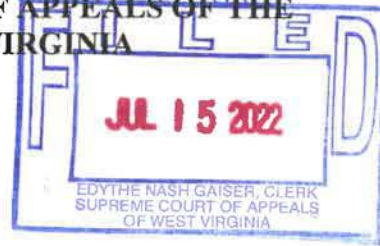


IN THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA



LAWYER DISCIPLINARY BOARD,

Petitioner,

vs.

No. 20-1027

DAVID R. TYSON,

Respondent.

AND

OFFICE OF LAWYER DISCIPLINARY COUNSEL,

Petitioner,

vs.

No. 22-0342

DAVID R. TYSON,

Respondent.

BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. STATEMENT OF THE CASES

A. NATURE OF PROCEEDINGS IN CASE NO. 20-1027

Formal charges were filed against David R. Tyson (hereinafter “Respondent”) with the Clerk of the Supreme Court of Appeals in Case No. 20-1027 on or about December 21, 2020, and served upon Respondent via certified mail by the Clerk on December 30, 2020. Lawyer Disciplinary Counsel filed her mandatory discovery on or about February 1, 2021. Respondent filed his Answer to the Statement of Charges on or about February 11, 2021, and provided his mandatory discovery on March 4, 2021. On March 12, 2021, Respondent filed the following motions: (1) Motion to Exclude Past Complaints and Findings; (2) Motion to Dismiss Count V I.D. No. 19-06-370 Complaint of Angela C. Robertson; and (3) Motion for Leave to File Amended Answer. On March 22, 2021, Lawyer Disciplinary Counsel filed her responses to all three motions and requested that they be denied. On March 29, 2021, Respondent filed responsive pleadings to Lawyer Disciplinary Counsel’s request for a denial of his motions. On April 1, 2021, Respondent filed for a continuance of the April 28 and 29, 2021 hearing dates.

On April 7, 2021, a prehearing conference was held via Microsoft Teams. The Hearing Panel Subcommittee of the Lawyer Disciplinary Board (hereinafter “HPS”) heard argument on all four motions and ruled as follows: (1) the motion to continue the hearing was granted and the hearing was set for July 13 and 14, 2021; (2) the motion to file an amended answer was denied; (3) the motion to exclude past complaints and findings was denied; and (4) the motion to dismiss Count V was held in abeyance. Thereafter, Complainant Willard E. Bays notified Lawyer Disciplinary Counsel that he had a vacation scheduled for the week of July 12, 2021, and would not be available to testify. Lawyer Disciplinary Counsel then filed a Motion for Telephonic Testimony or, Alternatively, a Date to Take the Testimony of This Witness. This motion was heard

on May 18, 2021, and a hearing date was set for June 28, 2021, for the sole purpose of taking the testimony of Willard E. Bays. Mr. Bays, however, did not appear for the June 28, 2021 hearing. Thereafter, due to a scheduling conflict for a HPS member, the hearing in this matter was continued from July 13, 2021, to September 27 and 28, 2021.

Thereafter, this matter proceeded to hearing in Huntington, West Virginia, on September 27, 2021. The HPS was comprised of Nicole A. Cofer, Esquire, Chairperson; Suzanne M. Williams-McAuliffe, Esquire; and Ms. Rachael Scudiere, Layperson. Renée N. Frymyer, Lawyer Disciplinary Counsel, and Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel, appeared on behalf of the Office of Lawyer Disciplinary Counsel (hereinafter “ODC”). D. Scott Bellomy, Esquire, appeared on behalf of Respondent, who also appeared. The HPS heard testimony from Angela C. Robertson, Todd Chapman, and Respondent. The parties had stipulated to Counts I-IV of the Statement of Charges along with a recommended discipline, and the document reflecting such was admitted into evidence as Joint Exhibit J1. In addition, ODC Exhibits 1-103 and Respondent Exhibits 1-20 were admitted into evidence.

On or about February 16, 2022, the HPS issued its decision in this matter and filed its “Report of the Hearing Panel Subcommittee” (hereinafter “Report”) with the Supreme Court of Appeals. The HPS properly found that the clear and convincing evidence was that Respondent violated Rules 1.5(a), 3.3(a)(1), 8.4(c) and 8.4(d) of the Rules of Professional Conduct for Counts I and II, no violation for Count III, Rule 1.5(b) for Count IV, and Rules 1.2(a), 1.3, 1.4(a)(3) and 1.5(a) for Count V. The HPS issued the following recommendation as the appropriate sanction:

- a. That Respondent’s law license be suspended for a period of three (3) years, which Respondent will voluntarily begin to serve on January 1, 2022;
- b. That upon suspension, Respondent must comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure;

- c. That Respondent be required to petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure;
- d. That based upon an analysis completed by PDS, Respondent shall allow PDS to withhold \$58,812.46 in unpaid vouchers as restitution for prior overpayments;
- e. That Respondent be required to refund Ms. Robertson the \$3,225.00, which includes the \$225.00 for court costs, that she was charged and paid as it was determined to be an unreasonable fee for work that was not completed;
- f. That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

B. FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CASE NO. 20-1027

- 1. Respondent is a lawyer practicing in Huntington, which is in Cabell County, West Virginia. Respondent was admitted to The West Virginia State Bar on September 30, 1980, after successful passage of the Bar Exam. 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 [Stipulated].

COUNT I¹

I.D. No. 17-06-346

Complaint of the Office of Lawyer Disciplinary Counsel

- 2. On or about July 31, 2017, the ODC sent Respondent correspondence via United States Mail in which he was notified that a complaint had been opened against him in the name of the ODC based upon a review of multiple billing vouchers he had submitted for payment to the Public Defendant Services Corporation of West Virginia (hereinafter "PDS"). Respondent was provided a copy of vouchers which reflected as follows:
 - a. Respondent submitted eight separate vouchers billing the PDS for 19.5 total hours of time performed on August 17, 2015.

¹ The facts and conclusions of law set forth herein in Counts I-IV were stipulated to by the parties prior to the hearing and adopted by the HPS in its Report.

- b. Respondent submitted nine separate vouchers billing the PDS for 20.3 total hours of time performed on November 13, 2015.
 - c. Respondent submitted seven separate vouchers billing the PDS for 18.2 total hours of time performed on November 19, 2015.
 - d. Respondent submitted seven separate vouchers billing the PDS for 18.4 total hours of time performed on May 16, 2016.
 - e. Respondent submitted ten separate vouchers billing the PDS for 23.9 total hours of time performed on August 23, 2016.
 - f. Respondent submitted seven separate vouchers billing the PDS for 19.6 total hours of time performed on February 24, 2017.
3. In the July 31, 2017 correspondence, Respondent was asked to review and address the billing vouchers he had submitted for payment to the PDS, as set forth above, in his response to the complaint.
4. On or about August 22, 2017, the ODC received correspondence via United States Mail from Timothy C. Bailey, Esquire, in which he noted his appearance as counsel to Respondent and in which he requested an extension of time until September 21, 2017 to respond to the complaint. The request for an extension of time was granted.
5. Thereafter, on or about September 19, 2017, the ODC received correspondence via United States Mail from Mr. Bailey in which he requested an additional extension of time until October 31, 2017 to respond to the complaint. The request for an extension of time was granted.
6. On or about October 31, 2017, the ODC received a copy of Respondent's response to the complaint via United States Mail.
7. In his response, Respondent, through counsel, acknowledged that he had made billing errors in the vouchers he submitted to PDS, but asserted that his billing errors were unintentional. Respondent stated that PDS did not address any concerns about his vouchers

prior to the complaint being filed by ODC, and that he would have cooperated with PDS and rectified any errors.

8. In response to ODC inquiries about the specific dates listed in the complaint, Respondent stated as follows:
 - a. Respondent noted that he had errors on five of the vouchers submitted for August 17, 2015, which reduced his billable hours from 19.5 hours to 11.8 hours;
 - b. Respondent noted that one of the vouchers submitted for November 13, 2015, was submitted twice and that PDS did not pay him twice, which reduced his billable hours from 20.3 hours to 16.1 hours;
 - c. Respondent noted that he had an error on one of the vouchers submitted for November 19, 2015, which reduced his billable hours from 18.2 hours to 17.2 hours;
 - d. Respondent noted that he had errors on three of the vouchers submitted for May 16, 2016, which reduced his billable hours from 18.4 hours to 15.6 hours.
 - e. Respondent noted that the vouchers submitted for August 23, 2016 did not contain any errors, and thus his 23.9 billable hours submitted were correct;
 - f. Respondent noted that he had errors on two of the vouchers submitted for February 24, 2017, including a voucher that contained a billing error that Respondent had previously reported to PDS, which reduced his billable hours from 19.6 hours to 11.6 hours.
9. Respondent stated that the billing errors were unintentional and that he would cooperate with PDS to rectify the errors.
10. On or about December 13, 2017, the ODC sent correspondence to Dana F. Eddy, Esquire, Executive Director of the PDS, in which it requested information concerning specific vouchers Respondent had submitted in a number of cases.

