

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

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Re: Benjamin R. Freeman, a licensed member of
The West Virginia State Bar

Bar No.: 8875
Supreme Court No.: 24-129
I.D. Nos.: 22-05-312
22-01-355
23-01-091
23-06-199
23-06-308
23-06-431
24-06-034

REPORT OF THE HEARING PANEL SUBCOMMITTEE

I. PROCEDURAL HISTORY¹

Formal charges were filed against Benjamin R. Freeman (hereinafter “Respondent”) with the Clerk of the Supreme Court of Appeals on or about March 7, 2024, and served upon Respondent by delivering a copy of the same to Respondent’s wife, Elaine Freeman, at Respondent’s residence on or about March 19, 2024. The parties convened for a scheduling conference by Microsoft Teams on March 26, 2024. The HPS ordered that the pre-hearing in this matter be held by Microsoft Teams on July 2, 2024, and that the hearing in this matter be held on July 16, 2024, in Charleston, West Virginia. The Office of Lawyer Disciplinary Counsel (hereinafter “ODC”) timely filed its mandatory discovery on or about April 8, 2024. Respondent timely filed his Answer to the Statement of Charges on April 19, 2024. Respondent failed to provide the ODC with his mandatory discovery. The ODC timely filed a Motion to Allow Testimony by Video Conference and a Motion to Exclude Testimony of Witnesses and Documentary Evidence or Testimony of Mitigating Factors. Respondent did not file any pre-hearing motions or responses to the motions filed by the ODC. A

¹ The Respondent agrees with the Procedural History submitted by the ODC

pre-hearing was held by Microsoft Teams on July 2, 2024, in which the parties appeared and the HPS granted the ODC's previously filed motions apart from permitting Respondent to testify regarding potential mitigating factors at the hearing in this matter.

This matter proceeded to a hearing in Charleston, West Virginia, on July 16, 2024. The Hearing Panel Subcommittee was comprised of Charles R. Steele, Esquire, Chairperson, Nicole A. Cofer, Esquire, and Margaret Chapman Pomponio, Layperson. Lauren M. Hall, Lawyer Disciplinary Counsel, appeared on behalf of the ODC. Respondent appeared *pro se*. The HPS heard testimony from: Marcus L. Young, Emily C. Stern, Esquire, Marjorie Allison, and Respondent. Joint Exhibit 1 and ODC Exhibits 1-164 were admitted into evidence without objection.

II. FINDINGS OF FACT² AND CONCLUSIONS OF LAW

1. Respondent is a lawyer practicing in Hurricane, which is located in Putnam County, West Virginia. Respondent, having passed the bar exam, was admitted to The West Virginia State Bar on October 10, 2001. 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.

2. Respondent currently operates a solo law practice. Prior to opening his law practice in 2017, Respondent worked at the Office of the West Virginia Attorney General for two years and prior to that, Respondent worked at the Kanawha County Prosecuting Attorney's Office for nearly 14 years. [Hrg. Tr. 52-54].

² The Respondent, in his submitted Proposed Findings of Fact and Conclusions of Law, agrees with "most of the factual history and legal citations" submitted by the ODC in its Proposed Findings of Fact. Respondent acknowledges that he failed to timely file four appellate matters as specified. He testified at the hearing in this matter, and set forth in his Proposed Findings of Fact, that an unusually heavy caseload, inconsistent staffing, and strained resources due to the Covid shutdown contributed to the timeliness of the filings. Respondent also cites disagreements with clients and difficulties in obtaining documents, files, and transcripts in preparation of habeas corpus cases.

3. Respondent's law practice consists primarily of abuse and neglect and criminal cases in Putnam and Kanawha County. [Hrg. Tr. 56, 58]. Respondent testified that he has been without support staff since the COVID-19 pandemic, and that he is responsible for everything at his office, including checking his post office box, calendaring filing deadlines, and answering phone calls. [Hrg. Tr. 58-59].

COUNT I
I.D. No. 22-05-312
Complaint of Marcus L. Young

4. Complainant Marcus L. Young filed an ethics complaint against Respondent on August 19, 2022, wherein he alleged that Respondent was court appointed to represent him in post-conviction *habeas corpus* proceedings and that Respondent had failed to meet him or otherwise communicate with him throughout the two months following his appointment. [ODC Ex. 1].

5. On or about June 7, 2022, The Honorable Tera L. Salango, Kanawha County Circuit Court Judge, appointed Respondent to represent Mr. Young in post-conviction *habeas corpus* proceedings and file an amended petition for *habeas corpus* relief on Mr. Young's behalf. [ODC Ex. 14, Bates 56-58].

6. Pursuant to the Order Appointing Counsel and Setting Briefing Schedule entered by the Court on June 7, 2022, Respondent was ordered to file an amended petition for post-conviction *habeas corpus* relief no later than 120 days following entry of the order. Further, Respondent was directed to meet with Mr. Young and submit to the Court, with the amended petition, a completed *Losh* list. The Court directed the Circuit Clerk to send a certified copy of this order to all parties, including Respondent and Mr. Young. [ODC Ex. 14, Bates 56-58].

7. By letter dated August 30, 2022, the ODC sent Respondent a copy of the complaint of Marcus L. Young and directed him to file a verified response within 20 days. This letter was sent

to Post Office Box 234, Hurricane, West Virginia. [ODC Ex. 2].

8. Respondent failed to file a response, so the ODC sent him a second letter to the same address on October 7, 2022, by first class and certified mail, directing him to file a verified response to the complaint by October 17, 2022. [ODC Ex. 3].

9. The letter sent by certified mail was returned to the ODC marked “Return to Sender Unclaimed Unable to Forward” on November 15, 2022. The letters sent by first class mail were not returned. [ODC Ex. 7].

10. By letter received by the ODC on November 7, 2022, Respondent provided a response to the complaint. [ODC Ex. 4]. Respondent hand-delivered the requisite verification for his response on November 21, 2022. [ODC Ex. 8].

11. In his response, Respondent stated that there was initially some confusion as to whether he was appointed to represent Mr. Young. Respondent stated that since then, he has been working on Mr. Young’s amended petition. Respondent stated that he has been working with the Court to obtain documents and transcripts needed to complete the amended petition and to schedule a hearing date to present the petition on Mr. Young’s behalf. Respondent stated that the Court indicated to him that the time frame to file the amended petition was “somewhat flexible.” [ODC Ex. 4].

12. Respondent attributed his delay in communicating with Mr. Young to his demanding schedule and initial uncertainty regarding which jail facility housed Mr. Young. Additionally, Respondent stated that he had been dealing with a hand injury for two months beginning in September 2022, and family issues related to COVID-19 in July and August 2022. [ODC Ex. 4].

13. By letter received by the ODC on January 11, 2023, Mr. Young advised that he called Respondent multiple times and wrote Respondent multiple letters, but that Respondent does not

answer his phone calls or respond to his letters. Mr. Young further advised that Respondent has yet to meet with him to discuss his case. [ODC Ex. 11].

14. By letter dated January 11, 2023, the ODC sent Respondent a copy of Mr. Young's letter and directed him to file a response within 20 days. [ODC Ex. 12].

15. By letter received by the ODC on February 9, 2023, Respondent stated that he attempted to contact Mr. Young by mail, but that he was unsure if Mr. Young received his letters. Respondent said that he may have missed Mr. Young's phone calls as he is often not in his office due to his demanding court schedule. Respondent stated that he has been working on Mr. Young's amended petition, and that gathering documents took an extensive amount of time. Respondent said that he had yet to locate certain transcripts from the underlying criminal matter, but that the Court has been flexible and understanding regarding this issue. Respondent stated that he is in the process of securing a hearing date, and that he will meet with Mr. Young before filing his amended petition. [ODC Ex. 13].

16. By letter dated March 21, 2023, the ODC requested that Respondent provide additional information within 20 days, including a time line for filing the amended petition and a copy of all correspondence he sent to Mr. Young. The ODC also asked Respondent if he had met with Mr. Young or otherwise communicated with him, and if he had filed any motions to extend the filing deadline. This letter was sent to Post Office Box 234, Hurricane, West Virginia. [ODC Ex. 15].

17. Respondent failed to respond to this letter.

18. By letter dated April 20, 2023, the ODC sent Respondent a second letter to the same address, by first class and certified mail, directing him to provide a response by May 1, 2023. [ODC Ex. 16].

19. Respondent failed to respond to this letter.

20. The letter sent by certified mail was returned to the ODC marked "Return to Sender Unclaimed Unable to Forward" on May 19, 2023. The letters sent by first class mail were not returned. [ODC Ex. 18].

21. Respondent was personally served with an investigative subpoena *duces tecum* on August 2, 2023, which directed him to appear at the ODC on August 30, 2023, to testify in the taking of a sworn statement, and to produce and permit inspection of and copying of any and all documents within his control regarding Mr. Young's complaint. [ODC Ex. 23].

22. At his sworn statement, Respondent stated that he receives mail at Post Office Box 234 in Hurricane, West Virginia. [ODC Ex. 161, Bates 2846]. Respondent described issues related to the unreliability of mail delivery to his post office box. Respondent stated that since the COVID-19 pandemic began, he experienced issues, on and off, wherein he would not receive mail for a few days and then receive a lot of mail all at once and sometimes not at all. Respondent believed that his mail issues were now resolved and stated that he checks his post office box approximately two to three times per week on a typical week. [ODC Ex. 161, Bates 2850-51].

23. Respondent stated that he did not recall receiving the letter from the ODC dated March 21, 2023, stating that he was having "major mail issues" at this time. Respondent also said that he could have missed this letter due to the high volume of mail he receives. [ODC Ex. 161, Bates 2849]. Respondent stated that he did not recall receiving the letter from the ODC dated April 20, 2023. Respondent also said that he did not recall receiving a slip notifying him of the certified letter. [ODC Ex. 161, Bates 2851].

24. Respondent acknowledged that he had not met with Mr. Young in person. When asked if he had communicated with Mr. Young by phone, Respondent said that he believed he had

spoken to him “a couple times” in 2022, and that he did not recall receiving a “mountain of calls” from Mr. Young. Respondent stated that he thought he had sent Mr. Young one or two letters. Respondent acknowledged that he received “a couple” letters from Mr. Young and agreed that it was fair to say that he did not respond to these letters. [ODC Ex. 161, Bates 2854-56].

25. By letter dated August 31, 2023, the ODC requested, in part, that Respondent provide the following information within 20 days: (1) a copy of Mr. Young’s client file; (2) copies of letters and other correspondence sent to and received from Mr. Young; and (3) time records for his work performed in this matter. [ODC Ex. 27].

26. On or about October 26, 2023, the ODC received Mr. Young’s client file from Respondent which contained: (1) a draft amended petition and *Losh* list; (2) records from the underlying criminal matter; and (3) a time sheet reflecting 14.4 hours of work in Mr. Young’s case, including two visits with Mr. Young at Mount Olive Correctional Complex (hereinafter “MOCC”). [ODC Ex. 31].

