

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

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**LAWYER DISCIPLINARY BOARD,**

**Petitioner,**

**v.**

**No. 22-916**

**JEFFERY A. DAVIS,**

**Respondent.**

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**BRIEF OF THE LAWYER DISCIPLINARY BOARD**

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## I. STATEMENT OF THE CASE

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

This is a lawyer disciplinary proceeding against Jeffery A. Davis (“Respondent”), arising as the result of a Statement of Charges issued against him by the Investigative Panel of the Lawyer Disciplinary Board and filed with the Supreme Court of Appeals of West Virginia on December 19, 2022. The Clerk of the Supreme Court of Appeals served the Statement of Charges upon Respondent by certified mail on January 7, 2023. On January 18, 2023, Lawyer Disciplinary Counsel filed her mandatory discovery upon Respondent. Respondent filed his Answer to the Statement of Charges on February 6, 2023. There were no pre-hearing motions filed by either party in these proceedings.

Thereafter, this matter proceeded to a hearing in Charleston, West Virginia, on May 3, 2023. The Hearing Panel Subcommittee (“HPS”) was comprised of Richard A. Pill, Esquire, Chairperson; David A. Wandling, Esquire; and Cynthia Tawney, Layperson. Renée N. Frymyer, Lawyer Disciplinary Counsel, appeared on behalf of the Office of Lawyer Disciplinary Counsel (“ODC”). Respondent appeared *pro se*. The HPS heard testimony from: Cletis Rogers; Samantha Shafer; and Respondent. In addition, ODC Exhibits 1-11 and Joint Exhibit 1, which consisted of the stipulations of the parties regarding certain findings of fact, conclusions of law, and recommendation as to discipline, were admitted into evidence without objection.

On or about August 16, 2023, the HPS issued its decision in this matter and filed with the Supreme Court its Report of the Hearing Panel Subcommittee (“Report”). The HPS properly found that the evidence established that Respondent had violated Rule 1.4(a)(4) and Rules 8.4(a) and (d) of the Rules of Professional Conduct regarding Count I of the Statement of Charges, and Rules 1.3, 3.2, and 1.16(d) of the Rules of Professional Conduct regarding Count II of the

Statement of Charges. The HPS recommended amongst other sanctions that Respondent's license to practice law be suspended for a period of three (3) years, served retroactively based upon the Supreme Court's Mandate of March 14, 2022, when Respondent's license to practice law was suspended for six (6) months in a separate disciplinary proceeding.

Thereafter, on August 28, 2023, the ODC filed its consent to the recommendation of the HPS. On September 5, 2023, Respondent filed his objection to the recommendation. On September 15, 2023, the Supreme Court of Appeals entered an Order that the matter be briefed by the parties and scheduled it for oral argument under Rule 19 of the Rules of Appellate Procedure.

**B. FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE HEARING PANEL SUBCOMMITTEE**

1. Respondent is a lawyer who last practiced in Spencer, which is located in Roane County, West Virginia. Respondent, having passed the Bar Exam, was admitted to The West Virginia State Bar on May 5, 1993. 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<sup>1</sup>]
2. Respondent's law license is currently suspended pursuant to a Mandate Order entered by the Supreme Court of Appeals of West Virginia on March 14, 2022, in a separate disciplinary matter [Ex. 11, pp. 347-348]. The Mandate Order followed a Memorandum Decision filed by the Court on February 11, 2022, which held that Respondent's law license should be suspended for a period of six months [Ex. 11, pp. 349-358].
3. On or about August 26, 2022, Respondent filed a Petition to Reinstate License to Practice

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<sup>1</sup> Pursuant to the stipulations contained in Joint Exhibit 1, Respondent and Lawyer Disciplinary Counsel agreed that entering into stipulations regarding certain facts and conclusions of law relieved either party from having to provide such evidence to support the allegations. However, exhibits that support the

Law with the Supreme Court of Appeals pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure. The HPS filed its Report with the Supreme Court in that matter on March 30, 2023, in which it recommended that Respondent's law license not be reinstated. On May 12, 2023, the Supreme Court entered an Order adopting the recommendation of the Hearing Panel Subcommittee and refused Respondent's petition for reinstatement [*See* Supreme Court No.: 22-657]. Respondent's license to practice law remains suspended at this time.

