated to allow the courts to administer justice to our citizenry.

Finally, lawyers are required to respond timely to ODC 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. There is no evidence

to dispute that Respondent acted knowingly in all of the transgressions.

**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.

**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 a member of the Bar and has practiced law since 1993. Respondent has failed 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.

Finally, regarding his prior disciplinary offenses, Respondent has been sanctioned in seven (7) prior disciplinary cases. Most recently, for violations of Rules 1.4 and 8.1(b) Respondent was suspended for thirty (30) days by the Supreme Court on June 10, 2019. [ODC Exhibit 21 Bates 207-208] He was admonished by the Investigative Panel for inaccurate billing to the Public Defender Services in violation of Rules 3.3, 4.1, and 8.4 in April of 2018 [ODC Exhibit 21 Bates 254-258] He was admonished for not responding to ODC in violation of Rule 8.1(b) in April of 2013. [ODC Exhibit 21 Bates 267-272] He was admonished in April of 2013 for not responding to ODC in violation of Rule 8.1(b) and failing to keep his information current with the West Virginia State Bar. [ODC Exhibit 21 Bates 275-280] In October of 2008, 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. [ODC Exhibit 21 Bates 289-294] 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 Exhibit 21 Bates 297-300]. He was also 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 Exhibit 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 most recent disciplinary matter. [ODC Exhibit 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 factors.**

In addition to adopting aggravating factors in Scott, the Scott court also adopted mitigating factors in a lawyer 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)<sup>4</sup>. Mitigating factors were not envisioned to insulate a violating lawyer from discipline. There are no mitigating factors present.

**VII. RECOMMENDED SANCTION BY THE  
HEARING PANEL SUBCOMMITTEE**

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.

---

<sup>4</sup> 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.

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. Respondent violated his duties to his client, the legal system, and the legal profession, and caused injury to his client, legal system, and the legal profession and suspension is warranted.

Additionally, case law in West Virginia concerning such misconduct has also resulted in attorneys receiving suspensions. *See* Lawyer Disciplinary Board v. Burgess, No. 23030 (W.Va. 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 (W.Va.

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 (W.Va. 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 (W.Va. 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. 6/10/19) (*unreported*) (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 Rules of Professional Conduct. That misconduct on its own is enough to warrant a sanction, but with Respondent's disciplinary history and the presence of the aggravating factors, it is clear that a suspension is

appropriate in this case. 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*)).

Respondent has failed to comply with the most basic requirements of being an attorney by failing to properly represent clients, and continuing to fail in following requirements of the disciplinary process. All of these violations go to the heart of the system and have caused direct harm to his clients and the system of justice. Respondent needs to be removed from the practice of law to appreciate the significance and of the rules governing our profession and to ensure that he will incorporate the appropriate practices and procedures into his practice.

For the public to have confidence in our State's disciplinary and legal systems, lawyers who engage in this type of unabated misconduct exhibited by Respondent must be disciplined. Therefore,

Respondent should be suspended for his misconduct, as a license to practice law is a revokable 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. Respondent's misconduct should result in a suspension and 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.

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 Hearing Panel Subcommittee recommended 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 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 to Complainant;
- 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 Office of Disciplinary Counsel urges that this Honorable Court uphold the sanctions recommended by the Hearing Panel Subcommittee.

*Respectfully submitted,*  
The Lawyer Disciplinary Board  
By Counsel



Rachael L. Fletcher Cipoletti [Bar No. 8806]  
Chief Lawyer Disciplinary Counsel  
[rfcipoletti@wvdc.org](mailto:rfcipoletti@wvdc.org)  
Office of Lawyer Disciplinary Counsel  
City Center East, Suite 1200C  
4700 MacCorkle Avenue SE  
Charleston, West Virginia 25304  
(304) 558-7999  
(304) 558-4015 - *facsimile*

---

---

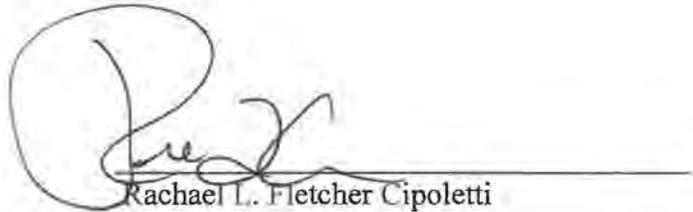
**CERTIFICATE OF SERVICE**

---

---

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 1<sup>st</sup> day of October, 2021, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" 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