

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

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LAWYER DISCIPLINARY BOARD,

Petitioner,

v.

No. 23-746

SCOTT A. CURNUTTE,

Respondent.

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 Scott A. Curnutte (hereinafter “Respondent”), arising from 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 17, 2023, and served upon Respondent via certified mail by the Clerk on January 5, 2024. Lawyer Disciplinary Counsel filed her mandatory discovery on January 23, 2024. Respondent filed his Answer to the Statement of Charges on January 26, 2024. Because Respondent did not provide any discovery to Lawyer Disciplinary Counsel, on March 28, 2024, the Office of Lawyer Disciplinary Counsel (hereinafter “ODC”) filed a Motion to Exclude Testimony of Witnesses and Documentary Evidence. On April 9, 2024, the ODC filed a Motion to Take Witness Testimony by Telephone. Both motions were granted by the Hearing Panel Subcommittee (hereinafter “HPS”) at the April 19, 2024 pre-hearing conference, with no objection voiced by Respondent.

Thereafter, on April 29, 2024, this matter proceeded to hearing in Charleston, West Virginia. The HPS was comprised of: Stephen M. Mathias, Esquire, Chairperson; Richard A. Pill, Esquire; and Mark Blankenship, Layperson. Renée N. Frymyer, Lawyer Disciplinary Counsel, appeared on behalf of the ODC. Respondent appeared *pro se*. The HPS heard testimony from: Terry McFarlan; Adam Kramer; John Lambert; Carolyn Channell; and Respondent. In addition, Exhibits 1-37 were admitted into evidence.

On or about October 24, 2024, the HPS issued its decision in this matter and filed with the Supreme Court its Report. The HPS properly found that the clear and convincing evidence established that Respondent had violated Rules 1.3, 1.4(a)(3), 1.4(a)(4), 3.2, and 8.1(b) of the

Rules of Professional Conduct regarding Count I of the Statement of Charges, Rules 3.2 and 8.1(b) of the Rules of Professional Conduct regarding Count II of the Statement of Charges, Rule 8.1(b) of the Rules of Professional Conduct regarding Count III of the Statement of Charges, and Rules 3.4(c), 8.1(b), and 8.4(d) of the Rules of Professional Conduct regarding Count IV of the Statement of Charges. The HPS recommended that Respondent's license to practice law be suspended for a period of six months, that he comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure regarding the duties of disbarred or suspended lawyers, that he be required to petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, and that he be ordered to pay the costs of the proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Thereafter, November 8, 2024, the ODC filed its consent to the recommendation of the HPS. On November 27, 2024, Respondent filed his objection to the disposition recommended by the HPS. On December 6, 2024, 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 practicing in Elkins, which is located in Randolph County, West Virginia. Respondent, having passed the Bar Exam, was admitted to The West Virginia State Bar on September 23, 1991. 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. [Admitted]

**COUNT I
I.D. No. 22-02-028
Complaint of Terry L. McFarlan**

2. In a notarized complaint, received by the ODC on February 3, 2022, Terry L. McFarlan stated that he retained Respondent to represent him in a property dispute. [Ex. 1]
3. Ultimately a civil action to clear title to real estate was filed by Respondent on Mr. McFarlan's behalf against Hollis Vance. Mr. McFarlan said that a settlement was reached via mediation on July 8, 2019, wherein both parties agreed to have a new survey done on the Vance property on the north side of Mr. McFarlan's home, and resurvey another part of Mr. McFarlan's property, and split the bill of the survey equally. [Admitted]
4. Mr. McFarlan stated that the survey was done, and the two properties at issue were split up into four parcels, "A-B-C-D," where Mr. McFarlan was to receive ownership of parcels "B and C," and parcels "A and D" were to go to the Vances. [Admitted]
5. According to Mr. McFarlan, new deeds were written by Respondent and opposing counsel, Frank Bush, respectively, and recorded. [Ex. 1]
6. Thereafter, Mr. McFarlan said that he believed that one of the deeds had not been correctly written due to what was reflected in tax department records. Mr. McFarlan said that Respondent agreed, wrote a revised deed, and sent it to Mr. Bush for review. [Ex. 1]
7. According to Mr. McFarlan, Mr. Bush would not have his clients execute a new deed. Mr. McFarlan asserted that years had passed, and he still did not have a proper deed for where his home sat, which was parcel "C," nor did Mr. Vance have a correct deed for parcel "D." [Ex. 1]
8. Mr. McFarlan said that he had called Respondent's office on many occasions and Respondent had not responded. [Ex. 1]
9. Mr. McFarlan alleged that Respondent would not resolve the situation. [Ex. 1]