**COUNT I**  
**I.D. No. 21-03-363**  
**Complaint of the Office of Lawyer Disciplinary Counsel**

4. On or about November 2, 2021, Judge Anita Ashley, Circuit Court Judge for the Fifth Judicial Circuit of West Virginia, provided the ODC with a copy of a handwritten document she referred to as a "*pro se* motion" she had received from Samantha Shafer. [Stipulated; Ex. 1]
5. At that time, Ms. Shafer was a defendant in a criminal matter pending in the Circuit Court of Roane County, West Virginia. Respondent was her court-appointed counsel in that matter. [Stipulated]
6. The document dated October 25, 2021, and signed by Ms. Shafer, stated that Respondent made sexual gestures toward her and had asked her if she wanted to go to the beach with him while she was his client. Ms. Shafer requested she be appointed a new lawyer. [Stipulated; Ex. 1, p. 2]
7. By letter dated November 5, 2021, the ODC advised Respondent that it had opened a complaint based upon the information received from Judge Ashley and directed him to file a response to the allegations within twenty (20) days. [Stipulated; Ex. 2]



8. By letter dated December 2, 2021, received by the ODC on December 6, 2021, Respondent provided a verified response to the complaint. [Stipulated; Ex. 3]
9. In his response, Respondent provided background of his representation of Ms. Shafer, which had resulted in her entry of a guilty plea pursuant to a plea agreement. Respondent said that after entering her plea but before her sentencing hearing was scheduled to take place, Ms. Shafer had reviewed the Pre-Sentence Investigation report and became angry. Respondent said that Ms. Shafer had apparently been told by the probation officer that to be considered for alternative sentencing she must be enrolled in a rehab facility since she had failed a prior screen for drugs. Respondent said he discussed the situation with Ms. Shafer on October 25, 2021, and she indicated that she did not want to go to a rehab facility and regretted entering the aforementioned plea. [Stipulated; Ex. 3]
10. Respondent stated that Ms. Shafer filed her “*pro se* motion” with the Court that same day. [Stipulated; Ex. 3]
11. Respondent was removed and replaced as counsel for Ms. Shafer by the Circuit Court on October 26, 2021. [Stipulated; Ex. 4, p. 11]
12. At the disciplinary hearing, Ms. Shafer testified that at one point during Respondent’s representation, he came to Clendenin and picked her and her son up in his personal vehicle and took them to Taco Bell for food and then to a school parking lot to talk. She said that Respondent did not discuss anything about her case at that time. Instead, she said they talked about trips and that Respondent offered to take her to the beach, “all expenses paid.” [Tr. pp. 38; 52]
13. Ms. Shafer felt that this conversation that took place with Respondent was inappropriate and unprofessional. [Tr. pp. 39-40]

14. Ms. Shafer also described an instance where she met with Respondent at his office and he complimented her looks, saying “[T]hose pants look nice on you.” She testified that her impression was that Respondent was attempting to flirt with her. [Tr. pp. 40-41]
15. Ms. Shafer stated that she wanted to talk about her case, which involved several serious felony charges, but Respondent would dismiss her. She testified, “I [felt] like there was nothing being said or done, you know, to try to help me and my case any at all.” [Tr. p. 41]
16. Ms. Shafer was incarcerated for approximately two (2) months while she was represented by Respondent. She testified that while she was incarcerated Respondent made no attempt to contact her. She further testified that while she was incarcerated, she attempted to call Respondent’s office every day, but he never answered the phone. [Tr. pp. 43; 70; 107]
17. Ms. Shafer said that the only time she was able to speak with Respondent was when another individual called him on her behalf with her on the line as a third party. She said they spoke in this manner on maybe three (3) occasions. [Tr. pp. 70-71]
18. Ms. Shafer further testified that she felt that if she had “made [Respondent] feel like, you know, maybe there was a chance for anything other than just him being my lawyer” he probably would have attempted to contact her at the jail, would have tried to have her released sooner, and been more interested in her case. [Tr. p. 46]
19. Ms. Shafer said she was surprised that Respondent had behaved in the manner she described. She said she had not had a similar experience with any other lawyer who had represented her in the past. [Tr. p. 100]
20. Although Respondent ultimately filed a motion to reinstate bond on behalf of Ms. Shafer,

she stated that she never saw a copy of that motion. [Tr. p. 72]