27. On or about October 25, 2023, the ODC received a call detail report from John M. Frisby, Investigator for the West Virginia Division of Corrections and Rehabilitation (hereinafter “WVDOCR”), which showed that between June 7, 2022, and October 24, 2023, Mr. Young attempted to call Respondent 31 times. None of these calls were accepted by Respondent. [ODC Ex. 30, Bates 111-15].

28. On or about January 23, 2024, the ODC received updated information from Mr. Frisby that, according to WVDOCR records, as of January 22, 2024, Mr. Young had not made any further attempts to contact Respondent by phone. [ODC Ex. 36, Bates 249].

29. By letter dated January 12, 2024, the ODC asked Mr. Young if his communication with Respondent had improved since August 30, 2023, and if Respondent had provided him with

a time line of when he planned to file his amended petition. [ODC Ex. 32].

30. By letter received by the ODC on January 18, 2024, Mr. Young confirmed that Respondent met with him at MOCC but stated that their interaction was very brief. Mr. Young stated that he does not want Respondent to file his amended petition until Respondent meets with him again to discuss the substantive issues that Mr. Young believes should be addressed in his amended petition. [ODC Ex. 33].

31. By letter dated January 18, 2024, the ODC sent Respondent a copy of Mr. Young's letter and directed him to contact Mr. Young to discuss this matter. [ODC Ex. 34].

32. The Itemized Statement of Legal Services submitted by Respondent on October 5, 2023, to Public Defender Services (hereinafter "PDS") set forth that Respondent performed 14.4 hours of work in Mr. Young's case, including: (1) an initial review of Mr. Young's case on June 17, 2022; (2) a meeting with the Court's law clerk to obtain documents on July 15, 2022; (3) additional investigation, research, and document review on July 2, 2023, July 3, 2023, and August 25, 2023; (4) drafting the amended petition on August 26, 2023, and September 8, 2023; (5) a one hour meeting with Mr. Young on September 16, 2023, and an approximately 30 minute meeting with Mr. Young on September 30, 2023; and (6) drafting the amended petition and appendix and preparing for filing on October 1, 2023, and October 5, 2023. [ODC Ex. 37].

33. The following documents were filed in the underlying matter, Case No. 22-P-185, following the entry of the June 7, 2022, Order Appointing Counsel and Setting Briefing Schedule:

- a. On or about August 3, 2022, Mr. Young wrote a letter to the Court regarding his communication issues with Respondent. A note at the bottom of this letter indicates that a copy of the same was emailed to Respondent. [ODC Ex. 14, Bates 62].
- b. On August 17, 2023, the Court wrote a letter to Respondent which stated: "On June 7, 2022, I entered an Order appointing you as Counsel to represent

the petitioner in this matter and file an amended Petition for Writ of Habeas Corpus within a specified time period. Please let me know within Fourteen (14) days if you cannot represent Mr. Young and file a motion to withdraw as counsel.” [ODC Ex. 25, Bates 97].

- c. On January 26, 2024, the Court entered an Order which set the underlying matter for a hearing on February 15, 2024, via Microsoft Teams, to determine the status of the amended petition and to set a deadline for its filing. [ODC Ex. 39, Bates 271-72].
- d. On February 29, 2024, Respondent filed an Amended Petition for Writ of *Habeas Corpus* and *Losh* List on Mr. Young’s behalf. [ODC Ex. 40].
- e. On or about April 17, 2024, Mr. Young wrote a letter to the Court wherein he stated that Respondent had not communicated with him and filed an amended petition that did not include all the claims which he wished to present to the Court. Mr. Young further stated that he attempted to contact Respondent to let him know that he was not satisfied with the amended petition, but that Respondent will not respond. Mr. Young requested that the Court not rule on the amended petition and allow time for either Respondent or another attorney to supplement the petition with more substantive grounds. Lastly, Mr. Young informed the Court that he was not opposed to Respondent being removed from his case and replaced with another attorney. [ODC Ex. 164, Bates 2928].
- f. On June 10, 2024, the Court entered an Order Relieving Respondent as Counsel for Petitioner; Appointing Gordon L. Mowen, II as New Counsel to File Second Amended Petition; and Directing Respondent to File an Answer. In this Order, the Court relieved Respondent as counsel for Mr. Young in the underlying matter based upon Respondent’s indication to the Court that he was no longer able to continue to represent him. [ODC Ex. 164, Bates 2930-32].

[ODC Ex. 163, Bates 2925-26].

34. Mr. Young testified that Respondent failed to answer any of his phone calls or respond to any of his letters. [Hrg. Tr. 11]. Mr. Young confirmed that Respondent met with him at MOCC on September 16, 2023, and September 30, 2023, testifying that this was the first contact that Respondent had with him. [Hrg. Tr. 12-13, 23]. Mr. Young testified that his meeting with Respondent on September 16, 2023, was brief, approximately ten to fifteen minutes, and that they

discussed the arguments that he wanted Respondent to include in his amended petition. [Hrg. Tr. 12]. Mr. Young testified that on September 30, 2023, Respondent brought a draft amended petition for him to review, and that he did not meet with him again following this meeting. [Hrg. Tr. 13]. Mr. Young testified that he sent a letter to Respondent on January 3, 2024, wherein he informed him that he did not want him to file the amended petition in his case as he did not have his trial transcript. Mr. Young testified that Respondent did not respond to this letter. [Hrg. Tr. 14-15]. Mr. Young testified that he felt bad to learn that Respondent filed the amended petition after he asked him not to. [Hrg. Tr. 15]. Mr. Young testified that he felt let down by how Respondent handled his case, and when asked if his experience with Respondent affected his opinion of lawyers and the legal system, he answered that it made him believe that lawyers do not care about the interests of their clients. [Hrg. Tr. 17].

35. On cross-examination, Mr. Young testified that he understood that Respondent was having issues obtaining his trial transcript due to the court reporter retiring, and that Respondent informed him that he requested an extension. [Hrg. Tr. 19-20]. Regarding the *Losh* list, Mr. Young acknowledged that he did not want to waive any grounds, and that Respondent advised him that they had to identify specific issues on the *Losh* list in order to have an effective petition. [Hrg. Tr. 21]. Mr. Young testified that he recalled a hearing in front of Judge Salango on February 15, 2024, but denied that he recalled the Court ordering Respondent to file “what [he] had.” [Hrg. Tr. 21-22]. Mr. Young maintained that he never spoke to Respondent on the phone throughout the duration of his case. [Hrg. Tr. 22].

36. Respondent testified that he received the letter from the ODC dated March 21, 2023, requesting additional information regarding Mr. Young’s complaint. [Hrg. Tr. 69]. Respondent did not remember if he received the letter from the ODC dated April 20, 2023, which was sent after he

failed to respond to the March 21, 2023, letter. [Hrg. Tr. 69-70].

37. Respondent testified that he spoke to Mr. Young on the phone at some point. [Hrg. Tr. 73]. After reviewing the call detail report which indicated that Mr. Young called him 31 times between June 15, 2022, and October 25, 2023, and that none of the calls were accepted by him, Respondent testified that he may not have spoken to Mr. Young “during this period.” [Hrg. Tr. 73-74]. Respondent maintained that although he could not recall when he spoke to Mr. Young on the phone, his memory was that he had “spoken to him on the phone during the pendency of his case.” [Hrg. Tr. 74-75]. Respondent testified that he thought he sent letters to Mr. Young but that he could not swear to it. [Hrg. Tr. 76]. Respondent testified that he was sure that he received letters from Mr. Young prior to August 30, 2023, and affirmed that it was fair to say that he did not respond to these letters. [Hrg. Tr. 77]. Respondent acknowledged that until their initial meeting on September 16, 2023, he had not consulted with Mr. Young regarding the substantive issues in his case or informed him that he was not going to adhere to the filing deadlines set forth in the June 7, 2022, Order. [Hrg. Tr. 78].

38. Respondent testified that he informally described to the Court the issues he was having with this case and was advised by the Court that moving the deadlines would not be an issue. [Hrg. Tr. 62-63]. Respondent acknowledged that he did not file a response to the Court’s August 23, 2023, letter, but testified that he advised the Court of what was going on. [Hrg. Tr. 79].

39. Respondent testified that he had not submitted any billing in Mr. Young’s case since October 5, 2023, and that he thought he visited Mr. Young a total of three times, but that he would have to look at his billing notes to confirm. [Hrg. Tr. 85]. Respondent testified that he keeps billing notes on his reMarkable tablet, and he unsuccessfully attempted to locate his billing notes for Mr. Young’s case on his reMarkable tablet. [Hrg. Tr. 86]. Respondent testified that he did not provide

any billing notes to the ODC. [Hrg. Tr. 86].

40. Respondent testified that he believed that the last meeting he had with Mr. Young was in October, and that at this meeting Mr. Young would not initial the items on the *Losh* list. Respondent testified that he did not know what to do so he advised the Court of the situation and was waiting for some guidance. [Hrg. Tr. 84].

41. Respondent acknowledged that he received the letter dated January 3, 2024, from Mr. Young wherein he asked him not to submit the amended petition and testified that he did not reach out to Mr. Young after receipt of this letter, but that he contacted the Court to ask for a hearing to be scheduled to address this matter. [Hrg. Tr. 87, 89]. Respondent testified that at the February 15, 2024, hearing, the Court ordered him to file an amended petition for Mr. Young. [Hrg. Tr. 88, 173]. Respondent further testified that he discussed with the Court the possibility of appointing new counsel for Mr. Young. [Hrg. Tr. 88, 174]. Respondent acknowledged that his communication with Mr. Young could have been better. [Hrg. Tr. 94].

42. Based upon the Exhibits introduced and the sworn testimony, it is clear that the Respondent failed to act with reasonable diligence and promptness in his representation of Mr. Young in the underlying matter. As such, 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.

43. Further, the record conclusively establishes that the Respondent failed to keep Mr. Young informed as to the status of his case and failed to respond to Mr. Young's attempts to communicate with him. Accordingly, he violated Rules 1.4(a)(3) and 1.4(a)(4) of the Rules of Professional Conduct, which provide:

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[.]

44. Additionally, because Respondent failed to comply with his obligations pursuant to the June 7, 2022, Order Appointing Counsel and Setting Briefing Schedule, he violated Rules 3.4(c) and 8.4(d) of the Rules of Professional Conduct, which provide:

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.

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

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

45. Finally, the record establishes that the Respondent failed to comply with the ODC's lawful request for information. Rule 8.1(b) of the Rules of Professional Conduct, provide as follows:

Rule 8.1. Bar Admission and Disciplinary Matters.

An applicant for admission to the bar, or a lawyer in connection with a bar admission or 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. 22-01-355
Complaint of the Office of Lawyer Disciplinary Counsel

46. This complaint was opened by the ODC on September 21, 2022, after receiving a referral from Thomas McQuain, Staff Attorney, for the Supreme Court of Appeals of West Virginia. The referral included a copy of Rule to Show Cause Orders regarding Respondent's failure to timely perfect appeals on behalf of his clients in two unrelated abuse and neglect appeals: *In re* K.H., No. 22-0408, and *In re* B.S., M.S., and H.S., No. 22-0413. [ODC Ex. 44].