10. By letter dated February 7, 2022, the ODC advised Respondent that it had opened a complaint regarding the matter and expected Respondent's verified response to the complaint within twenty days of his receipt of the letter. [Ex. 2]
11. In his response to the complaint, received by the ODC on March 10, 2022, Respondent said that the matter was "the most complicated and convoluted property case any of the attorneys were ever involved in." He stated that after he was contacted by Mr. McFarlan, he came to believe that Mr. Vance owned an interest in the parcel Mr. McFarlan thought he owned, and that Mr. McFarlan owned the parcel Mr. Vance thought he owned. Respondent said that Mr. Vance, by counsel Frank Bush, disputed his analysis, and Respondent filed suit. [Ex. 3]
12. To complicate matters, Respondent said that there were competing surveys about the bounds of the parcels regarding who owned what and there were competing claims of adverse possession of disputed validity. [Ex. 3]
13. Respondent stated that at a mediation, a "complicated settlement" was reached where the parties agreed to swap the parcels each party thought they owned, and also swap ownership of parcels owned by the parties which were not part of the disputed parcels. [Ex. 3]
14. After Mr. McFarland's surveyor delivered the new survey, Respondent said that Mr. Bush prepared deeds, which were ultimately executed and recorded in the office of the County Clerk of the Randolph County Commission. [Ex. 3]
15. Later, however, Respondent said that the Assessor notified the parties of his belief that those deeds did not accomplish the purpose they were intended to accomplish. Therefore,

- Respondent said he prepared revised deeds which he believed did accomplish that purpose and forwarded them to Mr. Bush. [Ex. 3]
16. After review, Respondent said that Mr. Bush took the position that the deeds Respondent prepared did not reflect the agreement of the parties at mediation. After several communications, Respondent said he agreed with Mr. Bush and accordingly prepared a third set of proposed deeds and forwarded them to Mr. Bush. Mr. Bush again apparently found the deeds unacceptable. [Ex. 3]
 17. In response to a request from ODC, Mr. Bush asserted that a settlement offer had been made on behalf of his client to Mr. McFarlan by and through Respondent that would fully and completely resolve the case, but Respondent had not responded. [Ex. 8]
 18. By letter dated September 30, 2022, the ODC asked Respondent to provide a status update regarding the matter. Respondent was also advised that Lawyer Disciplinary Counsel considered the request a lawful demand for information within the meaning of Rule 8.1(b) of the Rules of Professional Conduct. [Ex. 7]
 19. Respondent did not provide a response to the request of the ODC. [Admitted]
 20. On or about December 12, 2022, Lawyer Disciplinary Counsel requested that a subpoena be issued for Respondent's appearance at the ODC to provide a sworn statement regarding this complaint, and subsequently mailed the same to the Sheriff of Randolph County for service upon Respondent. [Ex. 27]
 21. On February 9, 2023, Respondent appeared at the ODC to provide a sworn statement. [Ex. 9]
 22. Regarding the McFarlan complaint, Respondent stated that he had spoken about the case with Mr. Bush within the last six weeks to finalize the deeds. Respondent said that he

would provide the ODC with an update when that occurred. He further stated that he was “hoping to get [the matter] wrapped up within a very short period of time.” [Ex. 9, bates 93-94]

23. Respondent did not dispute that Mr. Bush had previously conveyed to him a settlement offer, and that Respondent had not responded. [Ex. 9, bates 90]
24. By letter dated April 19, 2023, the ODC asked Respondent to provide a status update on the matter, in writing, within twenty days of his receipt of the letter. Respondent was also advised that Lawyer Disciplinary Counsel considered the request a lawful demand for information within the meaning of Rule 8.1(b) of the Rules of Professional Conduct. [Ex. 11]
25. Respondent did not provide a response to the request of the ODC. [Admitted]
26. By letter dated May 25, 2023, sent to Respondent via certified and regular mail, the ODC again asked that Respondent provide a status update on the matter, in writing, no later than June 23, 2023. The “green card” was returned to the ODC on or about June 1, 2023, indicating that the letter had been received by Krista Curnutte. [Ex. 12, 13]
27. Respondent did not provide a response to the request of the ODC. [Admitted]
28. By letter dated September 21, 2023, sent to Respondent via certified and regular mail, the ODC once again asked Respondent to provide a status update on the matter. The letter indicated that it was a final request for information and stated that if a response was not received by October 27, 2023, the allegations in the complaint would be deemed admitted and the matter would be referred to the Investigative Panel of the Lawyer Disciplinary Board at its December meeting for appropriate action. The “green card” was returned to

the ODC on or about October 16, 2023, indicating that the letter had been received by Krista Curnutte. [Ex. 14, 15]

29. Respondent did not provide a response to the request of the ODC. [Admitted]
30. At the hearing, Terry McFarlan discussed why he had sought out Respondent's representation regarding a property issue, which was mediated and settled several years ago, but as of the date of the hearing, he still did not have a proper deed for his property. He discussed his attempts to contact Respondent to get the matter resolved to no avail. He testified, "I just want my deed right. That's all I want." Mr. McFarlan testified to his frustration and stress from the matter and stated that he did not feel like a priority to Respondent. [Hr. Tr. pp. 11-36]
31. At the hearing, Respondent agreed that Mr. McFarlan had expressed the desire for him to resolve his case. [Hrg. Tr. p. 77] Respondent testified that there is no reason it could not be resolved. [Hrg. Tr. p. 91]
32. Because Respondent neglected Mr. McFarlan's case and failed to take appropriate action in the matter, he 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.

33. Because Respondent failed to keep Mr. McFarlan informed as to the status of the matter and failed to respond to his requests for information, Respondent violated Rule 1.4(a)(3) and Rule 1.4(a)(4) of the Rules of Professional Conduct:

Rule 1.4. Communication.