21. Ms. Shafer did not feel she received proper representation from Respondent. [Tr. p. 48]

22. At the hearing, Ms. Shafer expressed little understanding of what her exposure to incarceration was under the sentencing guidelines for her charges. [Tr. pp. 75-77]

23. With new counsel, Ms. Shafer was able to enroll in the Kanawha County Drug Court, which she called a “blessing.” [Tr. p. 42]

24. Respondent denied the allegations that he engaged in misconduct regarding Ms. Shafer. [Stipulated]

25. Respondent specifically denied making flirtatious comments in any nature toward Ms. Shafer or offering to take her to a beach. [Tr. pp. 131; 138; 146-147]

26. Respondent acknowledged that he had told Ms. Shafer on one occasion that she looked nice because she was dressed appropriately for court. [Tr. p. 138]

27. Regarding his communication with Ms. Shafer while she was incarcerated, Respondent testified that he believed he had adequately informed her on the status of the matter and it “would just be a waste of time and the state’s money” to visit her at the jail. [Tr. p. 152]

28. Respondent explained that he did not accept collect calls from the jail and that he did not believe that his landline could take collect calls. [Tr. pp. 175-176]

29. Because Respondent failed to respond to Ms. Shafer’s phone calls while she was incarcerated, he has violated Rule 1.4(a)(4) of the Rules of Professional Conduct which provides as follows:

**Rule 1.4. Communication.**

(a) A lawyer shall:

\* \* \*

(4) promptly comply with reasonable requests for information[.]

30. Because Respondent made unwelcome advances in an attempt to create an inappropriate

relationship of a sexual nature with his court-appointed client, Ms. Shafer, he has violated Rule 8.4(a) and (d) [attempted violation of Rule 1.8(j) of the Rules of Professional Conduct<sup>2</sup>], which provides as follows:

**Rule 8.4. Misconduct.**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

\* \* \*

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

**COUNT II**  
**I.D. No. 22-03-255**  
**Complaint of Cletis W. Rogers**

31. In a complaint, received by the ODC on July 7, 2022, Cletis W. Rogers stated that he and Respondent had entered into an agreement for representation in a civil matter, and Mr. Rogers had paid Respondent \$500.00 to file an injunction on his behalf. [Stipulated; Ex. 6]
32. According to the complaint, Respondent had not done the work and Mr. Rogers wanted his money refunded. [Stipulated; Ex. 6]
33. By letter dated July 27, 2022, the ODC advised Respondent that it had opened a complaint based upon the complaint filed by Mr. Rogers and directed him to file a response to the allegations within twenty (20) days. [Stipulated; Ex. 7]
34. By letter dated August 15, 2022, received by the ODC on August 16, 2022, Respondent

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<sup>2</sup> **Rule 1.8. Conflict of Interest: Current Clients: Specific Rules.**

(j) A lawyer shall not have sexual relations with a client whom the lawyer personally represents during the legal representation unless a consensual sexual relationship existed between them at the commencement of the lawyer/client relationship. For purposes of this rule, “sexual relations” means sexual intercourse or any touching of the sexual or other intimate parts of a client or causing such client to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party or as a means of abuse.

provided a verified response to the complaint. [Stipulated; Ex. 8]

35. Respondent stated that he had agreed to represent Mr. Rogers in an injunction in Clay County, West Virginia, in September 2021. Respondent said that the injunction was regarding a right of way to Mr. Rogers' property that was being blocked, and he wanted to use the right of way to haul timber cut on this land. [Stipulated; Ex. 8]
36. Respondent asserted that during late fall/early winter of 2021, Mr. Rogers informed him that there was no hurry in filing the injunction because the weather would be bad until spring. [Stipulated; Ex. 8]
37. Respondent said no communication with Mr. Rogers followed until he received a summons that he had been sued by Mr. Rogers in Clay County Magistrate Court on December 14, 2021. [Stipulated; Ex. 8]
38. Respondent said that the Magistrate awarded Mr. Rogers judgment for \$700.00 (\$500.00 refund plus \$200.00 filing fee) on March 7, 2022. [Stipulated; Ex. 8]
39. Mr. Rogers replied to Respondent's response and stated that he did not instruct Respondent to wait until spring to proceed with the matter. [Stipulated; Ex. 9]
40. On or about December 8, 2022, Respondent satisfied the civil judgment owed to Mr. Rogers. [Stipulated; Ex. 10]
41. Respondent stipulated that he neglected Mr. Rogers' case and failed to take appropriate action in the matter, in violation of Rule 1.3 of the Rules of Professional Conduct, which provides as follows:

**Rule 1.3. Diligence.**

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

42. Respondent stipulated that he failed to make reasonable efforts consistent with the stated

and agreed upon objectives of Mr. Rogers, in violation of Rule 3.2 of the Rules of Professional Conduct which provides as follows:

**Rule 3.2. Expediting litigation.**

A lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client.

43. Respondent stipulated that he failed to promptly return the unearned fee paid to him by Mr. Rogers upon termination of representation, in violation of Rule 1.16(d) of the Rules of Professional Conduct, which provides as follows:

**Rule 1.16. Declining or terminating representation.**

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

## II. SUMMARY OF ARGUMENT

The HPS correctly found that Respondent violated multiple Rules of Professional Conduct and made an appropriate recommendation that the Respondent's license to practice law be suspended for three (3) years, served retroactively based upon the Supreme Court's Mandate of March 14, 2022, amongst other sanctions. The findings of fact and conclusions of law made by the HPS in its Report, along with their determinations that Respondent violated the duties a lawyer owes to his clients and to the profession, acted in a negligent manner, and caused actual injury, were correct, sound, fully supported by clear and convincing evidence on the whole adjudicatory record, and should not be disturbed. The sanctions proposed by the HPS are adequate considering the record against Respondent, which includes a lengthy disciplinary history. In ordering such sanctions 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. A strong sanction is also necessary to deter lawyers who may be considering or who are engaging in similar misconduct.

### **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to Rule 19 of the Rules of Appellate Procedure, this Honorable Court's Order of September 15, 2023, set this matter for oral argument to take place presumably in the January 2024 Term of Court.

### **IV. ARGUMENT**

#### **A. STANDARD OF PROOF**

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 also* Syl. Pt. 1, *Lawyer Disciplinary Board v. McGraw*, 194 W. Va. 788, 461 S.E.2d 850 (1995). 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. *Committee on Legal Ethics v. McCorkle*, 192 W. Va. 286, 452 S.E.2d 377 (1994); *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*, 195 W.Va. at 39, 464 S.E.2d at 189.

"Stipulations or agreements made in open court by the parties in a trial of a case and acted upon are binding and a judgment founded thereon will not be reversed." Syl. Pt. 3, *Matter of Starcher*, 202 W.Va. 55, 501 S.E.2d 772 (1998) *citing* Syl. Pt. 1, *Butler v. Smith's Transfer Corporation*, 147 W.Va. 402, 128 S.E.2d 32 (1962). "In a disciplinary proceeding against a judge, in which the burden of proof is by clear and convincing evidence, where the parties enter

into stipulations of fact, the facts so stipulated will be considered to have been proven as if the party bearing the burden of proof has produced clear and convincing evidence to prove the facts so stipulated.” Syl. Pt. 4, *Matter of Starcher*, 202 W.Va. 55, 501 S.E.2d 772 (1998). The Court has also noted that the same rule would apply to pre-trial stipulations. *Id.* at 61, 778.

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. 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).

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

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 also* Syl. Pt. 4 of *Office of Disciplinary Counsel v. Jordan*, 204 W.Va. 495, 513 S.E.2d. 722 (1998). The record in this matter indicates that Respondent has



transgressed all four factors set forth in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure and *Jordan*.

**1. Respondent violated duties he owed to his clients and the 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 have duties relating to the legal profession, which include maintaining public trust. Indeed, lawyers are officers of the court and must act in a manner to maintain the integrity of the Bar and the profession. The HPS correctly found that the evidence established by clear and convincing proof that Respondent has violated duties owed to his clients in these proceedings, and to the legal profession.