47. Regarding *In re* K.H., Respondent was court appointed to represent M.H. in abuse and neglect proceedings in the Circuit Court of Putnum County, Case No. 20-JA-71. [ODC Ex. 161, Bates 2863].

48. On May 24, 2022, Respondent, on behalf of his client, M.H., filed an untimely notice of appeal of an April 4, 2022, order of the Circuit Court of Putnum County, along with a motion to file the notice of appeal out-of-time. [ODC Ex. 70, Bates 904-05].

49. By scheduling order entered on June 9, 2022, the motion was granted and the deadline to perfect the appeal was extended to July 15, 2022. Respondent did not perfect the appeal by July 15, 2022. [ODC Ex. 70, Bates 904-05].

50. On August 15, 2022, a Notice of Intent to Sanction was entered directing Respondent to perfect the appeal on or before August 30, 2022, or he would be subject to sanctions in accordance with Rule 11(e) of the Rules of Appellate Procedure. Respondent did not perfect the appeal by August 30, 2022. [ODC Ex. 70, Bates 911-12].

51. On September 15, 2022, the Court issued a Rule to Show Cause directing Respondent to appear before the Court on November 1, 2022, to show cause as to why he should not be held in contempt for failure to perfect the appeal, unless sooner mooted by perfecting the appeal with the

filing of petitioner's brief and appendix. [ODC Ex. 70, Bates 913].

52. Regarding *In re* B.S., M.S., and H.S., Respondent was court appointed to represent M.S. in abuse and neglect proceedings in the Circuit Court of Kanawha County, Case Nos. 21-JA-691, 21-JA-692, and 21-JA-693. [ODC Ex. 161, Bates 2863].

53. On May 25, 2022, Respondent, on behalf of his client, M.S., filed an untimely notice of appeal of an April 15, 2022, order of the Circuit Court of Kanawha County, along with a motion to file the notice of appeal out-of-time. [ODC Ex. 71, Bates 959-61].

54. By scheduling order entered on June 24, 2022, the motion was granted and the deadline to perfect the appeal was extended to July 28, 2022. Respondent did not perfect the appeal by July 28, 2022. [ODC Ex. 71, Bates 959-61].

55. On August 16, 2022, a Notice of Intent to Sanction was entered directing Respondent to perfect the appeal on or before August 30, 2022, or he would be subject to sanctions in accordance with Rule 11(e) of the Rules of Appellate Procedure. Respondent did not perfect the appeal by August 30, 2022. [ODC Ex. 71, Bates 964-65].

56. On September 15, 2022, the Court issued a Rule to Show Cause directing Respondent to appear before the Court on November 1, 2022, to show cause as to why he should not be held in contempt for failure to perfect the appeal, unless sooner mooted by perfecting the appeal with the filing of petitioner's brief and appendix. [ODC Ex. 71, Bates 966].

57. By letter dated September 26, 2022, the ODC provided Respondent with a copy of the Rule to Show Cause Orders and directed him to provide a verified response thereto within 20 days. This letter was sent to Post Office Box 234, Hurricane, West Virginia. [ODC Ex. 45].

58. Respondent failed to file a response, so the ODC sent Respondent a second letter to the same address on October 26, 2022, by first class and certified mail, directing him to file a

verified response to this matter by November 9, 2022. [ODC Ex. 46].

59. The letter sent by certified mail was returned to the ODC marked “Return to Sender Unclaimed Unable to Forward” on December 18, 2022. The letters sent by first class mail were not returned. [ODC Ex. 51].

60. By letter received by the ODC on November 7, 2022, Respondent provided a verified response. [ODC Ex. 47, 50].

61. In his response, Respondent stated that he was delayed in perfecting these appeals due to a hand injury which made typing difficult for a two-month period beginning in September 2022. Respondent stated that he was further delayed due to his demanding schedule which included multiple appeals and *habeas corpus* petitions, and family issues related to COVID-19 in July and August 2022. [ODC Ex. 47].

62. Respondent submitted a copy of the Response to Notice to Show Cause which he filed in both cases on October 27, 2022, wherein he stated that the appeals were perfected. Respondent set forth that he was delayed due to the considerable time it took to gather court orders and other documents and the time it took to investigate, research, and draft the appeals. Respondent set forth that he was also delayed due to his demanding schedule, a hand injury, and family health issues. Respondent stated that he would “strive to maintain adherence to guidelines in the future.” [ODC Ex. 47].

63. In *In re* K.H., Respondent filed the brief and appendix on or about October 7, 2022. The Rule to Show Cause was dismissed as moot on or about October 20, 2022. [ODC Ex. 70, Bates 931].

64. In *In re* B.S., M.S., and H.S., Respondent filed the brief and appendix on or about October 7, 2022. The Rule to Show Cause was dismissed as moot on or about October 20, 2022.

[ODC Ex. 71, Bates 985].

65. Emily Stern, Esquire, testified that she is employed as a Staff Attorney at the Office of the Clerk of the Supreme Court of Appeals of West Virginia. [Hrg. Tr. 25]. Ms. Stern testified that her duties include referring matters to the ODC at the direction of the Court. [Hrg. Tr. 26-27]. Ms. Stern testified that in cases such as *In re* K.H., and *In re* B.S., M.S., and H.S., which were filed prior to the implementation of the Court's e-filing system, notices and orders from the Court were sent to parties by mail. [Hrg Tr. 27].

66. Regarding *In re* K.H., Ms. Stern testified as to Respondent's failure to comply with the deadlines set forth in the scheduling order and notice of intent to sanction. [Hrg. Tr. 29-30]. Ms. Stern further testified that to her knowledge Respondent did not file any motions requesting the Court to extend the deadlines set forth in its orders prior to when he perfected the appeal on October 7, 2022. [Hrg. Tr. 31].

67. Regarding *In re* B.S., M.S., and H.S., Ms. Stern testified as to Respondent's failure to comply with the deadlines set forth in the scheduling order and notice of intent to sanction. [Hrg. Tr. 32-33]. Ms. Stern further testified that to her knowledge Respondent did not file any motions requesting the Court to extend the deadlines set forth in its orders prior to when he perfected the appeal on October 7, 2022. [Hrg. Tr. 34].

68. Ms. Stern testified that dismissal is a potential outcome when a party fails to properly perfect an appeal. Ms. Stern further testified that Respondent's failure to adhere to the scheduling deadlines in these cases necessitated extra work in that additional orders had to be prepared, and these matters had to be presented to the Court. Ms. Stern also testified that delay in abuse and neglect cases can delay permanency for the children involved. [Hrg. Tr. 48-49].

69. Respondent acknowledged that he did not disagree with Ms. Stern's testimony and

testified that he did not dispute that he received the orders she discussed in her testimony. [Hrg. Tr. 148, 158-59]. Respondent testified that he was counsel in the underlying abuse and neglect proceedings in all of the cases discussed herein, with the exception of *In re* A.B., No. 23-400. [Hrg. Tr. 154]. Respondent testified that in all of these cases his clients directed him to file an appeal of the final order of the circuit court terminating their parental rights. [Hrg. Tr. 154]. Respondent testified regarding the difficulties he encountered in handling the abuse and neglect appeals discussed herein, including difficulties communicating with his clients and obtaining necessary reports and orders. [Hrg. Tr. 153-54]. Respondent testified that he did not advise the Court of these difficulties because he was busy with other cases and got behind. [Hrg. Tr. 155-57].

70. Because Respondent failed to act with reasonable diligence and promptness in timely perfecting an appeal on behalf of his client, he violated Rule 1.3 of the Rules of Professional Conduct, as set forth above.

71. Because Respondent failed to make reasonable efforts to expedite the appeal consistent with his client's interests, 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.

72. Because Respondent failed to comply with his obligations pursuant to orders, notices, and rules issued by the Supreme Court of Appeals of West Virginia, he violated Rule 3.4(c) of the Rules of Professional Conduct, as set forth above.

73. Because Respondent failed to properly expedite his client's appeal and failed to comply with the orders of the Supreme Court of Appeals of West Virginia to perfect the same, he violated Rule 8.4(d) of the Rules of Professional Conduct as set forth above.

COUNT III
I.D. No. 23-01-091
Complaint of Marjorie L. Allison

74. Complainant Marjorie L. Allison (hereinafter “Ms. Allison”) filed the above-referenced complaint against Respondent on March 13, 2023. [Ex. 72].

75. In her complaint, Ms. Allison alleged that she hired Respondent on or about August 19, 2021, to petition the Family Court of Putnam County to obtain visitation of her great niece. That same day, Ms. Allison paid Respondent a retainer of \$2,200.00, by personal check, for his representation in this matter. Ms. Allison alleged that she provided Respondent with the opposing party’s address, however, after several months, Respondent was unable to locate the opposing party to effectuate service. Ms. Allison stated that several more months passed, and nothing happened in her case, so she requested that Respondent refund her money. Ms. Allison stated that Respondent agreed to refund her money but failed to do so. [ODC Ex. 72].

76. By letter dated March 16, 2023, the ODC sent Respondent a letter directing him to file a verified response to Ms. Allison’s complaint within 20 days. This letter was sent to Post Office Box 234, Hurricane, West Virginia. [ODC Ex. 73].

77. Respondent failed to file a response.

78. By letter dated April 18, 2023, the ODC sent Respondent a second letter to the same address, by first class and certified mail, directing him to file a verified response to the complaint by May 2, 2023. [ODC Ex. 74].

79. USPS Tracking indicated that the letter sent by certified mail was delivered and available for pickup on April 20, 2023, and that it was unclaimed. [ODC Ex. 75].

80. Respondent failed to file a response.

81. The letter sent by certified mail was returned to the ODC marked “Return to Sender

Unable to Forward” on May 23, 2023. The letters sent by first class mail were not returned. [ODC Ex. 78].

82. Respondent was personally served with an investigative subpoena *duces tecum* on August 2, 2023, which directed him to appear at the ODC on August 30, 2023, to testify in the taking of a sworn statement, and to produce and permit inspection of and copying of any and all documents within his control regarding Ms. Allison’s complaint. [ODC Ex. 82].

83. At his sworn statement, Respondent stated that he received the letter from the ODC dated March 16, 2023, but that he did not realize that he received it until he went back through his mail after receiving the subpoena to provide a sworn statement. Respondent stated that he could not recall, but that after looking back through his mail, he thought he also received the April 18, 2023, letter. [ODC Ex. 161, Bates 2868].