11. That on or about December 14, 2017, the Respondent sent correspondence to Mr. Eddy requesting information on how to amend vouchers and the procedure to repay PDS for errors in said vouchers.
12. On or about December 29, 2017, the ODC received correspondence from Mr. Eddy dated December 27, 2017, in which he stated “[a]s of the date of December 15, 2017, no payment of any amount for any purpose has been received from David R. Tyson.”
13. On or about January 4, 2018, the ODC sent correspondence to the Circuit Courts of Wayne County and Cabell County, West Virginia, in which it requested copies of the docket sheets and all payment vouchers Respondent had submitted in a number of cases.
14. On or about January 9, 2018, the ODC received copies of the “Order Approving Payment of Appointed Counsel Fees and Expenses” for Respondent in various cases in which he was appointed counsel from the Circuit Court of Cabell County, West Virginia.
15. On or about January 10, 2018, the ODC received copies of the “Order Approving Payment of Appointed Counsel Fees and Expenses” for Respondent in various cases in which he was appointed counsel from the Circuit Court of Wayne County, West Virginia.
16. On or about January 11, 2018, the ODC received documents from PDS in response to its December 13, 2017 correspondence.
17. Also, on or about January 11, 2018, the ODC served Lori J. Paletta-Davis, Esquire, Administrative Counsel with the Administrative Office of the Courts, Supreme Court of Appeals of West Virginia, with an Investigative Subpoena *Duces Tecum*. The Investigative Subpoena *Duces Tecum* requested, in pertinent part, any and all Mental Health Commissioner billing records for Respondent.

18. That as of February 21, 2018, Respondent had not received a response to his December 14, 2017 correspondence to Mr. Eddy regarding the procedure to amend vouchers and repay PDS. Thereafter, on February 21, 2018, Respondent again sent correspondence to Mr. Eddy requesting information on the procedures to amend the vouchers and repay PDS.
19. On or about March 26, 2018, the ODC received copies of the "Mental Hygiene Commissioner Billing Forms" for Respondent in various cases in which he was appointed Mental Hygiene Commissioner in cases in Wayne County, West Virginia.
20. That as of July 17, 2018, Respondent had not received a response to his December 14, 2017 and February 21, 2018 correspondences to Mr. Eddy regarding the procedure to amend vouchers and repay PDS. Thereafter, on July 17, 2018, Respondent again sent correspondence to Mr. Eddy requesting information on the procedures to amend the vouchers and repay PDS.
21. That as of January 19, 2019, Respondent had not received a response to his December 14, 2017, February 21, 2018, or July 17, 2018, correspondences to Mr. Eddy regarding the procedure to amend vouchers and repay PDS. Thereafter, on January 19, 2019, Respondent sent correspondence to the Clerk of the PDS requesting information on the procedures to amend the vouchers and repay PDS.
22. On or about February 14, 2019, the ODC sent correspondence to Mr. Eddy in which it requested, in pertinent part, additional billing records for Respondent.
23. On or about March 22, 2019, the ODC received vouchers from PDS in response to its February 14, 2019 correspondence.
24. On or about March 27, 2019, the ODC sent Respondent's counsel, Mr. Bailey, correspondence in which it informed him that it had received additional information from

PDS regarding Respondent's billing vouchers that he had submitted for payment to PDS, and requested that Respondent explain his time which reflected as follows:

- a. On February 27, 2017, Respondent billed PDS for 18.1 hours;
 - b. On March 10, 2017, Respondent billed PDS for 18.0 hours;
 - c. On April 12, 2018, Respondent billed PDS for 18.1 hours;
 - d. On September 20, 2018, Respondent billed PDS for 19.7 hours;
 - e. On October 15, 2018, Respondent billed PDS for 24.4 hours;
 - f. On November 16, 2018, Respondent billed PDS for 20.1 hours;
 - g. On November 19, 2018, Respondent billed PDS for 25.1 hours;
 - h. On December 6, 2018, Respondent billed PDS for 27.0 hours; and
 - i. On December 17, 2018, Respondent billed PDS for 24.7 hours.
25. On or about April 4, 2019, the ODC sent correspondence to Ms. Paletta-Davis in which it requested, in pertinent part, information regarding whether Respondent was compensated for providing legal services as guardian *ad litem* for the Family Court system, or for providing legal services to the mental hygiene system from January 25, 2017, to the present day.
26. On or about April 9, 2019, the ODC received correspondence from Mr. Bailey in which he advised that he was no longer Respondent's counsel in his disciplinary matter. Thereafter, on or about April 11, 2019, the ODC received correspondence via facsimile from Respondent in which he requested an extension of time to respond to the ODC's March 27, 2019 correspondence. The request for an extension of time was granted telephonically by the ODC.
27. On or about April 30, 2019, the ODC received a copy of Respondent's response to its March 27, 2019 correspondence.

28. In his response, Respondent acknowledged that he had made multiple billing errors in the vouchers he submitted to PDS but asserted that his billing errors were unintentional. Respondent stated that he was preparing vouchers that reflected the proper time he spent on his cases, and that he looked forward to working with PDS to fix the problem and to repay PDS the amount it deemed appropriate from his amended voucher submissions.
29. In response to ODC's inquiries about the specific dates listed in the March 27, 2019 correspondence, Respondent stated as follows:
- a. Respondent noted that his hours billed on February 27, 2017 were 18.1 hours, but after review, the time should be reduced by 7.5 hours to total 10.6 hours;
 - b. Respondent noted that his hours billed on March 10, 2017 were 18.0 hours, but after review, the time should be reduced by 6.3 hours to total 11.7 hours;
 - c. Respondent noted that his hours billed on April 12, 2018 were 18.1 hours, but after review, the time should be reduced by 7.9 hours to total 10.3 hours;
 - d. Respondent noted that his hours billed on September 20, 2018 were 19.7 hours, but after review, the time should be reduced by 8.0 hours to total 11.7 hours;
 - e. Respondent noted that his hours billed on October 15, 2018 were 24.4 hours, but after review, the time should be reduced by 12.3 hours to total 12.1 hours;
 - f. Respondent noted that his hours billed on November 16, 2018 were 20.1 hours, but after review, the time should be reduced by 11.1 hours to total 9.0 hours;
 - g. Respondent noted that his hours billed on November 19, 2018 were 25.1 hours, but after review, the time should be reduced by 14.7 hours to total 10.4 hours;
 - h. Respondent noted that his hours billed on December 6, 2018 were 27.0 hours, but after review, the time should be reduced by 16.2 hours to total 10.8 hours; and
 - i. Respondent noted that his hours billed on December 17, 2018 were 24.7 hours, but after review, the time should be reduced by 12.5 hours to total 12.2 hours.
30. On or about May 28, 2019, the ODC received documents responsive to its April 4, 2019 inquiry to Ms. Paletta-Davis in which it requested, in pertinent part, information regarding

whether Respondent was compensated for providing legal services as a guardian *ad litem* for the Family Court system, or for providing legal services to the mental hygiene system from January 25, 2017, to the present day. Keith R. Hoover, Administrative Counsel of the Supreme Court, responded on behalf of the Court and the ODC was informed that Respondent was not compensated for providing legal services as guardian *ad litem* for the Family Court system, or for providing legal services to the mental hygiene system from January 25, 2017, to the present day.

31. Thereafter, on or about October 31, 2019, the ODC received D. Scott Bellomy, Esquire's Notice of Appearance as counsel on Respondent's behalf.
32. On or about November 16, 2020, Respondent, with Mr. Bellomy, appeared for a sworn statement at the ODC in Charleston, West Virginia. Respondent acknowledged that mistakes in his billing occurred and testified that he believed that he submitted corrected, amended vouchers to PDS.
33. On or about December 11, 2020, the ODC received from PDS via electronic mail Respondent's Fiscal Years 2017 through 2020 Totals. In 2017, Respondent submitted a total of 2,556.7 hours to PDS for 213 claims, with a total amount billed of \$132,498.21. In 2018, Respondent submitted a total of 1,753.6 hours to PDS for 199 claims, with a total amount billed of \$92,649.84. In 2019, Respondent submitted a total of 3,491.2 hours to PDS for 330 claims, with a total amount billed of \$176,853.83. In 2020, to the date of issuance of the Statement of Charges, Respondent submitted a total of 1,275.0 hours to PDS for 141 claims, with a total amount billed of \$68,542.84.

34. “West Virginia Code § 29-21-13a(a) (2008)² requires panel counsel for the PDS to ‘maintain detailed and **accurate** records of the time expended and expenses incurred on behalf of eligible clients[.]’ (emphasis added). Subsection (d) of that statute provides that panel counsel ‘shall be compensated . . . for **actual** and necessary time expended for services performed and expenses incurred[.]’” (emphasis added). Further, Syllabus Point 1 of Frasher v. Ferguson, 177 W.Va. 546, 355 S.E.2d 39 (1987) states:

W.Va. Code 29-21-14 [1981], which governs state payment of counsel fees for indigent criminal defendants, envisages a system where each client is proportionately billed according to the time spent actually representing that client; consequently, billing for more hours than are actually worked is duplicative billing that is clearly contrary to the system envisaged by the legislature.”

Lawyer Disciplinary Board v. Cooke, 239 W.Va. 40, 49, 799 S.E.2d 117, 126 (2017).

35. Respondent admitted that by charging over 24 hours on four different dates in various cases wherein he was court-appointed to represent indigent clients, along with charging 15 hours or more on an additional 11 days, he violated Rule 1.5(a) of the Rules of Professional Conduct, which provides:

Rule 1.5. Fees.

