

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

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OFFICE OF LAWYER DISCIPLINARY COUNSEL,

Petitioner,

vs.

No. 23-619

JAMES W. KEENAN, a member
of the West Virginia State Bar,

Respondent.

REPLY BRIEF OF THE
OFFICE OF LAWYER DISCIPLINARY COUNSEL

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I. REPLY TO RESPONDENT'S BRIEF

This matter is before this Honorable Court pursuant to the petition filed by the Office of Lawyer Disciplinary Counsel ("ODC") on October 26, 2023, seeking the immediate suspension of the law license of James W. Keenan ("Respondent") in accordance with Rule 3.27 of the Rules of Lawyer Disciplinary Procedure, and the appointment of a trustee in accordance with Rule 3.29 of the Rules of Lawyer Disciplinary Procedure. Respondent requested a hearing therein and, at the direction of the Supreme Court, ODC filed a petitioner's brief on January 8, 2024. Respondent filed a response thereto on February 21, 2024.

Respondent was not a suspended lawyer at the time ODC filed its emergency petition in October 2023. Although the Lawyer Disciplinary Board Hearing Panel Recommendations on an unrelated matter were pending at the time of the filing, this Honorable Court is the final arbiter in determinations regarding lawyer discipline and it was unknown if the Court would adopt the recommendations. Multiple credible reports of Respondent's concerning and escalating conduct were made to ODC in the late summer and early fall of 2023, which prompted the petition's filing. In November 2023, this Honorable Court adopted the Lawyer Disciplinary Hearing Panel Recommendations on the unrelated matter and suspended Respondent for six (6) months. None of the issues raised in the emergency petition have been addressed or resolved, and they remain very active concerns.

In his brief, Respondent said he had closed his practice and referred his clients to other attorneys, which was the same information the trustee had reported to the ODC after Chief Judge Paul Blake appointed him in November 2023. However, shortly thereafter, ODC received calls from Respondent's clients asking for help and they were directed to the trustee for assistance. The

trustee has appeared in court and has assisted a client in obtaining a continuance to allow her time to retain alternative counsel. He has also retrieved files for other clients and has even assisted in obtaining a retainer refund from Respondent for another client, despite Respondent's report to the contrary. There is only Respondent's word that he has closed his practice and informed his clients of its closing. Accordingly, the Supreme Court's order directing the appointment of a trustee was, and remains, an imperative service to the public.

In his brief, Respondent attempted to diminish Respondent's profane and improper messages to Ms. Smith as an attempt at humor, that it was acceptable because he believed they were "social friends", and that it "should not be considered harassment" because he made no further contact. That is incredulous. Ms. Smith is the Deputy Chief Probation Officer for the circuit and is not a fragile person who just overreacted to a joke between friends. She found absolutely no humor in the messages and was so disturbed by them that she reported it to the Chief Probation Officer, who instructed her to draft a MEMO for the Chief Judge, who alerted ODC. The messages were very alarming to those referenced above, and Respondent's assertion that it was "humor" is further proof of a fundamental lack of appreciation and respect for court rules and personnel.

Regarding Respondent's response to Judge Ewing's affidavit concerning the September 15, 2023 Maddy hearing, Respondent said he had "informed the client" that he could not represent him at the hearing. However, the facts as alleged are that Respondent was counsel of record in the matter and had accepted a retainer for his representation from Mr. Maddy. Even if the Respondent's assertion that he notified Mr. Maddy that he could not attend the hearing were true, that alone is not enough to satisfy the Rules of Professional Conduct. People rely upon their counsel for legal guidance and expertise, and Respondent failed his client in this regard. By his

own admission in his Response, there are a myriad of potential Rules of Professional Conduct violations raised just in this scenario, including violations of Rule 1.1. Competence¹, Rule 1.3. Diligence², Rule 1.16(c). Declining or Terminating Representation³, Rule 3.2. Expediting Litigation⁴, Rule 3.4(c). Fairness to Opposing Party or Counsel⁵, and Rule 3.7. Lawyer as Witness⁶. Respondent also said he was unable to attend the hearing “due to health issues.” Having health issues alone does not excuse a lawyer from attending a hearing with his client, nor does it justify his absence. There are litigation tools available and Rules of Professional Conduct in place to protect the public and prevent a client from attending a hearing without their retained counsel. Respondent’s failure to utilize available litigation tools to protect his client, in the midst of other concerning conduct, was one of many factors that led to the filing of the emergency petition.