84. Respondent stated that he met with Ms. Allison several times and spent several hours investigating her case and researching the issues. Respondent stated that he encountered issues finding the opposing party in order to effectuate service, so there was “no point” in filing the petition. Respondent said that he discussed these issues with Ms. Allison on multiple occasions. [ODC Ex. 161, Bates 2869]. Respondent stated that after going “back and forth” with Ms. Allison he agreed to send her a refund check, even though he performed work in her case and earned the retainer, because he did not want a bad client review. Respondent stated that he thought he previously sent Ms. Allison a check in the amount of \$2,200.00, but he found no record of it being cashed, so he planned to send Ms. Allison another check. [ODC Ex. 161, Bates 2869-70].

85. Respondent stated that a written fee agreement was executed at the onset of his representation of Ms. Allison which set forth that his rate of fee was \$200.00 per hour. Respondent said that it was his assumption that investigation, research, and filing would cost approximately

\$2,200.00, and that he typically does not charge people more than the initial retainer. [ODC Ex. 161, Bates 2871].

86. Respondent stated that he maintains a client trust account and office operating account at City National Bank. [ODC Ex. 161, Bates 2846-47]. When asked if the \$2,200.00 check from Ms. Allison was deposited into his client trust account, Respondent stated that it was and that when he felt that he had done roughly ten hours of work, he transferred the funds to his general account. [ODC Ex. 161, Bates 2871].

87. By letter dated August 31, 2023, the ODC requested, in part, that Respondent provide the following information within 20 days: (1) a copy of Ms. Allison's client file; (2) copies of emails and other correspondence sent to and received from Ms. Allison regarding her request for a refund; (3) a copy of the written fee agreement; and (4) time records for his work performed in this matter. [ODC Ex. 84].

88. On October 26, 2023, the ODC received Ms. Allison's client file from Respondent which contained: (1) an undated letter from Respondent to Ms. Allison wherein Respondent stated that he is enclosing a refund check and that he believed that a check had been mailed to her previously; (2) a time sheet reflecting that he billed 8.7 hours for work performed in Ms. Allison's case; (3) an unsigned fee agreement; (4) a draft petition for visitation; and (5) emails between Respondent and Ms. Allison. [ODC Ex. 86].³

89. The unsigned fee agreement provided by Respondent set forth that Ms. Allison hired Respondent to "institute and pursue a matter in family court regarding visitation," and that Ms.

³ Respondent noted on the time sheet that he did not charge Ms. Allison for a one-hour initial consultation. According to the time sheet, Respondent earned \$1,740.00 of the \$2,200.00 paid by Ms. Allison. [ODC Ex. 86, Bates 1054-56].

Allison would pay a \$2,200.00 retainer which would be billed by Respondent at a rate of \$250.00 per hour. [ODC Ex. 86, Bates 1052-53].

90. On December 20, 2023, Ms. Allison advised the ODC, by phone, that she had not received a refund check from Respondent. By letter dated December 20, 2023, the ODC advised Respondent that Ms. Allison said that she did not receive the refund check and directed Respondent to look into this matter and provide a written response within 20 days. [ODC Ex. 89].

91. Respondent failed to respond to this letter.

92. On or about January 16, 2024, the ODC received records pursuant to an investigative subpoena *duces tecum* issued by the Supreme Court of Appeals of West Virginia to City National Bank at the request of the ODC for records from any and all business, operating, trust, or IOLTA accounts maintained by Respondent and/or Freeman Law Offices from July 1, 2021, through present day. [ODC Ex. 90, Bates 1097; ODC Ex. 96-99].

93. A review of Respondent's client trust account, account number 9011378875, which is labeled "IOLTA Account," revealed that, contrary to the testimony he provided at his sworn statement, Respondent did not deposit Ms. Allison's retainer into his client trust account. [ODC Ex. 96, Bates 1174-75, 1183-94].

94. According to bank records, the last statement date for this account was on or about December 31, 2021, and it was subsequently closed. [ODC Ex. 98].

95. A review of Respondent's operating account, account number 9011378867, which is labeled "Freeman Law Offices," revealed that Respondent deposited Ms. Allison's retainer into his operating account, an account which contained Respondent's personal funds and was used by Respondent for personal use. [ODC Ex. 96, Bates 1168, 1241].

96. Prior to depositing Ms. Allison's \$2,200.00 check, the balance of Respondent's

operating account on August 23, 2021, was -\$632.65. The deposit of Ms. Allison's \$2,200.00 check brought the balance of this account to \$1,567.35. That same day, Respondent received a wire transfer credit from Creed Capital, LLC, in the amount of \$493.73 for payment of a PDS billing invoice which brought the balance of this account to \$2,061.08. [ODC Ex. 96, Bates 1157, 1241].⁴

97. The following transactions occurred in Respondent's operating account on August 23, 2021: (1) Respondent was assessed a \$15.00 wire transfer fee; (2) Respondent withdrew \$200.00 cash; (3) Respondent had four charges from PayPal for payments which totaled \$192.24; and (4) Respondent wrote a \$1,350.00 check to City National Bank. [ODC Ex. 96, Bates 1157, 1241].

98. Respondent testified that he would not dispute that he received the March 16, 2023, and April 18, 2023, letters from the ODC directing him to file a response to Ms. Allison's complaint. [Hrg. Tr. 95-96]. Regarding the December 20, 2023, letter from the ODC requesting additional information, Respondent testified that he did not dispute that this letter was sent to him, although he did not remember receiving it. [Hrg. Tr. 146-47].

99. Respondent agreed that the \$2,200.00 paid by Ms. Allison was a legal fee paid in advance to be billed against at a rate of \$200.00 per hour. [Hrg. Tr. 103, 105]. Respondent testified that he had done work on Ms. Allison's case prior to depositing her check, including legal research, and that he subsequently did work on her case. [Hrg. Tr. 105].

100. Respondent testified: "I tell people – I don't quite call it a flat fee, but I tell people, 'I'm not gonna charge you more than this amount of money.' And I'm – and I really never have. ...if I tell you something's gonna cost \$1,500, it's not gonna cost more than that." [Hrg. Tr. 102-03].

⁴ This account was frequently overdrawn. In 2021, Respondent was assessed \$6,156.00 in return items fees and \$1,404.00 in overdraft item fees. [ODC Ex. 96, Bates 1290]. In 2022, Respondent was assessed \$3,924.00 in return item fees and \$792.00 in overdraft item fees. [ODC Ex. 96, Bates 1426]. In 2023, Respondent was assessed \$2,736.00 in return item fees and \$9,648.00 in overdraft item fees. [ODC Ex. 96, Bates 1595].

When asked what his process is if he does not earn the initial retainer, Respondent testified that he has “never had that happen.” [Hrg. Tr. 103]. Respondent explained that he does not charge clients a “huge retainer” because he does not like keeping track of money and most people cannot afford to pay it. [Hrg. Tr. 103-04].

101. Respondent testified that the fee agreement in this matter was never signed by Ms. Allison. Respondent acknowledged that the intent expressed in the unsigned fee agreement which he submitted in this matter was that he would bill against the \$2,200.00 paid by Ms. Allison at an hourly rate. [Hrg. Tr. 121; ODC Ex. 86, Bates 1052-53]. Respondent testified: “Like I said, I don’t call these flat fees, but I’m not gonna say, ‘You have a base retainer with me and if we have to go to court five times, I’m charging you more.’ I felt like what it would take to draft a petition and go to family court a couple of times would be about 10 hours of work-ish so about \$2,200.00.” [Hrg. Tr. 121].

102. Respondent testified that he “almost never” used his IOLTA account. [Hrg. Tr. 111]. Respondent testified that he did not know his IOLTA account was closed until he received the Statement of Charges, as he does not typically hold client money, and that this account was closed due to having a negative balance after being assessed direct deposit fees. [Hrg. Tr. 106-08].

103. When asked where he deposited Ms. Allison’s August 19, 2021, check, Respondent acknowledged that although he did not remember at the time, he deposited it into his business account instead of his IOLTA account like he should have. [Hrg. Tr. 114, 120]. Respondent continued: “... [Ms. Allison’s check] got deposited into the operating account when it should’ve gotten deposited into the IOLTA account or I should’ve held it until I had done the full \$2,200 worth of work. And it did not get done correctly in this case.” [Hrg. Tr. 120].

104. Respondent acknowledged that his testimony at his sworn statement that he deposited

Ms. Allison's \$2,200.00 check into his IOLTA account was not accurate. Respondent testified that he thought he deposited these funds into his IOLTA account but that he may have been "thinking about something else." [Hrg. Tr. 116]. Regarding Respondent's testimony at his sworn statement that when he felt that he had done roughly ten hours of work, he transferred the funds from his IOLTA account to his general account, Respondent acknowledged that he was wrong. [Hrg. Tr. 117]. Respondent explained that it had been a couple of years since he worked on Ms. Allison's case, and he had not reviewed bank records at that time. [Hrg. Tr. 117, 120].

105. Respondent confirmed that the above-referenced wire transfer from Creed Capital, LLC, was money he earned from PDS. [Hrg. Tr. 125]. Respondent confirmed that the above-referenced PayPal charges were for personal spending. [Hrg. Tr. 127]. Respondent testified that the above-referenced \$1,350.00 check to City National Bank was a payment toward a personal loan. [Hrg. Tr. 128].

106. According to the time sheet provided by Respondent for Ms. Allison's case, the only work Respondent performed in Ms. Allison's case prior to depositing her \$2,200.00 check into his operating account was a one-hour meeting on August 19, 2021, and a review of her case on August 20, 2021, for eight tenths of an hour. [ODC Ex. 86, Bates 1054].

107. Respondent testified that after he was hired by Ms. Allison, he performed legal research regarding sibling visitation and drafted a petition on her behalf. [Hrg. Tr. 132-33]. Respondent testified that Ms. Allison provided him with an address to serve the opposing party, and that although he did not recall the exact issue with this address, it was enough of an issue that he held off on filing the petition in her case. Respondent testified that he discussed these issues with Ms. Allison. [Hrg. Tr. 135-36]. Respondent confirmed that he sent Ms. Allison a replacement refund check after learning that she did not receive the first one, but that it never got cashed. [Hrg. Tr. 144].

108. On March 22, 2022, Respondent advised Ms. Allison by email that he was going to have to refile her petition because it was never served, and that he would contact the sheriff to straighten out any problems. [ODC Ex. 94, Bates 1142]. Respondent testified that this email was a mistake, and he was unsure why he would have provided this incorrect information to Ms. Allison, stating that he may have been responding to another person. [Hrg. Tr. 137-39].

109. On August 17, 2022, Respondent advised Ms. Allison by email that he would re-evaluate whether he could get the opposing party served and would contact her very soon. [ODC Ex. 94, Bates 1132].