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and skill requisite to perform the legal service properly;
- (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and results obtained;

² This statute was amended during the 2019 Legislative session. However, because the conduct at issue herein took place prior to the amendment, the former statute is cited and applied.

- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

36. Respondent admitted that as a result of his submission of billing vouchers which misrepresented the time expended for services performed in filings before the appointed circuit judge and/or appointing tribunal, requisite knowledge being inferred from the underlying circumstances, which involves numerous verified submissions he submitted over the course of several years resulting in the overpayment of fees from the PDS, Respondent has violated Rule 3.3(a)(1) of the Rules of Professional Conduct, which provides:

Rule 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

- (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer[.]

37. Respondent admitted that because he engaged in improper and/or unsubstantial billing with regard to cases in which he was appointed to represent indigent clients on behalf of the PDS, he violated Rule 8.4(c) and (d) of the Rules of Professional Conduct, which provides:

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

* * *

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice[.]

38. The ODC declined to pursue a violation of Rule 8.4(b) of the Rules of Professional Conduct as charged with regard to Count I of this Statement of Charges, and the HPS did not find a violation of such.

COUNT II

19-06-365

Complaint of the Office of Lawyer Disciplinary Counsel

39. On or about August 26, 2019, the ODC sent Respondent correspondence via United States Mail in which he was notified that a complaint had been opened against him in the name of the ODC based upon documents received from PDS on August 23, 2019. Respondent was informed that PDS notified ODC that he had billed an excessively high number of hours for July and August of 2019, and that PDS denied payment on all his vouchers submitted for that time period. Respondent was further informed that he had billed PDS for at least 1,723 hours between January 1, 2019, and July 1, 2019, and that PDS stated that it would deny payment on all of Respondent's future vouchers until his billing issues were resolved. Respondent was provided a copy of vouchers which reflected as follows:
- a. Respondent submitted ten separate vouchers billing the PDS for 18.6 total hours of time performed on July 1, 2019;
 - b. Respondent submitted 11 separate vouchers billing the PDS for 20.0 total hours of time performed on July 2, 2019;
 - c. Respondent submitted 11 separate vouchers billing the PDS for 16.6 total hours of time performed on July 3, 2019;
 - d. Respondent submitted nine separate vouchers billing the PDS for 11.4 total hours of time performed on July 5, 2019;
 - e. Respondent submitted ten separate vouchers billing the PDS for 17.2 total hours of time performed on July 6, 2019;
 - f. Respondent submitted 13 separate vouchers billing the PDS for 20.3 total hours of time performed on July 8, 2019;

- g. Respondent submitted 13 separate vouchers billing the PDS for 23.9 total hours of time performed on July 9, 2019;
- h. Respondent submitted 11 separate vouchers billing the PDS for 27.1 total hours of time performed on July 10, 2019;
- i. Respondent submitted 12 separate vouchers billing the PDS for 16.8 total hours of time performed on July 11, 2019;
- j. Respondent submitted 12 separate vouchers billing the PDS for 14.3 total hours of time performed on July 12, 2019;
- k. Respondent submitted seven separate vouchers billing the PDS for 10.4 total hours of time performed on July 13, 2019;
- l. Respondent submitted 11 separate vouchers billing the PDS for 14.6 total hours of time performed on July 14, 2019;
- m. Respondent submitted 11 separate vouchers billing the PDS for 19.2 total hours of time performed on July 15, 2019;
- n. Respondent submitted nine separate vouchers billing the PDS for 17.0 total hours of time performed on July 16, 2019;
- o. Respondent submitted eight separate vouchers billing the PDS for 18.4 total hours of time performed on July 17, 2019;
- p. Respondent submitted seven separate vouchers billing the PDS for 20.0 total hours of time performed on July 18, 2019;
- q. Respondent submitted 11 separate vouchers billing the PDS for 22.7 total hours of time performed on July 19, 2019;
- r. Respondent submitted 11 separate vouchers billing the PDS for 13.5 total hours of time performed on July 20, 2019;
- s. Respondent submitted ten separate vouchers billing the PDS for 12.8 total hours of time performed on July 21, 2019;
- t. Respondent submitted 11 separate vouchers billing the PDS for 16.1 total hours of time performed on July 22, 2019;
- u. Respondent submitted four separate vouchers billing the PDS for 12.2 total hours of time performed on July 23, 2019;

- v. Respondent submitted eight separate vouchers billing the PDS for 14.7 total hours of time performed on July 24, 2019;
- w. Respondent submitted six separate vouchers billing the PDS for 13.7 total hours of time performed on July 25, 2019;
- x. Respondent submitted eight separate vouchers billing the PDS for 17.2 total hours of time performed on July 26, 2019;
- y. Respondent submitted seven separate vouchers billing the PDS for 12.0 total hours of time performed on July 27, 2019;
- z. Respondent submitted eight separate vouchers billing the PDS for 12.2 total hours of time performed on July 28, 2019;
- aa. Respondent submitted seven separate vouchers billing the PDS for 14.4 total hours of time performed on July 29, 2019;
- bb. Respondent submitted nine separate vouchers billing the PDS for 15.1 total hours of time performed on July 30, 2019;
- cc. Respondent submitted six separate vouchers billing the PDS for 15.0 total hours of time performed on July 31, 2019;
- dd. Respondent submitted five separate vouchers billing the PDS for 20.4 total hours of time performed on August 1, 2019;
- ee. Respondent submitted six separate vouchers billing the PDS for 11.7 total hours of time performed on August 2, 2019;
- ff. Respondent submitted eight separate vouchers billing the PDS for 16.0 total hours of time performed on August 3, 2019;
- gg. Respondent submitted five separate vouchers billing the PDS for 11.0 total hours of time performed on August 4, 2019;
- hh. Respondent submitted nine separate vouchers billing the PDS for 18.7 total hours of time performed on August 5, 2019;
- ii. Respondent submitted eight separate vouchers billing the PDS for 22.1 total hours of time performed on August 6, 2019;
- jj. Respondent submitted six separate vouchers billing the PDS for 17.1 total hours of time performed on August 7, 2019;

- kk. Respondent submitted seven separate vouchers billing the PDS for 16.3 total hours of time performed on August 8, 2019; and
 - ll. Respondent submitted three separate vouchers billing the PDS for 11.8 total hours of time performed on August 9, 2019.
40. On or about September 19, 2019, the ODC received from PDS documents that Respondent had given PDS via correspondence dated September 16, 2019. The documents included the following: correspondence dated September 13, 2019, in which Respondent discussed his vouchers submitted during July and August 2019; correspondence from Circuit Court Judges in Wayne County and Cabell County, West Virginia; Respondent's time sheets from July 1, 2019, through August 21, 2019; and docket sheets from certain cases of Respondent's in Wayne County, West Virginia.
41. On or about October 2, 2019, the ODC sent Respondent correspondence via United States Mail in which he was notified that the August 26, 2019 correspondence had been returned to sender marked "unclaimed." The ODC enclosed the August 26, 2019 correspondence and its attachments to the October 2, 2019 correspondence and requested that Respondent file his verified response to the complaint on or before October 30, 2019.
42. Also, on or about October 2, 2019, the ODC sent Mr. Eddy correspondence in which it requested a copy of Respondent's billing records from January 1, 2019 through June 30, 2019.
43. On or about October 18, 2019, the ODC received from PDS Respondent's billing records from January 1, 2019, through June 30, 2019. In pertinent part, the vouchers received reflected as follows:
- a. Respondent submitted nine separate vouchers billing the PDS for 15.9 total hours of time performed on January 3, 2019;

- b. Respondent submitted 12 separate vouchers billing the PDS for 21.1 total hours of time performed on January 4, 2019;
- c. Respondent submitted 11 separate vouchers billing the PDS for 17.5 total hours of time performed on January 7, 2019;
- d. Respondent submitted eight separate vouchers billing the PDS for 17.5 total hours of time performed on January 8, 2019;
- e. Respondent submitted 11 separate vouchers billing the PDS for 21.0 total hours of time performed on January 10, 2019;
- f. Respondent submitted ten separate vouchers billing the PDS for 20.3 total hours of time performed on January 14, 2019;
- g. Respondent submitted 13 separate vouchers billing the PDS for 21.0 total hours of time performed on January 15, 2019;
- h. Respondent submitted 16 separate vouchers billing the PDS for 33.7 total hours of time performed on January 16, 2019;
- i. Respondent submitted 13 separate vouchers billing the PDS for 19.7 total hours of time performed on January 17, 2019;
- j. Respondent submitted seven separate vouchers billing the PDS for 16.0 total hours of time performed on January 19, 2019;
- k. Respondent submitted 11 separate vouchers billing the PDS for 17.2 total hours of time performed on January 22, 2019;
- l. Respondent submitted 12 separate vouchers billing the PDS for 25.4 total hours of time performed on January 24, 2019;
- m. Respondent submitted seven separate vouchers billing the PDS for 16.7 total hours of time performed on January 30, 2019;
- n. Respondent submitted nine separate vouchers billing the PDS for 16.9 total hours of time performed on February 6, 2019;
- o. Respondent submitted eight separate vouchers billing the PDS for 16.0 total hours of time performed on February 21, 2019;
- p. Respondent submitted nine separate vouchers billing the PDS for 17.5 total hours of time performed on February 26, 2019;