(a) A lawyer shall:

* * *

- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information[.]

34. Because Respondent failed to make reasonable efforts consistent with the stated and agreed upon objectives of Mr. McFarlan, he violated Rule 3.2 of the Rules of Professional Conduct which provides:

Rule 3.2. Expediting Litigation.

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

35. Because Respondent failed to comply with the ODC's lawful requests for information, he violated Rule 8.1(b) of the Rules of Professional Conduct, which provides:

Rule 8.1. Bar Admission and Disciplinary Matters.

[A] lawyer in connection with . . . a disciplinary matter, shall not:

* * *

(b) . . . knowingly fail to respond to a lawful demand for information from . . . disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

COUNT II
I.D. No. 22-01-133
Complaint of John R. Lambert

36. In a notarized complaint, received by the ODC on April 11, 2022, John R. Lambert, by his Power of Attorney Carolyn Channell, stated that Respondent had been hired six years ago to represent Mr. Lambert regarding the estate of his late wife. [Ex. 16]

37. Mr. Lambert contended that his wife's sister had taken his wife to various lawyers while she was heavily sedated and had his wife "sign everything over to her." Upon his wife's passing, Mr. Lambert said his wife's sister inherited everything he owned. [Ex. 16]

38. Mr. Lambert said he retained Respondent right away, and Respondent had assured him that he could handle the case and "get [Mr. Lambert's] life back." [Ex. 16]

39. Mr. Lambert stated that they went to court on August 2, 2019, and everything was to be settled. However, he alleged that was the last time he talked to Respondent. [Ex. 16]

40. Mr. Lambert alleged that Respondent refused to do anything and would not set up an appointment with him or talk to him on the phone. [Ex. 16]
41. By letter dated April 29, 2022, the ODC advised Respondent that it had opened a complaint regarding the matter and expected Respondent's verified response to the complaint within twenty days of his receipt of the letter. [Ex. 17]
42. After receiving no response from Respondent, by letter dated May 31, 2022, sent via certified and regular mail, the ODC advised Respondent that if it did not hear from Respondent by June 14, 2022, a subpoena may be issued for him to appear at the office to give a sworn statement, or the allegations in the complaint would be deemed admitted and the matter would be referred to the Investigative Panel of the Lawyer Disciplinary Board. [Ex. 19]
43. The "green card" was returned to the ODC on or about June 3, 2022, indicating that the letter had been received by Krista Curnutte. [Ex. 20]
44. In his response to the complaint, received by the ODC on June 6, 2022, Respondent said that he was retained by Mr. Lambert to challenge certain transactions by his former wife before she died. He stated that he filed a Petition for Elective Share before the Tucker County Commission on or about March 24, 2016. Despite various pleadings being filed and hearings noticed, Respondent said that each hearing was canceled *sua sponte* by the County Commission. [Ex. 21]
45. Respondent stated that in June 2018, the County Commission, through the Prosecuting Attorney, indicated that it did not intend to proceed and insisted the parties file a joint notice of removal to Circuit Court. Respondent said that he prepared such a notice but could not get opposing counsel to respond to requests to sign it. Accordingly, in

- November 2018, Respondent said he moved unilaterally to transfer the case to Circuit Court. [Ex. 21]
46. Because the Circuit Court did not set a scheduling conference, Respondent stated that in February 2019 he noticed a status hearing for the following month. Following the status hearing, Respondent said that the Circuit Court entered a scheduling order. The cases were then essentially bifurcated at the request of counsel. [Ex. 21]
 47. Respondent asserted that on August 2, 2019, the Circuit Court conducted an evidentiary hearing regarding the assets within the augmented estate for purposes of calculating Mr. Lambert's elective share. He said that the Court directed the parties to submit proposed orders by September 12, 2019. Respondent said that he did so, but opposing counsel did not. [Ex. 21]
 48. On January 3, 2020, the Circuit Court entered its Order Delineating the Augmented Estate, in which Respondent said Mr. Lambert prevailed on every single disputed issue. [Ex. 21]
 49. Respondent stated that the other "half" of an elective share proceeding was satisfying the elective share, once the augmented estate is identified and the monetary amount of the elective share is calculated. He said that other beneficiaries of the will must give up bequests and devises *pro rata* to satisfy the surviving spouse's elective share. [Ex. 21]
 50. Respondent said that he had repeatedly contacted opposing counsel with a proposal to satisfy Mr. Lambert's elective share, without a substantive response. [Ex. 21]

51. Respondent stated that during the pendency of the matter, his records reflected over two hundred phone and office conferences with Mr. Lambert or Ms. Channell or both, involving either Respondent or his staff. [Ex. 21]¹
52. On or about December 12, 2022, Lawyer Disciplinary Counsel requested that a subpoena be issued for Respondent's appearance at the ODC to provide a sworn statement regarding this complaint, and subsequently mailed the same to the Sheriff of Randolph County for service upon Respondent. [Ex. 27]
53. On February 9, 2023, Respondent appeared at the ODC to provide a sworn statement. [Ex. 9]
54. Regarding the Lambert complaint, Respondent stated that he had recently spoken with opposing counsel regarding the resolution of the case. He advised Lawyer Disciplinary Counsel that he anticipated the case concluding within the next couple months and he would let the ODC know once the matter was resolved. [Ex. 9, bates 98-99]
55. By letter dated April 19, 2023, the ODC asked Respondent to provide a status update regarding the matter, in writing, within twenty days of his receipt of the letter. Respondent was also advised that Lawyer Disciplinary Counsel considered the request a lawful demand for information within the meaning of Rule 8.1(b) of the Rules of Professional Conduct. [Ex. 22]
56. Respondent did not provide a response to the request of the ODC. [Admitted]
57. By letter dated May 25, 2023, sent to Respondent via certified and regular mail, the ODC again asked Respondent to provide a status update on the matter, in writing, no later than