110. Ms. Allison testified that Respondent informed her at the August 17, 2021, meeting that he would file the petition for sibling visitation that day. [Hrg. Tr. 201-02]. Ms. Allison testified that in November of that year she asked Respondent to withdraw the petition as she believed that she may have resolved the matter with the opposing party. [Hrg. Tr. 202-03]. Ultimately, the matter remained unresolved and shortly after Thanksgiving of that year Ms. Allison requested that Respondent file the petition. [Hrg. Tr. 203]. Ms. Allison testified that Respondent advised her that he would file the petition again, but that he needed the opposing party's address. [Hrg. Tr. 203]. Ms. Allison testified that she provided Respondent with the opposing party's address over the phone, and after that she did not hear anything from Respondent. [Hrg. Tr. 204]. Ms. Allison acknowledged that Respondent provided her with an update on her case by email on August 17, 2022, and that she reached out to him by email to request another update on October 18, 2022, and November 26, 2022. [Hrg. Tr. 209; ODC Ex. 94, Bates 1137]. After receiving no response, Ms. Allison sent an email to Respondent on December 12, 2022, requesting that he refund her money, to which Respondent promptly responded and agreed to refund the bulk of her retainer. [Hrg. Tr. 209-10; ODC Ex. 88, Bates 1088]. Ms. Allison testified that Respondent "did not help [her] and it became an issue," and

that her opinion of lawyers is not good after her experience with Respondent. [Hrg. Tr. 213].

111. On cross examination, Ms. Allison clarified that Respondent told her he was filing her petition twice, the first time was after she hired him when he told her he would file her petition that day, and the second time was when he advised her by email that he was going to refile her petition. [Hrg. Tr. 214-15].

112. Respondent presented Ms. Allison with a refund check in the amount of \$2,200.00. [Hrg. Tr. 216] at the final hearing in this matter. Respondent testified that although he did a lot of work in Ms. Allison's case, he wanted to make sure that she got her money back, so she did not think that he or any other lawyer was out to cheat her. [Hrg. Tr. 218]. Respondent apologized for the disagreements and misunderstandings that he had with Ms. Allison regarding the filing and service of her petition. [Hrg. Tr. 216].

113. Because Respondent failed to keep Ms. Allison reasonably informed about the status of her case, he violated Rule 1.4(a)(3) of the Rules of Professional Conduct, as set forth above.

114. Because Respondent failed to keep the funds provided to him in advance by Ms. Allison in a separate account designated as "client's trust account," and instead deposited client funds into his operating account before those fees were earned or the expenses were incurred, he violated Rules 1.15(a) and 1.15(c) of the Rules of Professional Conduct, as set forth below:

Rule 1.15. Safekeeping Property.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account designated as a "client's trust account..."

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

115. Because Respondent accepted a fee for legal services and wrongfully commingled,

misappropriated, and converted funds belonging to his client to his own use, Respondent violated Rule 8.4(c) and 8.4(d) of the Rules of Professional Conduct, as set forth below:

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

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

116. Because Respondent stated at his sworn statement that he deposited the \$2,200.00 check from Ms. Allison into his client trust account and that he transferred the funds into his general account once earned, when the bank records show that this check was deposited into his operating account, he violated Rules 8.4(c) and 8.4(d), as set forth above, and Rule 8.1(a) of the Rules of Professional Conduct, as set forth below:

Rule 8.1. Bar Admission and Disciplinary Matters.

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact;

117. Because Respondent failed to comply with the ODC's lawful request for information by failing to provide a verified response, he violated Rule 8.1(b) of the Rules of Professional Conduct, as set forth above.

COUNT IV

I.D. No. 23-06-199

Complaint of Office of Lawyer Disciplinary Counsel

118. This complaint was opened by the ODC on May 15, 2023, after receiving a referral from Emily Stern, Term Law Clerk, for the Supreme Court of Appeals of West Virginia. The referral included a copy of a Rule to Show Cause Order regarding Respondent's failure to timely perfect an appeal on behalf of his client in an abuse and neglect appeal: *In re* A.B. and J.S., No. 23-

140. [ODC Ex. 99].

119. Respondent was court appointed to represent A.S. in abuse and neglect proceedings in the Circuit Court of Kanawha County, Case Nos. 21-JA-625 and 21-JA-626. [ODC Ex. 99].

120. On March 10, 2023, Respondent, on behalf of his client, A.S., filed a notice of appeal from a February 28, 2023, order of the Circuit Court of Kanawha County. Respondent requested that transcripts be produced for purposes of appeal, but he did not submit an appellate transcript request form. [ODC Ex. 118, Bates 2207-29].

121. By scheduling order entered on March 10, 2023, the Court directed Respondent to submit a signed and complete appellate transcript request form on or before March 24, 2023, and set the deadline to perfect the appeal as May 1, 2023. Respondent did not submit an appellate transcript request form, nor did he perfect the appeal by May 1, 2023. [ODC Ex. 118, Bates 2230-31].

122. On May 2, 2023, the guardian *ad litem*, Sharon K. Childers, filed a motion to dismiss the appeal. Respondent did not file a response to the motion. [ODC Ex. 118, Bates 2234-37].

123. On May 12, 2023, the Court issued a Rule to Show Cause directing Respondent to appear before the Court on September 6, 2023, to show cause as to why he should not be held in contempt for his failure to perfect the appeal, unless sooner mooted by perfecting the appeal with the filing of a petitioner's brief and appendix. [ODC Ex. 118, Bates 2238-39].

124. By letter dated May 17, 2023, the ODC provided Respondent with a copy of the Rule to Show Cause Order and directed him to provide a verified response thereto within 20 days. This letter was sent to Post Office Box 234, Hurricane, West Virginia. [ODC Ex. 100].

125. Respondent failed to file a response.

126. By letter dated June 16, 2023, the ODC sent Respondent a second letter to the same

address, by first class and certified mail, directing him to provide a verified response to this matter by June 26, 2023. [ODC Ex. 103].

127. Respondent failed to file a response.

128. The letter sent by certified mail was not delivered to Respondent according to USPS Tracking. [ODC Ex. 104]. The letters sent by first class mail were not returned to the ODC.

129. Respondent was personally served with an investigative subpoena *duces tecum* on August 2, 2023, which directed him to appear at the ODC on August 30, 2023, to testify in the taking of a sworn statement, and to produce and permit inspection of and copying of any and all documents within his control regarding this matter. [ODC Ex. 108].

130. At his sworn statement, Respondent stated that he thought he perfected this appeal on or about April 21, 2023, and that he did not realize this appeal had not been perfected until he checked File & ServeXpress after being served with the subpoena to provide a sworn statement regarding this matter. [ODC Ex. 161, Bates 2876-77]. Respondent stated that he was unsure why the Court said that he needed to produce a transcript request form, because he obtained the transcripts from the underlying proceedings from the court reporter. [ODC Ex. 161, Bates 2876]. Respondent stated that he did not recall receiving the Court's May 12, 2023, Rule to Show Cause Order, stating that he did not see this Order until it was shown to him on August 30, 2023, by Lawyer Disciplinary Counsel at his sworn statement. [ODC Ex. 161, Bates 2878].

131. Respondent filed a petitioner's brief and appendix on or about September 5, 2023. The Rule to Show Cause was dismissed as moot thereafter. [ODC Ex. 118, Bates 2259].

132. By letter dated August 31, 2023, the ODC requested that Respondent provide additional information within 20 days, including time records for his work performed in this matter. [ODC Ex. 110, Bates 1837-38].

133. On October 26, 2023, the ODC received the requested information from Respondent. The Itemized Statement of Legal Services provided by Respondent, which was submitted to PDS, stated that Respondent completed the brief and appendix for this matter on April 21, 2023. [ODC Ex. 112].

134. Emily Stern, Esquire, testified that she is employed as a Staff Attorney at the Office of the Clerk of the Supreme Court of Appeals of West Virginia. [Hrg. Tr. 25]. Ms. Stern testified that her duties include referring matters to the ODC at the direction of the Court. [Hrg. Tr. 26-27]. Ms. Stern testified that in cases that were filed after the implementation of the Court's e-filing system notices and orders from the Court are sent to parties through File & ServeXpress. [Hrg Tr. 27].

135. Regarding *In re* A.B. and J.S., Ms. Stern testified as to Respondent's failure to comply with the deadline set forth in the scheduling order. [Hrg. Tr. 35]. Ms. Stern testified that Respondent did not file a response to the motion to dismiss filed by the guardian *ad litem*. [Hrg. Tr. 35]. Ms. Stern further testified that Respondent did not file any motions requesting the Court to extend the deadlines set forth in its scheduling order prior to when he perfected the appeal on September 5, 2023. [Hrg. Tr. 37].

136. Ms. Stern testified that dismissal is a potential outcome when a party fails to properly perfect an appeal. Ms. Stern further testified that Respondent's failure to adhere to the scheduling deadlines in these cases necessitated extra work in that additional orders had to be prepared, and these matters had to be presented to the Court. Ms. Stern also testified that delay in abuse and neglect cases can delay permanency for the children involved. [Hrg. Tr. 48-49].

137. Respondent acknowledged that he did not disagree with Ms. Stern's testimony and testified that he did not dispute that he received the orders she discussed in her testimony. [Hrg. Tr.

148, 158-59]. Respondent testified that he was counsel in the underlying abuse and neglect proceedings in all of the cases discussed herein, with the exception of *In re* A.B. [Hrg. Tr. 154]. Respondent testified that in all of these cases his clients directed him to file an appeal of the final order of the circuit court terminating their parental rights. [Hrg. Tr. 154]. Respondent testified regarding the difficulties he encountered in handling the abuse and neglect appeals discussed herein, including difficulties communicating with his clients and obtaining necessary reports and orders. [Hrg. Tr. 153-54]. Respondent testified that he did not advise the Court of these difficulties because he was busy with other cases and got behind. [Hrg. Tr. 155-57].

138. Respondent testified that he was not going to dispute that the ODC sent him “all of these letters” and acknowledged that he should have responded. Respondent testified that he would not “dispute that for all these cases.” [Hrg. Tr. 162]. Respondent testified that “things were hitting [him] left, right, and center and [he] was trying to triage things,” and responding to these letters might have been “put to the bottom of the list.” Respondent acknowledged that this should not have happened. [Hrg. Tr. 160-61].

139. Because Respondent failed to act with reasonable diligence and promptness in timely perfecting an appeal on behalf of his client, he violated Rule 1.3 of the Rules of Professional Conduct, as set forth above.

140. Because Respondent failed to make reasonable efforts to expedite the appeal consistent with his client’s interests, he violated Rule 3.2 of the Rules of Professional Conduct, as set forth above.

141. Because Respondent failed to comply with his obligations pursuant to orders, notices, and rules issued by the Supreme Court of Appeals of West Virginia, he violated Rule 3.4(c) of the Rules of Professional Conduct, as set forth above.

142. Because Respondent failed to properly expedite his client's appeal and failed to comply with the orders of the Supreme Court of Appeals of West Virginia to perfect the same, he violated Rule 8.4(d) of the Rules of Professional Conduct, as set forth above.

143. Because Respondent failed to comply with the ODC's lawful request for information by failing to provide a verified response, he violated Rule 8.1(b) of the Rules of Professional Conduct, as set forth above.