- q. Respondent submitted six separate vouchers billing the PDS for 18.7 total hours of time performed on February 27, 2019;
- r. Respondent submitted ten separate vouchers billing the PDS for 21.4 total hours of time performed on February 28, 2019;
- s. Respondent submitted nine separate vouchers billing the PDS for 19.5 total hours of time performed March 13, 2019;
- t. Respondent submitted ten separate vouchers billing the PDS for 16.7 total hours of time performed on April 5, 2019;
- u. Respondent submitted ten separate vouchers billing the PDS for 15.0 total hours of time performed on May 27, 2019;
- v. Respondent submitted seven separate vouchers billing the PDS for 15.4 total hours of time performed June 4, 2019;
- w. Respondent submitted nine separate vouchers billing the PDS for 15.4 total hours of time performed June 10, 2019;
- x. Respondent submitted 12 separate vouchers billing the PDS for 21.3 total hours of time performed on June 11, 2019;
- y. Respondent submitted nine separate vouchers billing the PDS for 20.9 total hours of time performed on June 14, 2019;
- z. Respondent submitted seven separate vouchers billing the PDS for 15.2 total hours of time performed June 16, 2019;
- aa. Respondent submitted eight separate vouchers billing the PDS for 15.8 total hours of time performed June 19, 2019;
- bb. Respondent submitted eight separate vouchers billing the PDS for 18.3 total hours of time performed on June 20, 2019;
- cc. Respondent submitted 11 separate vouchers billing the PDS for 18.9 total hours of time performed on June 21, 2019;
- dd. Respondent submitted 12 separate vouchers billing the PDS for 24.3 total hours of time performed on June 24, 2019; and
- ee. Respondent submitted eight separate vouchers billing the PDS for 17.5 total hours of time performed on June 25, 2019.

44. After requesting and being granted two extensions of time, Respondent, through counsel Mr. Bellomy, filed his response to the complaint on or about December 13, 2019. Respondent included with his response his time sheets from July 1, 2019, through August 12, 2019, and correspondence from Circuit Court Judges in Wayne County and Cabell County, West Virginia.
45. In his response, Respondent, through counsel, acknowledged that he had made billing errors in the vouchers he submitted to PDS, but asserted that his billing errors were unintentional. Respondent noted that PDS upgraded its voucher entry system in July 2019 and, as a result, early in July 2019, Respondent and his staff had significant difficulty accessing the system. Respondent stated that as a result of the new voucher entry system, he experienced a number of failed voucher entries, an inability to modify line items, and an inability to delete pending vouchers.
46. Respondent stated that as a result of the difficulty he experienced with the new voucher entry system, he and his staff instituted a secondary system for tracking time spent on cases, and thus, both he and his staff kept track of all billable time. Respondent asserted that he and his staff worked to merge their notations daily, and upon completion of such merger, Respondent noted his files. Respondent stated that he would then have a final list of time for each day to be submitted.
47. Respondent maintained that there were instances in which hours were compiled on both his list and his staff's, which Respondent had forgotten to note, and as a result, there were some vouchers that were submitted to PDS that contained twice the amount of billable hours as were accurate. Respondent stated that the vouchers that were double billed were modified in PDS's entry system to reduce certain line items by 50% and resubmitted

following the receipt of the complaint from ODC. Respondent identified those numbered vouchers as follows:

a.	20182055	r.	20185879
b.	20182605	s.	20185701
c.	20185017	t.	20183960
d.	20183963	u.	20184098
e.	20185849	v.	20184447
f.	20185414	w.	20184134
g.	20185418	x.	20185709
h.	20185013	y.	20185116
i.	20185002	z.	20185249
j.	20186267	aa.	20185871
k.	20183464	bb.	20185559
l.	20185024	cc.	20185401
m.	20185693	dd.	20186457
n.	20184842	ee.	20186060
o.	20186046	ff.	20186287
p.	20183692	gg.	20185540
q.	20183711		

48. Respondent further asserted that, as a result of a system error, several cases were billed twice. Thus, the system reflected that Respondent experienced the “temporal impossibility” of having billed for more than 24 hours in a single day on the numbers vouchers as follows:

a.	20186547	e.	20183458
b.	20183467	f.	20183457
c.	20184674	g.	20183452
d.	20183461		

49. Respondent stated that he subsequently instituted internal controls to prevent such billing errors from occurring.

50. On or about October 26, 2020, the ODC sent Mr. Eddy correspondence in which it requested the following: the total number of hours Respondent submitted to PDS in 2019; the total number of Respondent's hours that were denied payment by PDS; the date on which the authority to approve or deny voucher payments shifted from the Courts to PDS; and whether a specific court case ever has more than one OVS number assigned to it by PDS.
51. On or about November 2, 2020, the ODC sent Mr. Bellomy a copy of Respondent's billing records from January 1, 2019 through June 30, 2019.
52. Also, on or about November 6, 2020, the ODC received from PDS via electronic mail monthly calendars from July 2018 through March 2020, which depicted the number of hours Respondent submitted to PDS. The calendar listing through August 2019 demonstrates Respondent's pattern and practice of billing that, when taken in sum total and accounting for the fact that he also had privately retained clients, indicate false and unreasonable billings. Specifically, the calendars reflected as follows:
- a. July 2018 – Respondent billed PDS for hours for all 31 days of the month, with ten days billed for 9 to 18 hours;
 - b. August 2018 – Respondent billed PDS for hours for all 31 days of the month, with 19 days billed for 9 to 18 hours;
 - c. September 2018 – Respondent billed PDS for hours for all 30 days of the month, with 11 days billed for 9 to 18 hours, and two days billed for 18 or more hours;
 - d. October 2018 – Respondent billed PDS for hours for 30 of the 31 days of the month, with 17 days billed for 9 to 18 hours, one day billed for 18 or more hours, and one day billed for 24 or more hours;
 - e. November 2018 – Respondent billed PDS for hours for all 30 days of the month, with 14 days billed for 9 to 18 hours, 3 days billed for 18 or more hours, and one day billed for 24 or more hours;

- f. December 2018 – Respondent billed PDS for hours for 29 of the 31 days of the month, with seven days billed for 9 to 18 hours, five days billed for 18 or more hours, and two days billed for 24 or more hours;
- g. January 2019 – Respondent billed PDS for hours for all 31 days of the month, with 13 days billed for 9 to 18 hours, five days billed for 18 or more hours and two days billed for 24 or more hours;
- h. February 2019 – Respondent billed PDS for hours for 27 of the 28 days of the month, with 12 days billed for 9 to 18 hours, and two days billed for 18 or more hours;
- i. March 2019 – Respondent billed PDS for hours for all 31 days of the month, with eight days billed for 9 to 18 hours, and one day billed for 18 or more hours;
- j. April 2019 – Respondent billed PDS for hours for all 30 days of the month, with 19 days billed for 9 to 18 hours;
- k. May 2019 – Respondent billed PDS for hours for all 31 days of the month, with 29 days billed for 9 to 18 hours;
- l. June 2019 – Respondent billed PDS for all 30 days of the month, with 23 days billed for 9 to 18 hours, four days billed for 18 or more hours, and one day billed for 24 or more hours;
- m. July 2019 – Respondent billed PDS for hours for 30 of the 31 days of the month, with 18 days billed for 9 to 18 hours;
- n. August 2019 – Respondent billed PDS for hours for 16 of the 31 days of the month, with eight days billed for 9 to 18 hours.
- o. September 2019 – Respondent billed PDS for hours for 13 of the 30 days of the month, with all 13 days billed for under 9 hours;
- p. October 2019 – Respondent billed PDS for hours for 13 of the 31 days of the month, with all 13 days billed for under 9 hours;
- q. November 2019 – Respondent billed PDS for hours for 16 of the 30 days of the month, with all 16 days billed for under 9 hours;
- r. December 2019 – Respondent billed PDS for hours for 14 of the 31 days of the month, with all 14 days billed for under 9 hours;

- s. January 2020 – Respondent billed PDS for hours for 21 of the 31 days of the month, with all 21 days billed for under 9 hours;
 - t. February 2020 – Respondent billed PDS for hours for 19 of the 29 days of the month, with all 19 days billed for under 9 hours;
 - u. March 2020 – Respondent billed PDS for hours for 21 of the 31 days of the month, with two days billed for 9 to 18 hours;
 - v. April 2020 – Respondent billed PDS for hours for eight of the 30 days of the month, with all eight days billed for under 9 hours;
 - w. May 2020 – Respondent billed PDS for hours for 21 of the 31 days of the month, with all 21 days billed for under 9 hours; and
 - x. June 2020 – Respondent billed PDS for hours for 18 of the 30 days of the month, with all 18 days billed for under 9 hours.
53. On or about November 16, 2020, Respondent, with Mr. Bellomy, appeared for a sworn statement at the ODC in Charleston, West Virginia. Respondent acknowledged that mistakes in his billing occurred and testified that he believed that he submitted corrected, amended vouchers to PDS.
54. On or about December 11, 2020, the ODC received from PDS via electronic mail Respondent's Fiscal Years 2017 through 2020 Totals. In 2017, Respondent submitted a total of 2,556.7 hours to PDS for 213 claims, with a total amount billed of \$132,498.21. In 2018, Respondent submitted a total of 1,753.6 hours to PDS for 199 claims, with a total amount billed of \$92,649.84. In 2019, Respondent submitted a total of 3,491.2 hours to PDS for 330 claims, with a total amount billed of \$176,854.83. In 2020, to the date of issuance of the Statement of Charges, Respondent submitted a total of 1,275.0 hours to PDS for 141 claims, with a total amount billed of \$68,542.84.
55. Respondent admitted that from January 1, 2019 through June 30, 2019, by charging over 24 hours on three different dates in various cases wherein he was court-appointed to

represent indigent clients, along with charging 15 hours or more on an additional 25 days, he violated Rule 1.5(a) of the Rules of Professional Conduct, as provided, *supra*.