A client in a felony criminal matter, Ms. Shafer relied on Respondent to protect her liberty. In addition, loyalty and independent judgment are essential elements in the lawyer's relationship to a client. *See* Comment 1 to Rule 1.7 of the Rules of Professional Conduct. A lawyer also has a fiduciary duty to a client and, with that duty, an obligation to act in her best interests. In finding that Respondent had violated Rules of Professional Conduct regarding his representation of Ms. Shafer, the HPS clearly found Ms. Shafer's testimony at the hearing credible and compelling, including her impression that had she reciprocated the type of inappropriate and unprofessional conversations initiated by Respondent, she would have been represented differently [Tr. p. 46]. By engaging in conversations of this nature with Ms. Shafer during every meeting he had with her [Tr. p. 46], Respondent fell short of his duties and fiduciary role to a court-appointed client, and his ability to exercise independent judgment and advice regarding her case became impaired. This impairment was evident when Respondent failed to respond to Ms. Shafer's phone calls or otherwise communicate with her once she

became incarcerated [Tr. p. 43]. Respondent also admittedly violated the duty of diligence he owed to his client, Mr. Rogers. Thus, the findings made by the HPS regarding the duties violated were clearly supported by the reliable, probative, and substantial evidence on the record.

**2. Respondent has acted negligently.**

The *ABA Standards for Imposing Lawyer Sanctions* states that 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, both without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. Respondent stipulated, and the evidence supports the finding of the HPS, that Respondent acted in a negligent manner in the underlying matters.

**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's actions caused frustration and delay on the part of Mr. Rogers. At the hearing, Mr. Rogers testified that it was "shocking" to him when Respondent did not do the work he was paid to do [Tr. p. 14]. He said that Respondent failed to take any action in the case for six (6) or seven (7) months, and that the matter for which he retained Respondent remained unresolved [Tr. pp. 14; 19]. In addition, Mr. Rogers indicated that he no longer trusts lawyers [Tr. p. 14-15].

Ms. Shafer testified that she felt "abandoned" when Respondent did not visit or communicate with her while she was incarcerated and had "no hope" [Tr. p. 44]. She stated that

she did not feel Respondent was on her side [*Id.*]. The HPS found that these emotional injuries, though intangible, were nonetheless significant. It was also clear to the HPS that Respondent's conduct had brought the legal system and legal profession into disrepute. These HPS findings are sound and also fully supported by the clear and convincing evidence in the record.

**4. There are aggravating factors present.**

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 HPS found that Respondent's prior disciplinary offenses constituted an aggravating factor in this proceeding, noting that Respondent has previously been the subject of eight (8) disciplinary sanctions. Respondent was admonished by the Investigative Panel of the Lawyer Disciplinary Board for not responding to the 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 on May 12, 2007 [Ex. 11, pp. 151-157]. Respondent was twice admonished by the Investigative Panel on October 25, 2008, for not responding to the ODC in violation of Rule 8.1(b) and warned about being diligent and communicating with clients involving Rules 1.3 and 1.4 in one matter, and for not responding to the ODC in violation of Rule 8.1(b) and warned regarding his fees pursuant to Rule 1.5 in another matter [Ex. 11, pp. 161-164 and 174-179]. On April 27, 2013, Respondent was issued two admonishments for not responding to ODC in violation of Rule 8.1(b) in one matter, and for

not responding to the ODC in violation of Rule 8.1(b) along with being directed to update his phone number with the State Bar in another matter [Ex. 11, pp. 190-195 and 196-201]. Respondent was admonished for inaccurate billing to the Public Defender Services in violation of Rules 3.3, 4.1, and 8.4 on April 13, 2018 [Ex. 11, pp. 260-264]. On June 10, 2019, Respondent was suspended for thirty (30) days by the Supreme Court of Appeals of West Virginia, being found in violation of Rules 1.4 and 8.1(b) [Ex. 11, pp. 229-230], and on March 14, 2022, Respondent was suspended for six (6) months by the Supreme Court, being found in violation of Rules 1.3, 8.4(d), 1.4, 1.5(b) and 8.1(b) [Ex. 11, pp. 347-358]. Therefore, the aggravating factor of prior discipline is clearly existing in this matter. Rule 9.22(a) of the *ABA Model Standards for Imposing Lawyer Sanctions* also indicates that substantial experience in the practice of law may be considered as an aggravating factor, which the HPS also correctly found was present herein.