COUNT V
I.D. No. 23-06-308
Complaint of Garland L. Murray

144. On or about April 26, 2023, The Honorable Louis H. Bloom, Kanawha County Circuit Court Judge, appointed Respondent to represent Complainant Garland L. Murray (hereinafter "Mr. Murray") in post-conviction *habeas corpus* proceedings and file an amended petition for *habeas corpus* relief on Mr. Murray's behalf. [ODC Ex. 140, Bates 2607].

145. Pursuant to the Scheduling Order and Order Appointing Counsel entered by the Court on April 26, 2023, Respondent was ordered to consult with Mr. Murray to determine appropriate grounds for potential *habeas corpus* relief. Further, the Court ordered that the amended petition for writ of *habeas corpus*, if applicable, be filed on or before August 4, 2023. The Court directed the Circuit Clerk to send a copy of this order to all parties, including Respondent and Mr. Murray. [ODC Ex. 140, Bates 2607].

146. On or about July 21, 2023, Mr. Murray filed an ethics complaint against Respondent with the ODC. Mr. Murray alleged that, despite multiple attempts to contact Respondent, Respondent has not communicated with him. [ODC Ex. 119].

147. By letter dated July 24, 2023, the ODC sent Respondent a copy of the complaint and directed him to file a verified response within 20 days. This letter was sent to Post Office Box 234,

Hurricane, West Virginia. [ODC Ex. 120].

148. Respondent failed to file a response.

149. By letter dated August 25, 2023, the ODC sent Respondent a second letter to the same address, by first class and certified mail, directing him to file a verified response to the complaint by September 8, 2023. [ODC Ex. 121].

150. The letter sent by certified mail was returned to the ODC marked “Return to Sender Unclaimed Unable to Forward” on September 25, 2023. The letters sent by first class mail were not returned. [ODC Ex. 128].

151. By letter received by the ODC on September 13, 2023, Respondent provided a response to the complaint which did not include the requisite verification. [ODC Ex. 124].

152. In his response, Respondent stated that he has spoken to Mr. Murray several times by phone, and that Mr. Murray’s wife has relayed several messages to him, to which Respondent has responded. Respondent further stated that he has had several discussions with Mr. Murry regarding the substance of his amended petition and other matters, that he has filed motions to extend the filing deadline, and that he planned to meet with Mr. Murray that week. [ODC Ex. 124].

153. By letter received by the ODC on September 13, 2023, Mr. Murray stated that Respondent has postponed his case twice, failed to file motions on his behalf, and failed to answer phone calls, emails, and messages. [ODC Ex. 126].

154. By letter dated September 19, 2023, the ODC provided Respondent with a copy of Mr. Murray’s letter and directed him to provide a response thereto within 20 days. [ODC Ex. 127].

155. By letter received by the ODC on October 16, 2023, Respondent provided a verified amended response to the complaint wherein he stated that he has met with Mr. Murray at MOCC three times, and that he continues to consult with Mr. Murray regarding substantive issues.

Respondent stated that he and Mr. Murray “continue to disagree” regarding which matters are not relevant to his amended petition which has caused additional delays in filing said petition. [ODC Ex. 129].

156. On or about October 25, 2023, the ODC received a call detail report from John M. Frisby, Investigator for the WVDOCR, which showed that between June 7, 2022, and October 24, 2023, Mr. Murray called Respondent three times. The calls were not accepted by Respondent. [ODC Ex. 132].

157. The following documents were filed in the underlying matter, Case No. 23-P-59, following the entry of the April 26, 2023, Scheduling Order and Order Appointing Counsel:

- a. On May 10, 2023, Mr. Murray filed a *pro se* motion to hold a recording of a witness in the underlying matter. [ODC Ex. 140, Bates 2609].
- b. On May 31, 2023, a copy of an envelope which was mailed to Respondent at an incorrect address marked “Return to Sender, Not Deliverable as Addressed, Unable to Forward” was filed. It was noted that this envelope contained a copy of the April 26, 2023, Scheduling Order and Order Appointing Counsel, and that a copy of the same was emailed to Respondent on May 31, 2023. [ODC Ex. 140, Bates 2610]
- c. On July 27, 2023, the Court lodged a letter from Mr. Murray which addressed, in part, concerns regarding Respondent’s lack of communication. [ODC Ex. 140, Bates 2611].
- d. On August 14, 2023, Respondent filed a Motion for Extension to File Petitioner’s Amended *Habeas Corpus* Petition wherein he set forth that the issues were such that additional time was required to investigate, research, and draft said petition. [ODC Ex. 140, Bates 2614-16].
- e. On August 18, 2023, the Court entered an Order Granting Motion for Time Extension to File Amended *Habeas Corpus* Petition and ordered that the amended petition be filed on or before September 11, 2023, and that the parties appear at a final omnibus evidentiary hearing before the Court on December 8, 2023, at 10:30 a.m. [ODC Ex. 140, Bates 2617].
- f. On September 12, 2023, Respondent filed a second Motion for Extension to File Petitioner’s Amended *Habeas Corpus* Petition wherein he set forth that

he was working to obtain necessary documents and would not be able to coordinate a meeting with Mr. Murray until the week of September 11, 2023. [ODC Ex. 140, Bates 2618-20].

- g. On September 19, 2023, the Court entered an Order Granting Motion for Time Extension to File Amended *Habeas Corpus* Petition and Rescheduling Hearing and ordered that the amended petition be filed on or before October 1, 2023, and that the parties appear at a final omnibus evidentiary hearing before the Court on December 20, 2023, at 10:30 a.m. [ODC Ex. 140, Bates 2624].
- h. On September 25, 2023, Respondent filed Motions Regarding Investigations into Underlying Claims Related to Petition for *Habeas Corpus* Relief. [ODC Ex. 140, Bates 2625-27].
- i. On September 27, 2023, the Court entered an Order Denying Petitioner's Motions. [ODC Ex. 140, Bates 2628-29].
- j. On November 29, 2023, the Court lodged three letters from Mr. Murray. In a letter dated November 5, 2023, Mr. Murray advised the Court of a lack of communication from Respondent and stated that he had not heard from Respondent and was unsure if Respondent filed his *habeas corpus* petition without consulting him. In a letter dated November 21, 2023, Mr. Murray advised the Court that Respondent came to MOCC with "a start" of a brief and then never came back. Mr. Murray was unsure about the scheduling order and requested that Respondent be removed from his case. In a letter dated November 22, 2023, Mr. Murray advised that he did not want to proceed with Respondent as his attorney and would represent himself in this matter. Respondent was advised by Judge Abraham's administrative assistant, Melissa Ketter, that these letters and Mr. Murray's concerns would be addressed at the hearing scheduled for December 20, 2023. [ODC Ex. 140, Bates 2636-42].
- k. On November 30, 2023, the Court lodged another letter from Mr. Murray, dated November 27, 2023, wherein Mr. Murray requested that the Court remove Respondent from his case. [ODC Ex. 140, Bates 2643-45].
- l. On December 4, 2023, the Court entered an Order for Mr. Murray to be transported from MOCC to the Circuit Court of Kanawha County for the December 20, 2023, hearing. [ODC Ex. 140, Bates 2646].
- m. On December 5, 2023, the Court lodged another letter from Mr. Murray, dated November 27, 2023, wherein Mr. Murray requested that the Court remove Respondent from his case and appoint another attorney. [ODC Ex. 140, Bates 2647-49].

- n. On December 21, 2023, the Court entered an Order which set forth that this matter was before the Court for an omnibus evidentiary hearing on December 20, 2023. The Order stated that Respondent failed to appear at this hearing. The Order noted that Respondent failed to abide by the Court's Scheduling Order as well as the deadlines set forth in the Order Granting Petitioner's Motion for Time Extension to File Amended Petition. The Court noted that Mr. Murray sent several letters to the Court requesting that a new attorney be appointed to represent him. The Court removed Respondent and appointed a new attorney to represent Mr. Murray. [ODC Ex. 140, Bates 2650-51].

[ODC Ex. 140, Bates 2501].

158. On or about January 23, 2024, the ODC received updated information from Mr. Frisby that, according to WVDOCR records, as of January 22, 2024, Mr. Murray had not made any further attempts to contact Respondent by phone. [ODC Ex. 134, Bates 2452].

159. On or about January 24, 2024, the ODC received Respondent's Itemized Statement of Legal Services from PDS which stated that Respondent performed 45.8 hours of work in Mr. Murray's case, which included several entries regarding communication with Mr. Murray, including four meetings with Mr. Murray at MOCC, on September 16, 2023, September 30, 2023, October 6, 2023, and October 21, 2023, and a video conference with Mr. Murray on October 17, 2023. Respondent set forth that he finished drafting the amended petition and appendix on October 22, 2023. [ODC Ex. 135].

160. Respondent testified that Mr. Murray's case was one of the more difficult cases on paper and dealing with Mr. Murray presented difficulty in that "he has his own ideas about what he wants to file in his case, which don't match the law." [Hrg. Tr. 168]. Respondent continued: "Frankly, I have a petition and his exhibits ready to file. I would assume after two complaints to the ODC that somebody's removing me from the case. So that's where we stand." [Hrg. Tr. 169]. Respondent testified that Mr. Murray's case is a "habeas of a habeas," which means that he can only argue ineffective assistance of counsel, and despite advising him of the same, Mr. Murray insisted

on arguing additional issues. [Hrg. Tr. 171-72]. Respondent testified that he and Mr. Murray did not see eye-to-eye, and that he communicated with Judge Abraham regarding the difficulties he experienced in this case. [Hrg. Tr. 170, 172].

161. Respondent testified that despite completing Mr. Murray's petition, he delayed in filing it because he knew if he filed what Mr. Murray wanted him to file it would be unsuccessful. [Hrg. Tr. 178, 180]. Respondent testified that he hoped that he could massage the situation with Mr. Murray to help him get the best outcome possible. [Hrg. Tr. 182].

162. Respondent confirmed that he received the September 19, 2023, Order which set his deadline to file the amended petition in this case as October 1, 2023, and ordered the parties to appear for a final evidentiary hearing before the Court on December 20, 2023. [Hrg. Tr. 177]. Respondent acknowledged that he did not comply with the filing deadline set forth in this order, and that he did not file any motions to extend the deadline. [Hrg. Tr. 178]. Respondent did not recall receiving the above-referenced emails from Judge Abraham's assistant. [Hrg. Tr. 184-85]. Respondent did not recall seeing the December 4, 2023, Order for Mr. Murray to be transported from MOCC to the Circuit Court of Kanawha County for the December 20, 2023, hearing. [Hrg. Tr. 186].

163. Respondent testified that he did not know that a hearing was held in this matter on December 20, 2023. [Hrg. Tr. 186]. Although Respondent acknowledged receiving the September 19, 2023, Order scheduling this hearing, Respondent testified that he was not sure why this hearing was not on his calendar. [Hrg. Tr. 189-91]. Respondent did not recall seeing the December 21, 2023, Order removing him as counsel in this case. [Hrg. Tr. 190]. Respondent testified that he learned that he was removed from Mr. Murray's case at the disciplinary hearing held in this matter. [Hrg. Tr. 191-92].