¹ Carolyn Channell disputed the accuracy of this assertion during her testimony at the hearing. [See Tr. pp. 149-150; 157-158]

- June 23, 2023. The “green card” was returned to the ODC on or about June 1, 2023, indicating that the letter had been received by Krista Curnutte. [Ex. 12, 13]
58. Respondent did not provide a response to the request of the ODC. [Admitted]
59. By letter dated September 21, 2023, sent to Respondent via certified and regular mail, the ODC once again asked Respondent to provide status update on the matter. The letter indicated that it was a final request for information and stated that if a response was not received by October 27, 2023, the allegations in the complaint would be deemed admitted and the matter would be referred to the Investigative Panel of the Lawyer Disciplinary Board at its December meeting for appropriate action. The “green card” was returned to the ODC on or about October 16, 2023, indicating that the letter had been received by Krista Curnutte. [Ex. 14, 15]
60. Respondent did not provide a response to the request of the ODC. [Admitted]
61. At the hearing, John Lambert testified that his sister, Carolyn Channell, had power of attorney on his behalf. He identified the power of attorney document [Ex. 36] and said his sister had his permission to answer questions on his behalf. He indicated that his signature appeared on the complaint filed with our office against Respondent. [Ex. 16] [Hrg. Tr. pp. 115-128]
62. Carolyn Channell testified as to why Respondent was retained to represent her brother, John Lambert, in 2016. She said Respondent assured them the “he would get Johnny’s life back for him” following the passing of his wife and learning that he had been excluded from her estate. Ms. Channell said that as of the date of the disciplinary hearing, the matter was not resolved and there had been no explanation from Respondent. Ms. Channell believed the matter should have been concluded six or seven years ago. She

said Mr. Lambert had received nothing from his late wife's estate, despite a court order. She testified that nobody answered the phone at Respondent's office. She said she wanted the case resolved on behalf of her brother. She stated that she kept calling Respondent asking that he set a court hearing. [Hrg. Tr. pp. 133-161]

63. At the hearing, Respondent attributed the fact that the case had been pending for a long period of time to other factors and not his own actions. [Hrg. Tr. pp.163-169]
64. Because Respondent failed to make reasonable efforts consistent with the stated and agreed upon objectives of Mr. Lambert, he violated Rule 3.2 of the Rules of Professional Conduct, as previously stated.
65. Because Respondent failed to comply with the ODC's lawful requests for information, he violated Rule 8.1(b) of the Rules of Professional Conduct, as previously stated.

COUNT III
I.D. No. 23-03-226
Complaint of Edwin A. Orrillo

66. In a notarized complaint, received by the ODC on June 2, 2022, Edwin A. Orrillo stated that Respondent, his court-appointed lawyer, had not communicated with him despite being his attorney for over six months. [Ex. 24]
67. Mr. Orrillo alleged that he had a court date and was supposed to receive the discovery in his case but had heard nothing from Respondent. [Ex. 24]
68. Mr. Orrillo further alleged that Respondent would not answer his phone calls and had not visited him at the jail. [Ex. 24]
69. By letter dated June 9, 2022, the ODC advised Respondent that it had opened a complaint regarding the matter and expected Respondent's verified response to the complaint within twenty days of his receipt of the letter. [Ex. 25]

70. After receiving no response from Respondent, by letter dated July 11, 2022, sent via certified and regular mail, the ODC advised Respondent that if it did not hear from Respondent by July 22, 2022, a subpoena may be issued for him to appear at the office to give a sworn statement, or the allegations in the complaint would be deemed admitted and the matter would be referred to the Investigative Panel of the Lawyer Disciplinary Board. [Ex. 26]
71. Respondent did not provide a response. [Admitted]
72. On or about December 12, 2022, Lawyer Disciplinary Counsel requested that a subpoena be issued for Respondent's appearance at the ODC to provide a sworn statement regarding this complaint, and subsequently mailed the same to the Sheriff of Randolph County for service upon Respondent. [Ex. 27]
73. On February 9, 2023, Respondent appeared at the ODC to provide a sworn statement. [Ex. 9]
74. Regarding the Orrillo complaint, Respondent did not deny that he had not filed a response to the complaint, despite acknowledging receipt of the letter(s) from the ODC. [Ex. 9, bates 100]
75. Respondent attributed his failure to respond to the ODC to "prioritizing workload." [Ex. 9, bates 100]
76. Respondent acknowledged that a failure to respond to a complaint can be the subject of separate disciplinary proceedings. [Ex. 9, bates 110]
77. He stated that Mr. Orrillo had been indicted along with multiple defendants on federal charges, and that in cases like that he typically waits until the full discovery is provided and a plea offer from the government is tendered to schedule a meeting with the client to

go over everything. Respondent said that the last person to be arrested in the case was July 28, 2022, and the government had never tendered a plea offer, which was unusual. [Ex. 9, bates 105-106]