56. Respondent admitted that from January 1, 2019 through June 30, 2019, as a result of his submission of incorrect billing vouchers in a number of his court-appointed cases before the appointed circuit judge and/or appointing tribunal, knowledge implied by his signature verifying the accuracy of said billing with each filing, Respondent has violated Rule 3.3(a)(1) of the Rules of Professional Conduct, as provided, *supra*.
57. Respondent admitted that because he engaged in improper and/or unsubstantial billing with regard to cases in which he was appointed to represent indigent clients on behalf of the PDS, he violated Rules 8.4(c) and (d) of the Rules of Professional Conduct, as provided, *supra*.
58. The ODC declined to pursue a violation of Rule 8.4(b) of the Rules of Professional Conduct as charged with regard to Count II of this Statement of Charges, and the HPS did not find a violation of such.
59. Respondent in no way admitted or stipulated to any criminal conduct or criminal intent as alleged in the Statement of Charges.

COUNT III
I.D. No. 19-06-361
Complaint of Willard E. Bays (I)

60. Respondent represented Willard E. Bays in a criminal matter in the Cabell County Magistrate Court, West Virginia.
61. On or about August 21, 2019, Mr. Bays filed an ethics complaint against Respondent with the ODC in which he alleged that he hired Respondent to represent him on two misdemeanor possession charges and a *capias* for failure to appear before the Cabell

County Magistrate Court. Mr. Bays alleged that he agreed to pay Respondent \$7,000.00 for his representation, but instead, Respondent charged him \$10,000.00. Mr. Bays further alleged that Respondent failed to provide him with an accounting of his case and failed to reimburse him \$3,000.00. Mr. Bays asserted that he was owed.

62. On or about August 21, 2019, the ODC sent Respondent a copy of the complaint and directed him to file a response within 20 days.
63. On or about August 26, 2019, the ODC received correspondence from Mr. Bays dated August 19, 2019, that he had also sent to the Executive Director of The West Virginia State Bar. Mr. Bays alleged that he had hired Respondent to represent Jamie Bias in 2018 on various charges in the Cabell County Magistrate Court, and that he paid Respondent either \$3,000.00 or \$3,500.00. Mr. Bays further alleged that Ms. Bias was in a drug treatment program in Ohio and failed to appear for court in West Virginia, and thus, a *capias* was issued for her arrest. Mr. Bays alleged that Respondent was to address the *capias* with the Court and request a continuance during the time Ms. Bias was receiving drug treatment.
64. Mr. Bays alleged that, at some point, Ms. Bias began using drugs again and incurred new criminal charges. Mr. Bays further alleged that Respondent agreed to represent Ms. Bias for all of her pending charges for either \$7,000.00 or \$7,500.00, and thus, Mr. Bays paid Respondent twice to represent Ms. Bias.
65. After requesting and receiving an extension of time to respond, Respondent provided his response to the complaint to ODC on or about September 19, 2019. In the response, Respondent stated that Mr. Bays contacted his law firm on or about August 26, 2018, to retain Respondent's representation on various cases in the Cabell County Magistrate Court. Respondent asserted that his fee agreement provided that Respondent would represent Mr.

Bays on the pending charges for \$10,000.00. Respondent further asserted that his fee agreement provided that Respondent would prepare other legal documents for Mr. Bays, including a Durable Power of Attorney, a Living Will, and a Last Will & Testament, and that each document required several revisions. Respondent noted that Mr. Bays failed to execute the aforementioned documents, as he neglected to appear for several appointments with Respondent.

66. In his response, Respondent also acknowledged that Mr. Bays retained him to represent Ms. Bias on various charges in the Cabell County Magistrate Court. Respondent stated that the agreed upon fee was \$6,000.00, and that he earned his fee and achieved a favorable result for Ms. Bias.
67. Thereafter, on or about February 3, 2020, the ODC sent Respondent correspondence in which it requested that Respondent provide a fee agreement for Mr. Bays' representation and provide a copy of Respondent's billing records for work performed on his matters.
68. On or about March 4, 2020, the ODC sent Respondent, via certified and United States Mail, correspondence in which it referenced its February 3, 2020 correspondence, noted that Respondent had failed to respond to the same, and requested that Respondent provide a response by March 16, 2020.
69. That on or about March 13, 2020, the Respondent sent correspondence to Lawyer Disciplinary Counsel. Said correspondence contained the requested response to Mr. Bays' Complaint.
70. On or about April 20, 2020, the ODC received correspondence from Respondent in which he provided a copy of his billing records that showed dates and work performed on Mr. Bays' behalf in his criminal matters in the Magistrate Court of Cabell County.

71. On or about November 16, 2020, Respondent, with Mr. Bellomy, appeared for a sworn statement at the ODC in Charleston, West Virginia. Respondent produced Mr. Bays' client file, which contained work product and documents regarding Mr. Bays' matters and a fee agreement executed by Mr. Bays and Respondent on June 26, 2018. In the fee agreement, the parties agreed to the fee of \$10,000.00 for Respondent's representation, and it was noted that Respondent would represent Mr. Bays in his criminal matters as well as would prepare wills and a power of attorney for Mr. Bays.
72. On June 28, 2021, an evidentiary hearing was held in Huntington, West Virginia, to take Mr. Bays' testimony with respect to Count III of the Statement of Charges, as Mr. Bays had previously advised ODC that he was unavailable to attend the hearing as then scheduled for July 13 and 14, 2021. Joanne M. Vella, Lawyer Disciplinary Counsel, appeared on behalf of the ODC. Mr. Bellomy appeared for Respondent, who also appeared. The Hearing Panel Subcommittee, comprised of Nicole A. Cofer, Esquire, Chairperson; Suzanne M. Williamis-McAuliffe, Esquire (who appeared via Microsoft Teams); and Ms. Rachel Scudiere, Layperson, presided over this matter. Mr. Bays was notified of this date by letter dated May 19, 2021. Ms. Vella spoke with Mr. Bays on May 25, 2021, and requested that he provide a street address for the subpoena for his appearance on June 28, 2021. Mr. Bays refused to provide an address for the subpoena but agreed for Ms. Vella to call him at 10:00 a.m. on June 24, 2021, to discuss the scope of his testimony. On June 24, 2021, Ms. Vella called Mr. Bays at the appointed time and several times thereafter, at the new telephone number he provided but there was no answer at this number. Mr. Bays did not appear for the June 28, 2021 hearing. Subsequent efforts by the ODC to locate Mr. Bays before the final hearing were unsuccessful.

73. Based upon the record and per a stipulation between the parties, the ODC declined to pursue a violation of Rule 1.5(a) of the Rules of Professional Conduct as charged with regard to Count III of this Statement of Charges, and the HPS did not find a violation of such.

COUNT IV
I.D. No. 20-06-054
Complaint of Willard E. Bays (II)

74. Respondent represented Jamie B. Bias in a criminal matter in the Cabell County Magistrate Court, West Virginia.
75. On or about February 11, 2020, Willard E. Bays filed an ethics complaint against Respondent on behalf of Ms. Bias with the ODC. Mr. Bays alleged that he hired Respondent to represent Ms. Bias, his ex-girlfriend, on three misdemeanor charges in the Cabell County Magistrate Court. Mr. Bays included with his complaint correspondence dated August 19, 2019, that he had also sent to the Executive Director of The West Virginia State Bar. Mr. Bays alleged that he had hired Respondent to represent Ms. Bias in 2018 on various charges in the Cabell County Magistrate Court, and that he paid Respondent either \$3,000.00 or \$3,500.00. Mr. Bays further alleged that Ms. Bias was in a drug treatment program in Ohio and failed to appear for court in West Virginia, and thus, a *capias* was issued for her arrest. Mr. Bays alleged that Respondent was supposed to address the *capias* with the Court and request a continuance during the time Ms. Bias was receiving drug treatment.
76. Mr. Bays further alleged that Ms. Bias subsequently began using drugs again, was arrested and incurred additional criminal charges. Mr. Bays alleged that Respondent agreed to represent Ms. Bias on all of her pending charges for either \$7,000.00 or \$7,500.00, which

Respondent paid. Thus, Mr. Bays alleged that he paid Respondent twice to represent Ms. Bias and should be refunded for the initial fee he paid Respondent in 2018.