164. Because Respondent failed to act with reasonable diligence and promptness in his representation of Mr. Murray in the underlying matter, he violated Rule 1.3 of the Rules of Professional Conduct, as set forth above.

165. Because Respondent failed to meet his obligations pursuant to orders issued by the Circuit Court of Kanawha County, Respondent violated Rules 3.4(c) and 8.4(d) of the Rules of Professional Conduct, as set forth above.

COUNT VI
I.D. No. 23-06-431
Complaint of Office of Lawyer Disciplinary Counsel

166. This complaint was opened by the ODC on October 24, 2023, after receiving a referral from Emily Stern, Staff Attorney for the Supreme Court of Appeals of West Virginia. The referral included a copy of a Rule to Show Cause Order regarding Respondent's failure to timely perfect an appeal on behalf of his client in an abuse and neglect appeal: *In re* L.T., L.T., and J.T., No. 23-516. [ODC Ex. 141].

167. Respondent was court appointed to represent M.T. in abuse and neglect proceedings in Circuit Court of Kanawha County, Case Nos. 22-JA-288, 22-JA-289, and 22-JA-290.

168. On August 22, 2023, Respondent, on behalf of his client, M.T., filed a notice of appeal from a July 31, 2023, order of the Circuit Court of Kanawha County. [ODC Ex. 150, Bates 2683-95].

169. By scheduling order entered on August 31, 2023, the Court directed Respondent to submit a Certificate of Service certifying that copies of the notice of appeal and attachments were served on all parties to the case and to the clerk of the circuit court, on or before September 7, 2023, and set the deadline to perfect the appeal as October 2, 2023. Respondent did not submit a Certificate of Service on or before September 7, 2023. [ODC Ex. 150, Bates 2717-19].

170. On September 12, 2023, a Notice of Intent to Sanction was entered ordering Respondent to submit a Certificate of Service on or before September 22, 2023, or he would be subject to sanctions. Respondent failed to submit a Certificate of Service on or before September 22, 2023. [ODC Ex. 150, Bates 2722-23].

171. Respondent failed to perfect the appeal on or before October 2, 2023.

172. On October 20, 2023, the Court issued a Rule to Show Cause directing Respondent to appear before the Court on January 9, 2024, to show cause as to why he should not be held in contempt for his failure to file a Certificate of Service and perfect the appeal, unless sooner mooted by filing the Certificate of Service as directed by the Court and perfecting the appeal with the filing of a petitioner's brief and appendix. [ODC Ex. 2724-25].

173. By letter dated November 14, 2023, the ODC provided Respondent with a copy of the Rule to Show Cause Order and directed him to provide a verified response thereto within 20 days. This letter was sent to Post Office Box 234, Hurricane, West Virginia. [ODC Ex. 142].

174. Respondent failed to file a response.

175. By letter dated December 7, 2023, the ODC sent Respondent a second letter to the same address, by first class and certified mail, and directed him to provide a verified response to this matter by December 24, 2023. [ODC Ex. 143].

176. Respondent failed to file a response.

177. The letter sent by certified mail was returned to the ODC marked "Return to Sender Unable to Forward" on January 6, 2024. The letters sent by first class mail were not returned. [ODC Ex. 144].

178. Respondent did not file a response in this matter.

179. Respondent filed the brief and appendix on or about November 13, 2023, and the

Rule to Show Cause was dismissed as moot on or about November 15, 2023. [ODC Ex. 150, Bates 2735].

180. Emily Stern, Esquire, testified that she is employed as a Staff Attorney at the Office of the Clerk of the Supreme Court of Appeals of West Virginia. [Hrg. Tr. 25]. Ms. Stern testified that her duties include referring matters to the ODC at the direction of the Court. [Hrg. Tr. 26-27]. Ms. Stern testified that in cases that were filed after the implementation of the Court's e-filing system notices and orders from the Court are sent to parties through File & ServeXpress. [Hrg. Tr. 27].

181. Ms. Stern testified as to Respondent's failure to comply with the deadlines set forth in the scheduling order and notice of intent to sanction. [Hrg. Tr. 39-40]. Ms. Stern further testified that to her knowledge Respondent did not file any motions requesting the Court to extend the deadlines set forth in its orders prior to when he perfected the appeal on November 13, 2023. [Hrg. Tr. 42].

182. Ms. Stern testified that dismissal is a potential outcome when a party fails to properly perfect an appeal. Ms. Stern further testified that Respondent's failure to adhere to the scheduling deadlines in these cases necessitated extra work in that additional orders had to be prepared, and these matters had to be presented to the Court. Ms. Stern also testified that delay in abuse and neglect cases can delay permanency for the children involved. [Hrg. Tr. 48-49].

183. Respondent acknowledged that he did not disagree with Ms. Stern's testimony and testified that he did not dispute that he received the orders she discussed in her testimony. [Hrg. Tr. 148, 158-59]. Respondent testified that he was counsel in the underlying abuse and neglect proceedings in all of the cases discussed herein, with the exception of *In re* A.B. [Hrg. Tr. 154]. Respondent testified that in all these cases his clients directed him to file an appeal of the final order

of the circuit court terminating their parental rights. [Hrg. Tr. 154]. Respondent testified regarding the difficulties he encountered in handling the abuse and neglect appeals discussed herein, including difficulties communicating with his clients and obtaining necessary reports and orders. [Hrg. Tr. 153-54]. Respondent testified that he did not advise the Court of these difficulties because he was busy with other cases and got behind. [Hrg. Tr. 155-57].

184. Regarding *In re* L.T., L.T., and J.T., Respondent testified that his client asked him to withdraw the appeal, and shortly before the disciplinary hearing in this matter Respondent received an order from the Court withdrawing and dismissing this appeal. [Hrg. Tr. 163-64].

185. Respondent testified that he was not going to dispute that the ODC sent him “all of these letters” and acknowledged that he should have responded. Respondent testified that he would not “dispute that for all these cases.” [Hrg. Tr. 162].

186. Because Respondent failed to act with reasonable diligence and promptness in timely perfecting an appeal on behalf of his client, he violated Rule 1.3 of the Rules of Professional Conduct, as set forth above.

187. Because Respondent failed to make reasonable efforts to expedite the appeal consistent with his client’s interests, he violated Rule 3.2 of the Rules of Professional Conduct, as set forth above.

188. Because Respondent failed to meet his obligations pursuant to orders, notices, and rules issued by the Supreme Court of Appeals of West Virginia, he violated Rule 3.4(c) of the Rules of Professional Conduct, as set forth above.

189. Because Respondent failed to properly expedite his client’s appeal and failed to comply with the orders of the Supreme Court of Appeals of West Virginia to perfect the same, he violated Rule 8.4(d) of the Rules of Professional Conduct, as set forth above.

190. Because Respondent failed to comply with the ODC's lawful request for information by failing to provide a verified response, he violated Rule 8.1(b) of the Rules of Professional Conduct, as set forth above.

COUNT VII
I.D. No. 24-06-034
Complaint of Office of Lawyer Disciplinary Counsel

191. This complaint was opened by the ODC on January 23, 2024, after receiving a referral from Emily Stern, Staff Attorney for the Supreme Court of Appeals of West Virginia. The referral included a copy of the Rule to Show Cause Order regarding Respondent's failure to timely perfect an appeal on behalf of his client in an abuse and neglect appeal: *In re* A.B., No. 23-400. [ODC Ex. 151].

192. Respondent was court appointed to represent T.B. for purposes of appeal by the Circuit Court of Kanawha County on September 25, 2023. [ODC Ex. 159, Bates 2816-17].

193. By amended scheduling order entered on October 4, 2023, the Court extended the deadline to perfect the appeal to October 18, 2023. Respondent failed to perfect the appeal on or before October 18, 2023. [ODC Ex. 159, Bates 2816-17].

194. On November 3, 2023, a Notice of Intent to Sanction was entered directing Respondent to perfect the appeal on or before November 9, 2023, or be subject to sanctions. [ODC Ex. 159, Bates 2818-19].

195. On November 9, 2023, Respondent filed a motion for extension of time. [ODC Ex. 159, Bates 2820-22]. By order entered on November 13, 2023, the Court granted the motion and extended the deadline to perfect the appeal to November 27, 2023. [ODC Ex. 159, Bates 2823].

196. Respondent failed to perfect the appeal on or before November 27, 2023.

197. On December 20, 2023, the respondent, West Virginia Department of Health and

Human Resources, by Andrew T. Waight, Assistant Attorney General, filed a motion to dismiss the appeal for petitioner's failure to timely perfect the appeal. [ODC Ex. 159, Bates 2824-33].

198. On January 18, 2024, the Court issued a Rule to Show Cause against Respondent directing him to appear before the Court on February 20, 2024, to show cause as to why he should not be held in contempt for his failure to perfect the appeal, unless sooner mooted by perfecting the appeal with the filing of a petitioner's brief and appendix. [ODC Ex. 159, Bates 2835-36].

199. On February 22, 2024, the Court issued a Corrected Contempt Order holding Respondent in contempt for his failure to perfect the appeal and otherwise comply with orders of the Court. In considering the sanction to be imposed, the Court denied Respondent eligibility for any court-appointed cases until the ODC's investigation into this matter and any resulting disciplinary action are fully concluded. [ODC Ex. 156].

200. By letter dated January 23, 2024, the ODC provided Respondent with a copy of the Rule to Show Cause Order and directed him to provide a verified response thereto within 20 days. This letter was sent to Post Office Box 234, Hurricane, West Virginia. [ODC Ex. 153].

201. Respondent failed to file a response.

202. By letter dated February 23, 2024, the ODC sent Respondent a second letter to the same address, by first class and certified mail, and directed him to provide a verified response to this matter by March 4, 2024. [ODC Ex. 157].

203. By letter received by the ODC on March 4, 2024, Respondent provided a response to the complaint. In his response, Respondent stated that he was appointed as substitute counsel after the conclusion of the circuit court proceedings. Respondent stated that prior counsel did not have a case file or contact information for the client. Respondent stated that he "was only able to piece together the case through part of the Court record and speaking to other attorneys on the case."

Respondent said that he is still in the process of obtaining certain transcripts and documents in the underlying matter and he is working to complete an appellate brief as soon as possible. [ODC Ex. 160].

204. Emily Stern, Esquire, testified that she is employed as a Staff Attorney at the Office of the Clerk of the Supreme Court of Appeals of West Virginia. [Hrg. Tr. 25]. Ms. Stern testified that her duties include referring matters to the ODC at the direction of the Court. [Hrg. Tr. 26-27]. Ms. Stern testified that in cases that were filed after the implementation of the Court's e-filing system notices and orders from the Court are sent to parties through File & ServeXpress. [Hrg. Tr. 27].