78. Respondent acknowledged that he had received the discovery but did not bring it to Mr. Orrillo to review it with him. He said that he had explained to Mr. Orrillo that he desired a plea offer be tendered before meeting with him, who was housed in the eastern panhandle at the time. [Ex. 9, bates 106]
79. Respondent stated that he no longer represented Mr. Orrillo as of December 9, 2022. [Ex. 9, bates 105]
80. Respondent disputed that he had not answered calls from Mr. Orrillo. [Ex. 9, bates 106]
81. Because Respondent failed to comply with the ODC's lawful requests for information, he violated Rule 8.1(b) of the Rules of Professional Conduct, as previously stated.

COUNT IV
I.D. No. 23-02-082
Complaint of Adam T. Kramer

82. In a notarized complaint, received by the ODC on March 6, 2023, Adam T. Kramer stated that on Friday, April 29, 2022, he attended mediation facilitated by Respondent at his office in Elkins. [Ex. 30]
83. The mediation had been ordered by the presiding Family Court regarding the modification of a parenting plan. [Admitted; Ex. 34, bates 333-334]
84. Mr. Kramer said that the parties ultimately agreed to a settlement, and Respondent said he would memorialize the mediation agreement over the weekend, and it would be ready sometime early the following week. Mr. Kramer said that Respondent went on to state that writing up the agreement was "the most important part of his job." [Ex. 30]

85. After not receiving the agreement, Mr. Kramer said he contacted his attorney at the time to inquire and express concern. Mr. Kramer alleged that weeks passed and his attorney said he had not heard back from Respondent regarding the matter. [Ex. 30]
86. Mr. Kramer stated that several weeks later, the other party backed out of the agreement. Mr. Kramer attributed this to Respondent's failure to complete the paperwork. [Ex. 30]
87. Mr. Kramer said that by letter dated December 8, 2022, hand-delivered to Respondent's office, he requested a full refund of the money that had been paid to Respondent to mediate the matter. Mr. Kramer said that Respondent did not respond and would not answer his calls. [Ex. 30]
88. By letter dated March 22, 2023, the ODC advised Respondent that it had opened a complaint regarding the matter and expected Respondent's verified response to the complaint within twenty days of his receipt of the letter. [Ex. 31]
89. After receiving no response from Respondent, by letter dated April 24, 2023, sent via certified and regular mail, the ODC advised Respondent that if it did not hear from Respondent by May 15, 2023, a subpoena may be issued for him to appear at the office to give a sworn statement, or the allegations in the complaint would be deemed admitted and the matter would be referred to the Investigative Panel of the Lawyer Disciplinary Board. [Ex. 32]
90. The certified letter was returned to the ODC on or about May 8, 2023, marked refused for postage due. The letter sent to Respondent via regular mail was not returned to sender. [Ex. 33]
91. Respondent did not provide a response to the complaint. [Admitted]

92. By letter dated May 25, 2023, sent to Respondent via certified and regular mail, the ODC asked Respondent for a response to Mr. Kramer's complaint, in writing, no later than June 23, 2023. The "green card" was returned to the ODC on or about June 1, 2023, indicating that it had been received by Krista Curnutte. [Ex. 12, 13]
93. Respondent did not provide a response to the complaint. [Admitted]
94. By letter dated September 21, 2023, sent to Respondent via certified and regular mail, the ODC once again asked Respondent to provide a response to the complaint of Mr. Kramer. The letter indicated that it was a final request for information and stated that if a response was not received by October 27, 2023, the allegations in the complaint would be deemed admitted and the matter would be referred to the Investigative Panel of the Lawyer Disciplinary Board at its December meeting for appropriate action. The "green card" was returned to the ODC on or about October 16, 2023, indicating that it had been received by Krista Curnutte. [Ex. 14, 15]
95. Respondent failed to provide a response to Mr. Kramer's complaint. [Admitted]
96. Rule 43 of the Rules of Practice and Procedure for Family Court states, in part, "Within five days of the conclusion of mediation, the mediator shall reduce any mediated agreement to writing on the required form; prepare a Mediation Outcome Report on the required form; file the agreement with the circuit clerk; send copies of the agreement to the parties; and send a copy of the report to the court." [Admitted]
97. At the hearing, Adam Kramer explained how Respondent had mediated a family court issue between him and the mother of his child at Respondent's office on April 29, 2022, where an agreement had been reached but was never memorialized by Respondent. Mr. Kramer said that following the mediation he was "pretty ecstatic not to have to go

through the long and stressful litigation process that would have ensued... had we not come to agreement.” Mr. Kramer testified that his child’s mother backed out of the agreement about a month after the mediation conference and Mr. Kramer proceeded to “litigate a very expensive court case.” He said the case was very long and very contentious. He said the case was extremely stressful for his daughter, as well as extremely stressful for himself and his wife. He testified that his attorney had tried calling Respondent several times about the issue. Mr. Kramer said he was interested in Respondent’s explanation of the situation in response to his ethics complaint but noted that Respondent “refused to respond.” Mr. Kramer said that he attempted to obtain reimbursement from Respondent for the fee he had been paid but he would not communicate with Mr. Kramer. Mr. Kramer said that Respondent stressed that writing the mediation agreement was the most important part of his job, and that he had given Mr. Kramer every assurance that the other party was willing to sign it, but nothing in writing was prepared. Mr. Kramer believed that satisfying his professional obligations was not a priority for Respondent, and he did not have complete faith that any attorney he hired was willing to follow through with their professional obligations in a timely manner. [Hr. Tr. pp. 38-61]