77. On or about February 14, 2020, the ODC sent Respondent a copy of the complaint and directed him to file a response within 20 days.
78. On or about March 24, 2020, the ODC received a copy of Respondent's response to the complaint. In the response, Respondent stated that Mr. Bays retained him to represent Ms. Bias on drug charges in the Cabell County Magistrate Court. Respondent further stated he was also retained by Mr. Bays to represent Ms. Bias on additional charges stemming from alleged criminal activity in 2016. Respondent asserted that on or about August 1, 2018, he provided a Notice of Appearance to the Cabell County Magistrate Court and filed a Motion to Set Aside the *Capias* resulting from Ms. Bias' 2016 charges.
79. Respondent stated that the Court scheduled a hearing for October 18, 2018, at which Respondent appeared on Ms. Bias' behalf and represented to the Court that Ms. Bias was unable to attend the hearing because she was in a drug treatment program in Ohio. The Court rescheduled the hearing for October 27, 2018 and December 5, 2018, at which times Respondent again appeared on Ms. Bias' behalf and again represented to the Court that Ms. Bias was unable to attend the hearings because she remained in drug treatment.
80. Respondent stated that he was informed that Ms. Bias was discharged from drug treatment in January 2019, and thus, a *capias* was issued by the Magistrate Court of Cabell County with bond being reset. Respondent asserted that Ms. Bias' bond was paid on or about May 22, 2019, and that a hearing was held on or about May 23, 2019, at which time Respondent filed a Motion to Dismiss the *capias* and Ms. Bias' underlying criminal charges. Respondent stated that the Court granted his motion and the 2016 criminal matter was

concluded. Respondent asserted that Mr. Bays then retained his services to represent Ms. Bias on her 2019 drug charges at an agreed upon fee of \$6,000.00, and that he earned his fee and achieved a favorable result for Ms. Bias.

81. On or about November 16, 2020, Respondent, with Mr. Bellomy, appeared for a sworn statement at the ODC in Charleston, West Virginia. Respondent produced Ms. Bias' client file, which did not contain either a fee agreement or billing records for his representation of Ms. Bias. Respondent acknowledged that he did not execute a fee agreement with Ms. Bias, and further acknowledged that he did not have an accounting of the work he performed for Ms. Bias but noted that he represented her through the conclusion of her criminal matters and was able to get the State to dismiss a felony charge against her.
82. Respondent admitted that because he failed to communicate the scope of the representation and the basis or rate of the fee and expense for which Ms. Bias would be responsible with Ms. Bias in writing, before or within a reasonable time after commencing the representation, and because Respondent had never represented Ms. Bias previously, Respondent has violated Rule 1.5(b) of the Rules of Professional Conduct, which provides:

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 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.

83. Based upon the record, the ODC declined to pursue a violation of Rule 1.5(a) of the Rules of Professional Conduct as charged with regard to Count IV of this Statement of Charges, and the HPS did not find a violation of such.

COUNT V³
I.D. No. 19-06-370
Complaint of Angela C. Robertson

84. On or about August 29, 2019, Angela C. Robertson filed an ethics complaint against Respondent with the ODC. Ms. Robertson alleged that she paid Respondent \$2,000.00 as a retainer fee, plus court costs totaling \$225.00, to represent her in her divorce. Ms. Robertson alleged that she had difficulty communicating with Respondent, and that Respondent's office informed her that she needed to pay additional funds for the cost of the legal work in her matter. Ms. Robertson further alleged that after approximately six months, she contacted Respondent's office to check on her case's status and learned that her husband had not yet been served with a petition for divorce. Ms. Robertson asserted that she was entitled to a refund of the total fees she paid to Respondent, \$3,225.00, as she did not receive any documents of Respondent's work product, nor had her husband been served with a petition for divorce [ODC Ex 97].
85. On or about August 29, 2019, the ODC sent Respondent a copy of the complaint and directed him to file a response within twenty days [ODC Ex 98].
86. On or about September 12, 2019, the ODC received a copy of Respondent's response to the complaint. In the response, Respondent stated that he met with Ms. Robertson on or about January 17, 2019, for an initial consultation in which she discussed her intentions to divorce her husband due to his erratic and, at times, violent behavior. Also, on or about January 17, 2019, Ms. Robertson signed a fee agreement. Respondent stated that his legal assistant, Todd Chapman, provided Ms. Robertson with the necessary documentation that she should complete and return. Respondent further stated that Ms. Robertson called his

³ The parties did not stipulate to Findings of Fact and Conclusions of Law with regard to Count V, and evidence was taken by the Hearing Panel regarding this Count at the September 27, 2020 hearing.

office on several occasions thereafter and asked what to do about her husband. Respondent said he explained to her that until she returned the paperwork or provided the information required therein to his office, Respondent could not obtain service, filing or a hearing date in her divorce [ODC Ex. 99].

87. Respondent maintained that in early February 2019, Ms. Robertson returned to his office with the paperwork, which was half-completed. Respondent stated that he and Ms. Robertson met and completed the paperwork. Respondent further stated that during their meeting, Ms. Robertson inquired of Respondent about not going through the divorce process, but rather filing for separation instead, as she was concerned about her financial situation should she get divorced. Respondent maintained that he advised Ms. Robertson about alternate options, such as filing for separation, as well as Ms. Robertson filing for Guardianship/Conservatorship over her husband due to his extreme illness and inability to care for himself [ODC Ex. 99].
88. Respondent stated that during a meeting with Ms. Robertson that occurred in late March 2019, Ms. Robertson advised Respondent that she wished to abandon her divorce action, and also abandon any plan to file for separation. Respondent maintained that he advised Ms. Robertson that she could file for Guardianship/Conservatorship over her husband due to his incapacity to care for himself or manage his own affairs. Respondent stated that he requested that Ms. Robertson sign another fee agreement for the matter to make her intentions clear, which she did on or about March 22, 2019. Respondent stated that Ms. Robertson's balance from the previous two domestic proceedings that had been changed at her request was to be applied to the preparation and filing of the Guardianship/Conservatorship matter [ODC Ex. 99].

89. Respondent stated that he prepared a Petition for a Guardianship/Conservatorship along with the necessary financial affidavit for Ms. Robertson. Respondent further stated that he was waiting for Ms. Robertson to return her husband's doctor's certification so that the matter could be filed, but that Ms. Robertson never provided him with the same. Respondent added that it was his understanding from conversations with Ms. Robertson that her husband was doing better and that she no longer wished to pursue any of the various legal proceedings she and Respondent discussed [ODC Ex. 99].
90. On or about October 24, 2019, Ms. Robertson filed a reply to Respondent's response to her complaint. Ms. Robertson refuted Respondent's assertion that he informed her that she could not go forward in her divorce without completion of the paperwork she was given. Ms. Robertson added that she had a difficult time communicating with Respondent because he would not return her telephone calls [ODC Ex. 101].
91. Ms. Robertson stated that she called Respondent's office in early June 2019 and left a voice mail in which she requested that Respondent proceed with her divorce. Ms. Robertson maintained that Respondent was untruthful when he stated that she changed her mind about pursuing a divorce from her husband [ODC Ex. 101].
92. Ms. Robertson stated that she paid Respondent a total of \$3,225.00, and that he failed to file her divorce action, as she requested he do [ODC Ex. 101].
93. On or about November 16, 2020, Respondent, with Mr. Bellomy, appeared for a sworn statement at the ODC in Charleston, West Virginia. Respondent produced Ms. Robertson's file, which included the two fee agreements she and Respondent executed, as well as notes and a signed "Financial Statement," a signed "Petition for the Appointment of a Guardian/Conservator," and a signed "Petition for Divorce." [ODC Ex. 102]

94. At the hearing, Ms. Robertson testified that she went to see Respondent for representation for a divorce from her husband [Tr. p. 8].
95. Ms. Robertson said that she asked Respondent how much it would cost to get a divorce and wrote him a check for the quoted amount. Ms. Robertson said that Respondent did not tell her the payment was a retainer, but how much the divorce would cost [Tr. pp. 8-9].
96. Ms. Robertson said she initially paid Respondent \$2,000.00 plus court costs [Tr. p. 10].
97. After six months passed, Ms. Robertson inquired about the court date for the divorce and was told Respondent needed \$1,000.00 more [Tr. p. 11].
98. Ms. Robertson said she finally dismissed Respondent because a divorce was never filed on her behalf, and she asked to be refunded the \$3,225.00 she had paid him [Tr. pp. 13-14; 25].
99. Ms. Robertson testified that she felt Respondent was using her for money [Tr. p. 14].
100. Ms. Robertson also testified that Respondent acted like she was “just an inconvenience” to Respondent unless she was giving them money [Tr. p. 16].
101. Ms. Robertson testified that at one point Respondent’s office phone had been disconnected, making it difficult to get a hold of him [Tr. p. 10]. She later testified that she could “never get a hold of” Respondent by phone [Tr. p. 28].
102. Ms. Robertson disputed that she had signed a document memorializing that she had decided to pursue a guardian conservatorship petition instead of a divorce [Respondent’s Ex. 20; Tr. pp. 21-22].
103. In fact, Ms. Robertson believed that her purported signature on the document had been traced and said that it did not look like her signature [Tr. p. 23].