As noted, the emergency petition was requested prior to Respondent’s current six (6) month suspension, and the allegations raised therein have yet to be adjudicated or resolved. The current suspension was ordered for conduct unrelated to the allegations contained in the emergency petition and would not serve as proper discipline or resolution of the conduct raised herein. It is important to note that Respondent’s alarming conduct referenced in the petition occurred *after* the Lawyer Disciplinary Board’s hearing in the unrelated matter, and while the recommended

¹ Rule 1.1. Competence. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

² Rule 1.3. Diligence. A lawyer shall act with reasonable diligence and promptness in representing a client.

³ Rule 1.16(c). Declining or Terminating Representation. A lawyer must obtain permission of the court when terminating a representation in litigation. When ordered to do so by the court, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

⁴ Rule 3.2. Expediting Litigation. A lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client.

⁵ Rule 3.4(c). Fairness to Opposing Party and Counsel. A lawyer shall not... (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

⁶ Rule 3.7. Lawyers as Witness. (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.

suspension was pending before the Supreme Court, which was illustrative of Respondent's spiraling behavior and contributed to the concern.

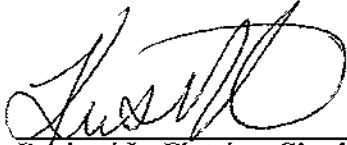
As noted previously, the Court in Battistelli stated that Rule 3.27 of the Rules of Lawyer Disciplinary Procedure should only be used in the most extreme cases, and that each case will be determined on a case-by-case basis given the practical difficulty in providing specific guidance. Syl. Pts. 1 and 4, Office of Disciplinary Counsel v. Battistelli, 193 W. Va. 629, 630, 457 S.E.2d 652, 653 (1995). Per Rule 3.27 of the Rules of Lawyer Disciplinary Procedure, the two-part test is that the lawyer has committed a violation of the Rules of Professional Conduct or is under a disability, and that he poses a substantial threat of irreparable harm to the public. Although Respondent may indeed have a Constitutional right to post his thoughts and opinions on Facebook, that right does not prevent or shield him from the consequences that follow. Respondent's posts contained information that alarmed Judge Thomas Ewing enough that he felt compelled to report the post to ODC, and even more worrisome when considered in context with Respondent's other concerning conduct involving brandishing and his "Ready to Draw" signature. ODC respects Respondent's exercise of his Fifth Amendment Constitutional Right against self-incrimination concerning the criminal charges filed against him and has stayed the investigation while the matter is pending. However, ODC's investigation of the brandishing and assault charges is incomplete and will remain undeveloped until such time as the underlying criminal matter is concluded. This impacts and limits ODC's ability to properly assess and determine Respondent's fitness to practice law and whether he is a danger to the public.

II. CONCLUSION

The emergency petition was not filed imprudently after Respondent made one misstep. Rather, there were a series of escalating issues and troubling conduct that occurred in a very brief time period and remain unresolved and very concerning. The allegations contained in the emergency petition, most of which were reported to ODC by members of the Judiciary and law enforcement, would equal at least four separate complaints against Respondent occurring within a couple of weeks of one another. Most troubling is that Respondent's alleged conduct happened while Respondent had a Lawyer Disciplinary Board Hearing Panel recommendation for suspension pending before the Court.

In conclusion, the allegations contained therein include brandishing and assault, harassment of court personnel, social media posts that contained potential threats against ODC, and failure to attend court with a retained client, reported to ODC by multiple judges and court personnel. Respondent's active caseload was unknown at the time of the petition's filing, and there remains genuine concern for his clients and their representation. Given the totality of the circumstances, an emergency petition requesting the temporary suspension pending the conclusion of the investigations into the matters raised, and the appointment of a trustee for Respondent's clients, was, and remains, appropriate. Counsel for ODC respectfully requests the emergency petition be granted and that Respondent remain suspended until such time as the conclusion of the investigation into the matters raised therein, and the trustee remain in place per the original order until such time, as well.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel



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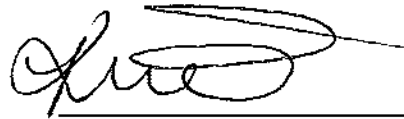
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CERTIFICATE OF SERVICE

This is to certify that I, Kristin P. Halkias, Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, **the 7th day of March, 2024**, served a true copy of the foregoing **“Reply Brief of the Office of Lawyer Disciplinary Counsel”** upon Respondent James W. Keenan, electronically through File and Serve Xpress, and via First Class Mail by the United States Mail with sufficient postage prepaid, to the following address:

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