98. At the hearing, Respondent agreed that he had informed the parties after the mediation which occurred on April 29, 2022, that he would draft a settlement agreement, though he denied stating that drafting such was the most important part of his job. Respondent admitted that he did not put the settlement in writing after the mediation. Respondent discussed how no mediated agreement is enforceable until it is approved by the family court, and that there was to be a court hearing on or about June 8, 2022. Respondent said

he received an email dated May 25, 2022, from the attorney for the mother of the child stating that the mother would not agree to joint-decision making [Ex. 37]. Respondent said at this point, because there was no longer an agreement, there was nothing to memorialize. Respondent denied that Rule 43 of the Rules of Practice and Procedure for Family Court applied to a private mediation, which he contended is what occurred in this matter. [Hr. Tr. pp. 177-195]

99. Mr. Kramer's testimony indicated that the mediation was court-ordered, and the court had appointed Respondent mediator. [Hrg. Tr. pp. 39-40; 54]
100. In his Answer to the Statement of Charges, Respondent admitted that the referenced mediation had been ordered by the presiding Family Court regarding the modification of a parenting plan. [See Respondent's Answer ¶ 53]
101. Because Respondent failed to comply with Rule 43 of the Rules of Practice and Procedure for Family Court² following the conclusion of the mediation over which he presided as the mediator, Respondent violated Rule 3.4 of the Rules of Professional Conduct, which provides:

Rule 3.4. 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.

102. Because Respondent failed to comply with the ODC's lawful requests for information, he violated Rule 8.1(b) of the Rules of Professional Conduct, as previously stated.

² Although there is contradicting testimony regarding whether the mediation at issue was court-ordered or was "private," the rule on its face does not provide an exception or exclusion for a private mediation as opposed to court-ordered mediation.

103. Because Respondent engaged in dilatory conduct by failing to prepare a report following the mediation over which he presided or otherwise report to the court the outcome of the mediation, Respondent violated Rule 8.4(d) of the Rules of Professional Conduct, which provides:

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

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

II. SUMMARY OF ARGUMENT

The HPS correctly found that the reliable, probative, and substantial evidence on the whole record established by clear and convincing proof that Respondent committed multiple violations of the Rules of Professional Conduct, intentionally and knowingly violated his duties to his clients, the public, the legal system, and the legal profession, and that his actions caused actual harm. The HPS also properly considered the aggravating factors of prior disciplinary offenses, substantial experience in the practice of law, and pattern and practice of failing to respond to the requests of the ODC, and a mitigating factor, and made an appropriate recommendation that the Respondent's license to practice law be suspended for six months. In adopting and ordering such sanction in this lawyer disciplinary proceeding, this Honorable Court will serve its goals of protecting the public, reassuring the public as to the reliability and integrity of attorneys, and safeguarding the administration of justice. 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

On December 6, 2024, 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.

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.

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*, 201 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 Appeal has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but also to protect the public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard its interests in the administration of justice. *Lawyer Disciplinary Board v. Taylor*, 192 W.Va. 139, 451 S.E.2d 440

(1994). 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. THE FINDINGS OF THE HPS ARE SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE

The Court gives “substantial deference . . . to the [HPS’s] findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.” See *McCorkle*, 192 at 287, 452 S.E.2d at 378, Syl. Pt. 3. Further, the HPS “hears testimony of the witnesses firsthand and, being much closer to the pulse of the hearing, is much better situated to resolve such issues as credibility.” *Id.* at 290, 452 S.E.2d 377 at 381. The review of the record in this case, which includes admissions made by Respondent, clearly supports the findings of fact made by the HPS were supported by reliable, probative and substantial evidence and should not be disturbed. In addition, the reliable, probative, and substantial evidence also supports the finding that Respondent violated the multiple Rules of Professional Conduct as determined by the HPS regarding all four Counts of the Statement of Charges.

C. 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, the public, the legal system, and the profession.

In determining the nature of the ethical duty violated, the standards assume that the most important ethical duties are those obligations which a lawyer owes to clients. The lawyer must at all times act in the best interest of the client. In addition to duties owed to clients, the lawyer also owes duties to the general public. Members of the public are entitled to expect lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in interference with the administration of justice. Lawyers also owe their duties to the legal system and the legal profession. A lawyer should demonstrate respect for the legal system and for those who serve it. Finally, lawyers are officers of the court, and as such, owe a duty to the legal system to operate within the bounds of the law and abide by the rules of procedure which govern the administration of justice in our state. A lawyer's duties also include maintaining the integrity of the profession.