104. At the hearing, Respondent acknowledged that his office phone had been out for about a two-week period due to changing phone providers [Tr. p. 65].
105. Respondent attributed his failure to file a divorce on Ms. Robertson's behalf to a "back and forth" in her desire to proceed, and he believed Ms. Robertson was not entitled to a refund because of the services rendered [Tr. pp.62-63; 65].
106. Because the clear and convincing evidence supports that Respondent failed to abide by Ms. Robertson's decisions concerning the objectives of representation in this matter, in that he failed to file a petition for divorce on her behalf, the HPS correctly found that Respondent violated Rule 1.2(a) of the Rules of Professional Conduct, which provides, in pertinent part:

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

107. Because the clear and convincing evidence supports that Respondent failed to act with reasonable and promptness in representing Ms. Robertson, in that he failed to file a petition for divorce on her behalf, the HPS correctly found that Respondent violated Rule 1.3 of the Rules of Professional Conduct, which provides:

Rule 1.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

108. Because the clear and convincing evidence supports that Respondent failed to keep Ms. Robertson reasonably informed about the status of the matter, in that he failed to

communicate with her about the status of her divorce proceeding, the HPS correctly found that he violated Rule 1.4(a)(3) of the Rules of Professional Conduct, which provides:

Rule 1.4. Communication.

(a) A lawyer shall:

(3) keep the client reasonably informed about the status of the matter[.]

109. Because the clear and convincing evidence supports that Respondent charged an unreasonable fee or an unreasonable amount for expenses in that he charged Ms. Robertson \$3,000.00 for his representation of her in her divorce proceeding and/or in her guardianship/conservatorship proceeding without ever filing a petition for divorce of a petition for guardianship/conservatorship on her behalf, and in that he charged Ms. Robertson \$225.00 in court costs for a divorce petition that was never filed, the HPS correctly found that Respondent violated Rule 1.5(a) of the Rules of Professional Conduct, as provided, *supra*.

**C. RECOMMENDATION OF THE HEARING PANEL SUBCOMMITTEE
IN CASE NO. 20-1027**

110. The HPS found clear and convincing evidence that Respondent knowingly violated duties owed to his clients, to the public, to the legal system and to the legal profession, that there is clear injury to the State of West Virginia, the legal profession, the PDS, and to Respondent's former client, Ms. Robertson, due to his conduct, and that there was an aggravating factor of prior discipline and no mitigating factors.
111. Based upon the stipulations, the parties agreed to a two (2) year suspension; however, based upon the lack of mitigating factors and considering the suspension periods imposed by the Supreme Court of Appeals in PDS billing cases for lawyers in other disciplinary actions, the HPS adopted the sanctions recommended by stipulation of the parties except for the

length of the suspension and included a sanction addressing Count V. Thus, the HPS recommended the following sanctions be adopted by this Honorable Court:

- a. That Respondent's law license be suspended for a period of three (3) years, which Respondent will voluntarily begin to serve on January 1, 2022;
- b. That upon suspension, Respondent must comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure;
- c. That Respondent be required to petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure;
- d. That based upon an analysis completed by PDS, Respondent shall allow PDS to withhold \$58,812.46 in unpaid vouchers as restitution for prior overpayments;
- e. That Respondent be required to refund Ms. Robertson the \$3,225.00, which includes the \$225.00 for court costs, that she was charged and paid as it was determined to be an unreasonable fee for work that was not completed;
- f. That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

112. On February 23, 2022, the ODC filed its consent to the recommendation of the HPS. Respondent did not file a consent or an objection to the recommendation.

D. NATURE OF PROCEEDINGS IN CASE NO. 22-0342

On March 30, 2022, in separate and distinct disciplinary proceedings,⁴ Respondent executed an Affidavit for Consent to Disbarment expressing his desire to consent to disbarment pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure. An email of the same was sent to Lawyer Disciplinary Counsel on April 29, 2022.

Thereafter, Lawyer Disciplinary Counsel provided a copy of the Affidavit to the Chair of the Lawyer Disciplinary Board along with a motion to accept the consent to disbarment. The

⁴ At the time, complaints docketed with identification numbers 20-06-299, 20-06-303, and 20-06-306 were pending against Respondent and under investigation by the ODC.

Chairperson subsequently issued an Order which directed that Chief Lawyer Disciplinary Counsel, upon receiving Respondent's original "Affidavit for Consent to Disbarment," shall file the same, under seal, as an attachment to the petition for disbarment filed pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure. On May 3, 2022, Chief Lawyer Disciplinary Counsel filed an original and ten copies of the Petition for Disbarment with the Supreme Court of Appeals, in which it was requested that the Supreme Court grant said Petition and accept Respondent's "Affidavit for Consent to Disbarment," that the referenced affidavit be kept under seal and not publicly disclosed or made available for use in any other proceedings, except by order of the Court, pursuant to Rules 3.25, and that the Court enter an Order of Disbarment of Respondent's license to practice law.

II. SUMMARY OF ARGUMENT

The record in Case Number 20-1027 reflects that Respondent has committed multiple clear violations of the Rules of Professional Conduct and discipline is required. The findings of fact and conclusions of law made by the HPS in its Report were correct, sound, fully supported by evidence on the whole adjudicatory record, and should not be disturbed. In addition, by adopting the recommendations of the HPS as to the sanction in that matter, this Court will be serving its goals of protecting the public, reassuring the public as to the reliability and integrity of attorneys, and restoring the faith of the victims. A strong sanction is also necessary to deter lawyers who may be considering or who are engaging in similar misconduct. In addition, in Case No. 22-0342, Rule 3.25 of the Rules of Lawyer Disciplinary Procedure states that upon receipt of the required affidavit, the Court shall enter an order disbarring the lawyer by consent. To serve the stated goals of the disciplinary system and to protect the interests of justice, this Honorable Court must enter simultaneous orders regarding these separate and distinct disciplinary cases forthwith.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the Order entered by the Supreme Court of Appeals on June 2, 2022, which *sua sponte* consolidated these matters for purposes of briefing, oral argument, consideration, and decision, oral argument under Rule 19 of the Rules of Appellate Procedure will be scheduled during the September 2022 Term of Court.

IV. ARGUMENT

A. STANDARD OF PROOF

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.* 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).

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." McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381. 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).

**B. ANALYSIS OF SANCTION UNDER RULE 3.16 OF THE RULES OF
LAWYER DISCIPLINARY PROCEDURE IN CASE NO. 20-1027**

Syllabus Point 4 of Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998) holds: 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. A review of the extensive record in this matter indicates that Respondent has transgressed all four factors set forth in Jordan.

1. Respondent has violated duties owed to his clients, to the public, to the legal system and to the legal profession.

Respondent stipulated, and the evidence is clear, that he violated duties owed to his clients, to the public, to the legal system and to the legal profession. Members of the public are entitled to expect lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty to act in such a manner as to maintain the integrity of the Bar and the profession. In filing vouchers that contained billing that did not accurately represent Respondent's actual time, Respondent failed this expectation. Moreover, lawyers are officers of the Court and must abide by the rules of substance and procedure which shape the administration of justice. When Respondent submitted his many vouchers for payment, he declared under the penalty of perjury with his signature that three things existed: (1) that the submitted voucher complied with the provisions of the statute; (2)

that the time set forth for the attorney was actual and necessary time that the attorney expended on legal services; and (3) that the expense set forth were actual and necessary expenses that that occurred in providing legal representation. In reality, Respondent's vouchers did not comply with the law or the guidelines of the PDS. The courts must be able to rely on lawyers to provide their true and accurate time when they submit vouchers to be paid, and without such truthfulness, the duty to the entire legal system is infringed.

In addition, lawyers owe their clients duties of loyalty, communication, and diligence. Regarding the matter of which Ms. Robertson complained, the HPS correctly found that Respondent had fallen short of his duties to communicate with her and diligently work on her case.

2. Respondent acted knowingly.

Respondent stipulated that he submitted pay vouchers to the courts that were incorrect and as such misrepresented these matters to the courts. Respondent's conduct of misrepresenting his actual and necessary time continued over the course of several years and Respondent received thousands of dollars in payments from the PDS for the bills he submitted. Respondent acknowledged in the stipulations that it was his professional and ethical responsibility to ensure that he and his staff were complying with the Rules of Professional Conduct, and that it is imperative that a lawyer scrutinize documents requiring the lawyer's own verification for accuracy. In not doing so, Respondent acknowledged that he knowingly assumed the risk of his conduct.

3. Respondent's misconduct has caused actual injuries.

Based upon the stipulations and the record of this case, it was clear to the HPS that actual injuries resulted from Respondent's misconduct. Respondent admitted that his conduct caused clear injury to the State of West Virginia and the legal profession. Respondent stipulated that the

PDS was forced to divert resources to investigate his conduct, and that his noncompliance with the Rules of Professional Conduct as exhibited in the record is detrimental to the reputation of the legal system and legal profession. Historically, there has been a substantial impact on the legal profession generated by lawyer overbilling. In addition, the evidence shows that Respondent's client, Ms. Robertson, was harmed in the delay in his failure to file for divorce on her behalf.

4. There is an aggravating factor and no mitigating 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 factor in this case is prior discipline. Respondent was admonished by the Investigative Panel of the Lawyer Disciplinary Board for a violation of Rule 1.5 of the Rules of Professional Conduct on December 10, 2005. In addition, by Order entered by the Supreme Court of Appeals on or about September 5, 2019, Respondent was publicly reprimanded for a violation of Rule 1.16(d) and Rule 8.1(b) of the Rules of Professional Conduct [ODC Ex. 103]. The HPS found no mitigating factors present, nor does the record support any such findings.