**5. There is a possible mitigating factor.**

The *Scott* court adopted mitigating factors in a lawyer disciplinary proceeding and stated that mitigating factors “are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.” *Lawyer Disciplinary Board v. Scott*, 213 W.Va. 209, 216, 579 S.E.2d 550, 557 (2003). Mitigating factors were not envisioned, however, to insulate a violating lawyer from discipline. In this case, the HPS stated that Respondent’s cooperative attitude toward proceedings may be considered in mitigation.

**C. RESPONDENT’S CONDUCT REQUIRES STRONG SANCTION**

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). 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 fundamental 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). Indeed, "the primary purpose of the ethics committee [ODC] is not punishment but rather the protection of the public and the reassurance of the public as to the reliability and integrity of attorneys. *Office of Lawyer Disciplinary Counsel v. Albers*, 214 W.Va. 11, 13, 585 S.E.2d 11, 13 (2003) citing *Committee on Legal Ethics of the West Virginia State Bar v. Ikner*, 190 W.Va 433, 436, 438 S.E.2d 613, 616 (1993) (internal citations omitted).

For the public to have confidence in our State's disciplinary and legal systems, lawyers who engage in the type of conduct exhibited by Respondent must receive a strong sanction. A license to practice law is a revokable privilege; when the privilege is abused, the privilege should be revoked or suspended. Prior to the hearing, the parties agreed that Respondent should be suspended for his conduct along with the imposition of other sanctions. However, in its Report, the HPS believed a three (3) year suspension was a more appropriate sanction than the agreed recommendation of a one (1) year suspension. The HPS adopted the recommendations that should Respondent be reinstated to the practice of law pursuant to the proceedings outlined in Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, that his practice be supervised for a period of two years by an attorney agreed upon by the ODC, and that Respondent shall pay the costs of this disciplinary proceeding to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Importantly, however, the evidentiary record established following the hearing, which included the testimony of the two complainants as well as that of Respondent, compelled the HPS to also require that Respondent's petition for reinstatement be denied until Respondent first undergoes a psychological evaluation with confirmation of his ability to practice law. The recommended sanctions of the HPS are firmly supported by the evidence and applicable law.

Indeed, absent any aggravating or mitigating circumstances, the *ABA Model Standards for Imposing Lawyer Sanctions* recognizes that:

Standard 4.42. 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 and causes injury or potential injury to a client.

Standard 7.2. Suspension is generally appropriate 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.

In addition, case law in West Virginia concerning such misconduct has resulted in attorney suspensions. *See Committee on Legal Ethics v. Keenan*, 189 W.Va. 37, 427 S.E.2d 471 (1993) (indefinite suspension for failure to provide competent representation, failure to act with reasonable diligence, failure to communicate effectively with his clients, and failure to return unearned fees); *Lawyer Disciplinary Board v. Burgess*, No. 23030 (WV 4/25/96) (unreported) (two year suspension with one year suspension deferred while respondent undergoes a one-year period of supervision following reinstatement for violation of Rules 1.3, 1.4, 8.1(b), 8.4(d) and other violations); *Lawyer Disciplinary Board v. Holmstrand*, No. 22523 (WV 5/30/96) (unreported) (one year suspension and psychiatric evaluation ordered for violation of Rules 1.3, 1.4, 8.4(d) and other violations); *Lawyer Disciplinary Board v. Morgan*, 228 W.Va. 114, 717 S.E.2d 898 (2011) (one year suspension for violation of Rules 1.3, 1.4, 8.1(b), 8.4(d), and other violations); *Lawyer Disciplinary Board v. Phalen*, No. 11-1746 (WV 11/14/12) (unreported)

(one year suspension for violation of Rules 1.3, 1.4, and other violations); *Lawyer Disciplinary Board v. 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, prior admonishments); *Lawyer Disciplinary Board v. Harmon-Schamberger*, No. 16-0662 (WV 5/16/17) (unreported) (90-day suspension for failures in diligence and in failing to properly supervised nonlawyer staff, prior admonishments); *Lawyer Disciplinary Board v. Gerlach*, No. 17-0869 (WV 4/11/19) (unreported) (90-day suspension for unauthorized practice of law, prior reprimand).