The HPS correctly found that Respondent engaged in conduct in violation of the Rules of Professional Conduct and therefore violated duties to his clients, the public, the legal system and legal profession. The evidence clearly demonstrates that Respondent repeatedly failed to respond to his clients' reasonable requests for information and failed to diligently pursue matters on their behalves. Moreover, Respondent failed to fulfill his duties as a mediator. In addition, although each one of the four complaints constituting the Statement of Charges was provided to Respondent's address of record pursuant to Rules 2.4 and 2.5 of the Rules of Lawyer Disciplinary Procedure, and responses to each complaint requested, Respondent provided an adequate response to only two of the complaints. Respondent then failed to respond to requests

for updates in all the cases despite multiple attempts made by the ODC to obtain such information. Respondent provided no explanation for his failure to respond to the ODC's requests. Indeed, the legal system and legal profession suffer when lawyers fall short of their duties under the rules and fail to participate in a disciplinary investigation properly.

2. Respondent acted intentionally and knowingly.

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. Rule 1.0(f) of the Rules of Professional Conduct states that a person's knowledge may be inferred from the circumstances. The HPS correctly found, and the evidence in these proceedings clearly supports, that there is no evidence to suggest that Respondent did not act intentionally or knowingly. There was also no evidence presented that any of Respondent's actions were the result of simple negligence or mistake. As such, this Court should adopt this finding of the HPS.

3. Harm resulted from Respondent's conduct.

Respondent's noncompliance with these rules as exhibited in the record is clearly detrimental to the legal system and legal profession. Because the legal profession is largely self-governing, it is vital that lawyers abide by the rules of substance and procedure which shape the legal system. Indeed, the rules enacted by the Supreme Court of Appeals governing the practice

of law and conduct of lawyers have force and effect of law. *See* W.Va. Const. Art. VIII, § 3 (“The court shall have power to promulgate rules...for all of the courts of the State relating to...practice and procedure, which shall have the force and effect of law.”) The HPS determined that Respondent’s noncompliance with the disciplinary process has brought the legal system and legal profession into disrepute, and that the conduct exhibited by Respondent undermines the integrity and public confidence in the administration of justice.

The HPS also found that clients experienced direct harm as a result of Respondent’s misconduct. Mr. McFarlan testified as to the stress and frustration he experienced due to Respondent’s failure to take action on his behalf. Hr. Tr. pp. 20-21, 24, 26. He also expressed how his experience with Respondent had affected the trust he has in lawyers. Hr. Tr. p. 27. Mr. Kramer, a non-client, testified to the stress he experienced, the delay his case suffered, and his loss of trust in lawyers due to Respondent’s misconduct as a mediator. Hr. Tr. pp. 46-47. These findings of the HPS are correct and should not be disturbed.

4. There are multiple aggravating factors present and only one mitigating factor that should be considered.

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). Rule 9.22(a) of the *ABA Model Standards for Imposing Lawyer Sanctions* indicates that prior disciplinary offenses constitute an aggravating factor. On February 2, 2019, the Investigative Panel of the Lawyer Disciplinary Board warned Respondent in a closing of a

complaint regarding his obligations under Rule 8.1(b) of the Rules of Professional Conduct to respond to the ODC's requests for information [Ex. 35, bates 414]. On November 17, 2020, the Supreme Court of Appeals suspended Respondent from the practice of law for a period of ninety days with automatic reinstatement in a separate disciplinary proceeding for a violation of Rule 8.4(c) of the Rules of Professional Conduct [Ex. 35, bates 422].

In addition to the appropriate aggravating factor of prior disciplinary offenses, the HPS determined that Respondent has substantial experience in the practice of law and exhibited a pattern and practice of failing to respond to the requests of the ODC as exhibited in the instant Statement of Charges. This Court should adopt these aggravating factors herein.

The *Scott* Court also adopted mitigating factors in a lawyer disciplinary proceeding and stated that mitigating factors "are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." *Lawyer Disciplinary Board v. Scott*, 213 W.Va. 209, 216, 579 S.E.2d 550, 557 (2003). It should be clear, however, that mitigating factors were not envisioned to insulate a violating lawyer from discipline. In this case, the HPS found that Respondent's cooperative attitude toward proceedings is a potential mitigating factor.

D. 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. Syllabus Pt. 3, in part, *Committee on Legal Ethics v. Tatterson*, 173 W.Va. 613, 319 S.E.2d 381 (1984), cited in *Committee on Legal Ethics v. Morton*, 186 W.Va. 43, 35, 410 S.E.2d 279, 281 (1991). In addition, discipline must serve as both instruction on the standards for ethical conduct and as a deterrent against similar misconduct to other attorneys. Indeed, 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.

Absent any aggravating or mitigating circumstances, the *ABA Model Standards for Imposing Lawyer Sanctions* provide 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.