C. SANCTION REGARDING CASE NO. 20-1027

The principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Syl. pt. 3, Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); and Syl. pt. 2, Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999). "A sanction is to not only punish the attorney, but should

also be designed to reassure the public confidence in the integrity of the legal profession and deter other lawyers from similar conduct.” Syl. pt 2, Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993); Syl. pt 3, Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Syl. pt. 5, Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Syl pt. 3, Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); and Syl pt. 3, Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000).

This disciplinary proceeding involves admitted violations of the Rules of Professional Conduct committed by Respondent, which are also supposed by the clear and convincing evidence contained in the record. Respondent stipulated that he misrepresented his actual and necessary time expended for services performed in filings before the appointed circuit judge and/or appointing tribunal and engaged in improper and unsubstantiated billing regarding cases in which he was appointed to represent indigent clients on behalf of the PDS. Respondent also was found to have been unresponsive to his client, not to have taken appropriate action on her case, and causing her real injuries. For the public to have confidence in our disciplinary and legal systems, lawyers such as Respondent must receive consequences for their actions. A severe sanction is also necessary to deter lawyers who may be considering or who are engaging in similar conduct.

The Supreme Court of Appeals has specifically held in cases of fraudulent PDS billing suspensions are the norm. In addition, conciliation agreements regarding restitution with PDS are also common and appropriate. See Lawyer Disciplinary Board v. Cooke, 239 W.Va. 40, 799 S.E.2d 117 (2017) (two-year suspension for lawyer’s misconduct of overbilling PDS; lawyer did not have a history of discipline and voluntarily entered into a conciliation agreement with the PDS, but had two additional complaints involving failure to timely file a brief as a guardian *ad litem* and failure

to communicate and refund fees in a case where he took an up-front retainer); Lawyer Disciplinary Board v. Hassan, 241 W.Va. 298, 824 S.E.2d 224 (2019) (six-month suspension for intentional use of “value billing” to PDS; lawyer’s lack of disciplinary history taken into consideration by the Court); Lawyer Disciplinary Board v. Jacovetty, No. 18-0365 (WV 4/11/19) (two-year suspension for fraudulent overbilling to PDS; lawyer entered into a conciliation agreement and agreed to a reduction of the held vouchers in the amount of \$127,771.55); Lawyer Disciplinary Board v. Grindo, 243 W.Va. 130, 842 S.E.2d 683 (2020) (two-year suspension for intentional errors in PDS billing as well as failure to be truthful about self-reporting his misconduct along with having prior discipline from the Court). In emphasizing the presumptive sanction of suspension, this Court has noted that “[t]his Court considers the protection of the public and the State coffers of paramount importance, particularly as pertains to lawyer disciplinary matters.” Cooke, 239 W.Va. at 55, 799 S.E.2d at 132. Thus, sustaining Respondent’s agreement with PDS in this matter regarding the withholding of unpaid vouchers as indicated in the record as a sanction is proper and necessary.

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syl.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). Furthermore, Standard 4.42 of the *ABA Model Standards for Imposing Lawyer Sanctions* states that suspension is generally appropriate when a lawyer, “(a) 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.” Respondent, a lawyer with considerable experience, has demonstrated numerous serious violations of the Rules which has fallen below the minimum standard for attorneys, and discipline must be imposed. Respondent’s actions in this matter as contained in the record clearly

rise to such a level to justify the sanctions recommended by the HPS. However, upon information and belief, Respondent has not voluntarily retired from the practice of law and is indeed still utilizing his active law license. Thus, the recommendation of the HPS which notes a voluntary retirement date of January 1, 2022 should be removed herein.

D. CASE NO. 22-0342 REQUIRES RESPONDENT'S DISBARMENT

Pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, a lawyer who is the subject of an investigation into or a pending proceeding involving allegations of misconduct may consent to disbarment, but only by delivering to the Lawyer Disciplinary Board an affidavit stating that he or she desires to consent to disbarment and (1) the lawyer's consent is freely and voluntarily given; (2) the lawyer is not being subjected to coercion or duress; (3) the lawyer is fully aware of the implications of submitting consent; (4) the lawyer is aware that there is presently pending an investigation into, or proceedings involving, allegations that there exists grounds for the lawyer's discipline, the nature of which the lawyer shall specifically set forth; (5) the lawyer acknowledges that the material facts so alleged are true; and (6) the lawyer submits his or her consent because the lawyer knows that if the charges were predicated upon the matters under investigation, or if the proceedings were prosecuted, the lawyer could not successfully defend the charges. The Rule goes on to state that upon receipt of the required affidavit, the Board shall file the same with the Supreme Court of Appeals which shall enter an order disbaring the lawyer by consent.

The parties have clearly complied with the provisions of Rule 3.25 of the Rules of Lawyer Disciplinary Procedure, as reflected in the Petition for Disbarment filed by the ODC on May 3, 2022; which included Respondent's executed affidavit submitted under seal as an attachment. As such, this Court is required to enter an order disbaring the lawyer by consent. Notably, the petition identifies the presently pending investigations or proceedings included in the case with numbers

20-06-299, 20-06-303, and 20-06-306, matters not included in the Statement of Charges of Case No. 20-1027, nor addressed or litigated before the HPS at the September 27, 2022 hearing.

The matters encompassed in Case No. 20-1027 and Case No. 22-0342 are distinct, and the Court's order regarding the same should address the unique circumstances of each case to preserve the discipline contained therein. Indeed, this Court has previously disbarred lawyers under Rule 3.25 in wholly distinct matters, without voiding or mooted orders of sanction from a separate disciplinary proceeding. On April 4, 2016, in Lawyer Disciplinary Board v. Thorn, 236 W.Va. 681, 783 S.E.2d 321 (2016), this Court suspended the respondent lawyer's license to practice law for one year and ordered that he issue refunds to multiple clients prior to reinstatement. Thereafter, in a case related to a subsequently filed Statement of Charges regarding additional matters, Mr. Thorn filed a formal affidavit consenting to his voluntary disbarment and the ODC proceeded to file a Petition for Annulment of Law License. This Court granted said Petition, pursuant to Rule 3.25 of the Rules of Lawyer Disciplinary Procedure. *See* Lawyer Disciplinary Board v. Thorn, No. 17-0469 (6/6/2017) (unpublished). While the subsequent order dismissed the Statement of Charges that was pending against Respondent at the time, as was referenced in Mr. Thorn's formal affidavit per the Rule, the orders from both proceedings remain valid.

Similarly, in Lawyer Disciplinary Board v. Sirk, 240 W.Va. 274, 810 S.E.2d 276 (2018), this Court ordered that the respondent's license to practice law be suspended for three years and ordered that restitution to clients be made before applying for reinstatement to the practice of law. Thereafter, like Thorn, in another disciplinary proceeding, Mr. Sirk filed a formal affidavit consenting to his voluntary disbarment and the ODC proceeded to file a Petition for Annulment of Law License, which was granted by the Court. *See* Office of Disciplinary Counsel v. Sirk, No. 19-

0996 (1/9/2020) (unpublished). Again, there is nothing to indicate that such consent to disbarment rendered any order of the Court in unrelated disciplinary proceedings moot or unenforceable.⁵

V. CONCLUSION

The Office of Lawyer Disciplinary Counsel urges that this Honorable Court uphold the sanctions recommended by the Hearing Panel Subcommittee in Case No. 20-1027. To wit:

- a. That Respondent's law license be suspended for a period of three years;
- b. That upon suspension, Respondent must comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure;
- c. That Respondent be required to petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure;
- d. That based upon an analysis completed by PDS, Respondent shall allow PDS to withhold \$58,812.46 in unpaid vouchers as restitution for prior overpayments;
- e. That Respondent be required to refund Ms. Robertson the \$3,225.00, which includes the \$225.00 for court costs, that she was charged and paid as it was determined to be an unreasonable fee for work that was not completed;
- f. That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

In addition, Respondent must be disbarred pursuant to his compliance with the mandate of Rule 3.25 in Case No. 22-0342. In order for this Honorable Court to serve the critical goals of protecting the public, reassuring the public as to the reliability and integrity of attorneys, and safeguarding its interests in the administration of justice, such sanctions should be ordered contemporaneously in the distinct cases, rendering both binding and enforceable.

⁵ The disbarment of a lawyer also does not preclude or moot any civil or criminal proceedings involving the former lawyer.

Respectfully submitted,
Lawyer Disciplinary Board and the
Office of Lawyer Disciplinary Counsel
By Counsel



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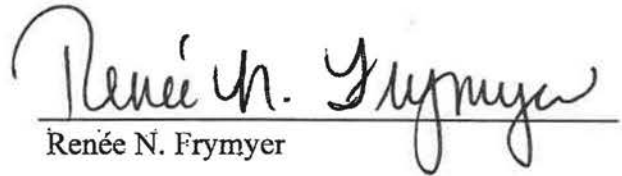
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CERTIFICATE OF SERVICE

This is to certify that I, Renée N. Frymyer, Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 15th day of July, 2022, served a true copy of the foregoing "**BRIEF OF THE LAWYER DISCIPLINARY BOARD**" upon D. Scott Bellomy, Esquire, counsel for Respondent David R. Tyson, by mailing the same via United States Mail with sufficient postage, to the following address:

D. Scott Bellomy, Esquire
741 ~ 5th Avenue
Huntington, West Virginia 25701


Renée N. Frymyer