In reaching its decision, the HPS examined the long history of misconduct committed by Respondent as exhibited in his public record at Exhibit 11, citing thirty-three (33) complaints, eight (8) disciplinary sanctions, six (6) admonishments and two (2) suspensions over a fifteen (15) year period, and found that the same demonstrated “an ongoing pattern of misconduct that has not been corrected by past minimal sanctions.” [Report at pp. 16-17]. The record clearly demonstrates an ongoing inability on the part of Respondent to abide by the rules of substance and procedure which shape the administration of justice, which is cause for grave concern.

For this Honorable Court to serve its goals of protecting the public, reassuring the public as to the reliability and integrity of attorneys, and safeguarding the administration of justice, Respondent must remain removed from the practice of law for a significant period of time. Respondent needs to appreciate the significance of the rules governing the legal profession and further be required to demonstrate by way of a comprehensive psychological evaluation prior to his reinstatement process an ability to comply with the Rules of Professional Conduct in any future practice. Such sanction is also necessary to deter other lawyers from engaging in similar

conduct and to restore the faith of the victims in this case and of the general public in the integrity of the legal profession.

## V. CONCLUSION

The HPS properly considered the reliable, probative, and substantial evidence on the whole adjudicatory record, the factors set forth in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure, the applicable law, and made an appropriate recommendation to this Honorable Court. The factual findings clearly and convincingly establish that in the instant proceedings, Respondent has violated Rules 1.4(a)(4), 8.4(a) and (d), 1.3, 3.2, and 1.16(d) of the Rules of Professional Conduct. The record also reflects Respondent's long history of misconduct for which past sanctions by both the Lawyer Disciplinary Board and this Honorable Court have not appeared effective in correcting Respondent's ability to comply with some of the most basic requirements of being an attorney. For the reasons set forth above, the ODC urges that this Honorable Court uphold the following sanctions made by the Lawyer Disciplinary Board in this matter, with the following clarifications:

1. That Respondent's law license be suspended for a period of three (3) years, served retroactively based upon the Supreme Court's Mandate of March 14, 2022, which suspended Respondent's license to practice law for six (6) months.<sup>3</sup>
2. That Respondent's petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure<sup>4</sup> be denied until Respondent undergoes a psychological evaluation with confirmation of his ability to practice law. Should he be reinstated to the practice of law pursuant to those proceedings, that

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<sup>3</sup> Respondent's law license shall not be reinstated before March 14, 2025.

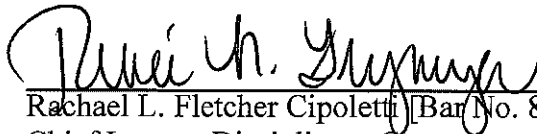
<sup>4</sup> Rule 3.32 of the Rules of Lawyer Disciplinary Procedure sets forth the reinstatement process of a lawyer whose license to practice law has been or shall be suspended for a period of more than three months.



Respondent's practice be supervised for a period of two years by an attorney agreed upon by the ODC and Respondent;<sup>5</sup>

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

*Respectfully submitted,*  
The Lawyer Disciplinary Board  
By Counsel

  
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<sup>5</sup> This recommendation is edited for clarity for the purposes of this brief. It slightly differs from that contained in the HPS Report but the intention of the HPS remains the same.

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**CERTIFICATE OF SERVICE**

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This is to certify that I, Renée N. Frymyer, Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 30<sup>th</sup> day of October, 2023, served a true copy of the foregoing "**BRIEF OF LAWYER DISCIPLINARY COUNSEL**" upon Respondent Jeffery A. Davis, by mailing the same via United States Mail, with sufficient postage, and electronically via File and Serve Xpress, to the following address:

Jeffery A. Davis, Sr., Esquire  
Post Office Box 175  
Wallback, WV 25285

  
\_\_\_\_\_  
Renee N. Frymyer, Esquire