Additionally, the case law in West Virginia concerning such misconduct has also resulted in attorneys receiving suspensions. In a recent comparable matter, *Lawyer Disciplinary Board v. Davis*, -- W.Va. --, -- S.E.2d --, 2022 WL 421119 (2022), the Supreme Court of Appeals suspended the respondent lawyer's license to practice law for six months for his violation of Rules 1.3, 1.4, 1.5(b) 8.1(b), and 8.4(d) of the Rules of Professional Conduct relating to a one-count Statement of Charges. In that matter, the Supreme Court specifically found a strong sanction consistent with the Court's obligation to protect the public interest and dissuade similar conduct in the future due to the lawyer's prior disciplinary sanctions, which included a thirty-day suspension. *See also Lawyer Disciplinary Board v. Aleshire*, 230 W. Va. 70, 79-80, 736 S.E.2d 70, 79-80 (2012) (imposing one-year suspension where attorney demonstrated "a consistent unwillingness" to respond to ODC); *Lawyer Disciplinary Board v. Duffy*, 239 W.Va. 481, 801 S.E.2d 496 (2017) (retroactive twelve-month suspension from the practice of law with requirement to apply for reinstatement was appropriate discipline to impose on attorney whose

misconduct included repeatedly failing to respond to numerous lawful requests for information by the ODC); *Lawyer Disciplinary Board v. Schillace*, 247 W.Va. 673, 885 S.E.2d 611 (2022) (two-year suspension ordered for lawyer with pattern of knowingly ignoring communications from his clients and ODC); *Lawyer Disciplinary Board v. Burgess*, No. 23030 (W.Va. 4/25/96) (unreported) (two year suspension with one year suspension deferred while respondent undergoes a one-year period of supervision following reinstatement for violation of Rules 1.3, 1.4, 8.1(b), 8.4(d) and other violations); *Lawyer Disciplinary Board v. Farber*, No. 32598 (W.Va. 1/26/06) (unreported) (indefinite suspension and a psychological counseling ordered to determine fitness to practice law for violation of Rules 1.3, 1.4, 8.1(b), and another violation); *Lawyer Disciplinary Board v. Morgan*, 228 W.Va. 114, 717 S.E.2d 898 (2011) (one year suspension for violation of Rules 1.3, 1.4, 8.1(b), 8.4(d), and other violations); *Lawyer Disciplinary Board v. 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 plus two years supervised practice for violation of Rules 1.3, 1.4, 8.1(b), 8.4(d), and other violations); *Lawyer Disciplinary Board v. Davis*, No. 18-0640 (W.Va. 6/10/19) (unreported) (suspension for thirty days, additional CLE hours, and two years of probation with supervised practice for Rule 1.4 and 8.1(b)).

The principal 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). In this case, the Lawyer Disciplinary Board asserts that Respondent knowingly engaged in conduct that violated his duties as a professional and caused direct harm to his clients, the public, the profession and the system of justice. The multiple infractions

committed by Respondent, in addition to the aggravating factors present, touch the very essence of the public's perception of the legal system. For the public to have confidence in our disciplinary and legal systems, lawyers such as Respondent must be removed from the practice of law for a period of time. A license to practice law is a revocable privilege and when such privilege is abused, the privilege should be revoked. A strong sanction is also necessary to deter other lawyers from engaging in similar conduct, to restore the faith of the complainants in these cases, and to reassure the general public of the integrity of the legal profession.

The HPS correctly found that Respondent has violated multiple Rules of Professional Conduct, including numerous violations for failing to respond to lawful requests for information from the ODC. That misconduct on its own is enough to warrant a sanction, but with Respondent's disciplinary history of a prior suspension and the presence of other aggravating factors, it is clear that a suspension is appropriate in this case. The HPS noted that Respondent needs to appreciate the significance and of the rules governing our profession and to ensure that he will incorporate the appropriate practices and procedures into any future practice. Respondent has also acknowledged that discipline is appropriate for his admitted conduct herein.

The recommendation made by the HPS that Respondent's license to practice law be suspended for six months, with the requirement to petition for the reinstatement, is appropriate. In adopting and ordering such sanction in this lawyer disciplinary proceeding, this Honorable Court will serve its goals of protecting the public, reassuring the public as to the reliability and integrity of attorneys, and safeguarding the administration of justice. A strong sanction is also necessary to deter lawyers who may be considering or who are engaging in similar misconduct.

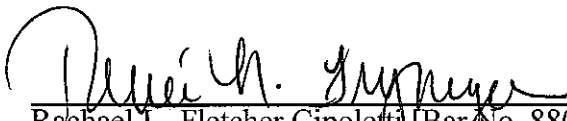
V. CONCLUSION

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 engaged in numerous violations of the Rules of Professional Conduct. Respondent's course of misconduct cannot be condoned or excused. 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:

1. Respondent's law license be suspended for a period of six months;
2. That Respondent must comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure;
3. That Respondent be required to petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure; and
4. 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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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 17th day of January, 2025, served a true copy of the foregoing **“BRIEF OF THE LAWYER DISCIPLINARY BOARD”** upon Respondent Scott A. Curnutte, Esquire, by mailing the same via email and electronically via File and Serve Xpress, to the following address:

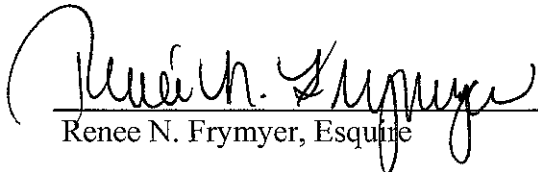
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And upon the Hearing Panel Subcommittee via United States Mail at the following addresses:

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