205. Ms. Stern testified as to Respondent's failure to comply with the deadlines set forth in the amended scheduling order and the November 13, 2023, order extending the deadline to perfect the appeal to November 27, 2023. [Hrg. Tr. 43-45]. Ms. Stern testified as to Respondent's failure to comply with the deadline set forth in the Rule to Show Cause. [Hrg. Tr. 47].

206. Ms. Stern testified that dismissal is a potential outcome when a party fails to properly perfect an appeal. Ms. Stern further testified that Respondent's failure to adhere to the scheduling deadlines in these cases necessitated extra work in that additional orders had to be prepared, and these matters had to be presented to the Court. Ms. Stern also testified that delay in abuse and neglect cases can delay permanency for the children involved. [Hrg. Tr. 48-49].

207. Respondent acknowledged that he did not disagree with Ms. Stern's testimony and testified that he did not dispute that he received the orders she discussed in her testimony. [Hrg. Tr. 148, 158-59]. Respondent testified that he did not receive the appointment order in this case, and was unaware that he was appointed in this matter until another attorney brought it to his attention. [Hrg. Tr. 150]. Respondent testified that he was the third or fourth attorney appointed to represent

T.B., and the prior attorneys “had no file to give [him] and no contact information for the client.” [Hrg. Tr. 149].

208. Because Respondent failed to act with reasonable diligence and promptness in timely perfecting an appeal on behalf of his client, he violated Rule 1.3 of the Rules of Professional Conduct, as set forth above.

209. Because Respondent failed to make reasonable efforts to expedite the appeal consistent with his client’s interests, he violated Rule 3.2 of the Rules of Professional Conduct, as set forth above.

210. Because Respondent failed to meet his obligations pursuant to orders, notices, and rules issued by the Supreme Court of Appeals of West Virginia, Respondent violated Rule 3.4(c) of the Rules of Professional Conduct, as set forth above.

211. Because Respondent failed to properly expedite his client’s appeal and failed to comply with the orders of the Supreme Court of Appeals of West Virginia to perfect the same, he violated Rule 8.4(d) of the Rules of Professional Conduct, as set forth above.

III. FACTORS TO BE CONSIDERED WHEN RECOMMENDING SANCTIONS

The Supreme Court of Appeals of West Virginia has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but rather 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 Bd. v. Taylor*, 192 W.Va. 139, 144, 451 S.E.2d 440, 445 (1994) (citation omitted). There is clear and convincing evidence that Respondent has violated the following Rules of Professional Conduct: (1) Rules 1.3, 1.4(a)(3)-(4), 3.4(c), 8.1(b), and 8.4(d) in Count I; (2) Rules 1.3, 3.2, 3.4(c), and 8.4(d) in Count II; (3) Rules 1.4(a)(3), 1.15(a) and 1.15(c), 8.4(c) and 8.4(d), and 8.1(a) and 8.1(b) in Count III; (4) Rules 1.3,

3.2, 3.4(c), 8.4(d), and 8.1(b) in Count IV; (5) Rules 1.3, 3.4(c), and 8.4(d) in Count V; (6) Rules 1.3, 3.2, 3.4(c), 8.4(d), and 8.1(b) in Count VI; and (7) Rules 1.3, 3.2, 3.4(c), and 8.4(d) in Count VII. In determining an appropriate sanction:

Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates factors to be considered in imposing appropriate sanctions and provides as follows: (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.

Syl. Pt. 4, *Office of Disciplinary Counsel v. Jordan*, 204 W.Va. 495, 513 S.E.2d 722 (1998) (citing W. Va. R. Law. Disc. P. 3.16).

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

Respondent's conduct violated duties owed to his clients, to the public, to the legal system, and to the legal profession. "A lawyer owes an ethical duty to clients including the duty of candor, loyalty, diligence, and competence." *Lawyer Disciplinary Bd. v. Blyler*, 237 W. Va. 325, 341, 787 S.E.2d 596, 612 (2016). Respondent violated duties owed to Mr. Young by failing to communicate with him until September 16, 2023, more than one year and three months after Respondent was appointed to represent him in the underlying proceedings. The phone records received from the WVDOCR confirm that Respondent did not answer any of Mr. Young's phone calls from June 7, 2022, through October 24, 2023 [ODC Ex. 30, Bates 111-15]. Respondent acknowledged that he received letters from Mr. Young throughout this period to which he failed to respond. [Hrg. Tr. 77].⁵

⁵ By letters dated March 21, 2023, April 20, 2023, and August 31, 2023, Disciplinary Counsel requested that Respondent provide copies of any letters he sent to Mr. Young. Respondent did not submit any letters in response to this request, nor did he submit any letters to be introduced as evidence in the instant disciplinary proceedings.

Moreover, Respondent's PDS billing records confirm a lack of communication with Mr. Young throughout this period. [ODC Ex. 37]. After meeting with Mr. Young on September 16, 2023, and September 30, 2023, Respondent's communication with Mr. Young deteriorated once again. Even if Respondent met with Mr. Young a third time in October, the record is void of any further communication with Mr. Young from this time until Respondent was removed as counsel in his case on June 10, 2024.⁶ Respondent also failed to diligently represent Mr. Young by failing to adhere to the filing deadline set forth in the Court's June 7, 2022, Order.

Respondent violated duties owed to Ms. Allison by failing to keep her reasonably informed about the status of her case and by improperly depositing advance legal fees into his operating account and spending these funds prior to being earned. The Rules of Professional Conduct require lawyers to hold the property of others with the care of a professional fiduciary, and to not commingle the lawyer's own funds with client funds. All legal fees paid in advance should be deposited into the client trust account, and withdrawn by the lawyer as fees are earned and expenses incurred. To protect client funds, lawyers should maintain acceptable accounting practices and accurate records to determine which part of the funds belong to the lawyer.

Respondent violated duties owed to Mr. Murray by failing to adhere to the filing deadline set forth in the Court's September 19, 2023, Order, and by failing to appear at the December 20, 2023, final omnibus evidentiary hearing on Mr. Murray's behalf. Finally, Respondent violated duties owed to his clients in the underlying abuse and neglect appeals. Respondent failed to act with reasonable diligence in those matters and his failure to comply with the deadlines to perfect the appeals set forth in the Court's orders could have resulted in the dismissal of their appeals.

⁶ A hearing was held in this matter on February 15, 2024, however there is no indication from the record that Respondent communicated with Mr. Young at any point before this hearing or after it concluded.

Regarding Respondent's duties to the public, to the legal system, and to the legal profession:

Lawyers also owe duties to the public who rely on lawyers to protect their interests. The general public deserves lawyers with the highest standards of honesty and integrity. As officers of the court, lawyers owe duties to the legal system whereby they must conduct themselves within the bounds of the law and abide by the rules of substance and procedure which afford the administration of justice. As to the legal profession, lawyers owe an ethical duty to maintain the integrity of the profession.

Blyler, 237 W. Va. at 341. Respondent violated duties owed to the public by failing to maintain the standards of honesty and integrity upon which the public relies. Here, Respondent made false statements at his sworn statement when he testified that he deposited the \$2,200.00 check from Ms. Allison into his IOLTA account and that when he felt that he had done roughly ten hours of work, he transferred the funds to his general account. [ODC Ex. 161, Bates 2871].⁷ Respondent testified that his false statements to Disciplinary Counsel were inadvertent and that he may have been "thinking about something else."

Respondent violated duties owed to the legal system by engaging in conduct that was prejudicial to the administration of justice and that involved dishonesty, deceit, and misrepresentation. Moreover, Respondent failed to comply with the scheduling deadlines set forth by numerous court orders in the underlying matters. Lawyers, as officers of the court, are expected to operate within the bounds of the law and Respondent's conduct fell short of this expectation. Respondent also violated duties to the legal profession by failing to maintain the integrity of the profession.

B. Respondent acted intentionally, knowingly, and/or with a careless disregard

⁷ The terms "IOLTA account" and "client trust account" are used interchangeably in reference to the same bank account. Respondent testified at his sworn statement that he maintained one client trust account which is the account at City National Bank labeled "IOLTA Account." [ODC Ex. 161, Bates 2846-47].

Respondent acted intentionally, knowingly and/or with a careless disregard of his duties to this clients when he committed the ethical violations herein. Regarding the evaluation of a lawyer's mental state:

The American Bar Association Standards for Imposing Lawyer Sanctions instruct that the most culpable mental state is that of intent, which consists of conduct by the lawyer with a conscious objective or purpose to achieve a particular result. The next most culpable mental state is that of knowledge when there are acts by the lawyer with awareness of the nature of the acts or the potential consequences of the conduct. However, with the state of knowledge there is no conscious effort to attain a particular result. The least culpable mental state is negligence, which involves a failure to be aware of substantial risks at issue.

Blyler, 237 W. Va. at 341. Respondent testified falsely at his sworn statement. Respondent acted knowingly by failing to keep Ms. Allison's legal fees paid in advance in a client trust account separate from his own property and by spending these funds prior to earning them. Respondent deposited these funds into his operating account, an account which had a negative balance at the time and later contained Respondent's own money. [Hrg. Tr. 120, 125; ODC Ex. 96, Bates 1157, 1241]. Respondent then promptly used the funds provided to him by Ms. Allison for personal spending, including making a personal loan payment. [Hrg. Tr. 128; ODC Ex. 96, Bates 1157, 1241].

Respondent acted with extreme carelessness if not knowingly by failing to communicate with Mr. Young until September 16, 2023. Respondent was aware that Mr. Young had sent him letters and that Mr. Young filed an ethics complaint against him on August 19, 2022, wherein he alleged that Respondent failed to answer his phone calls and respond to his letters. Despite an awareness of the same, Respondent's lack of communication persisted for more than a year and Mr. Young was left in the dark regarding the status of his case.

Respondent acted carelessly if not knowingly by failing to adhere to the filing deadline set

forth in the Court's September 19, 2023, Order, and by failing to appear at the December 20, 2023, final omnibus evidentiary hearing in Mr. Murray's case. Respondent testified that he received the September 19, 2023, Order which set the deadline to file the amended petition in Mr. Murray's case as October 1, 2023, and ordered the parties to appear for a final evidentiary hearing before the Court on December 20, 2023. [Hrg. Tr. 177]. Respondent testified that he did not comply with this Order due to ongoing disagreements with Mr. Murray, and that he did not file any motions to extend the filing deadline set forth in this Order. [Hrg. Tr. 178]. Respondent's contention that he was unaware that a hearing was held in this matter on December 20, 2023, is not compelling for several reasons. Most importantly, Respondent acknowledged that he received the Order which ordered the parties to appear for a final evidentiary hearing before the Court on December 20, 2023. [Hrg. Tr. 177]. Moreover, documents obtained from the Circuit Clerk of Kanawha County reflect that: (1) Respondent was advised by Judge Abraham's assistant on November 28, 2023, that the concerns raised in Mr. Murray's letters to the Court would be addressed at the December 20, 2023, hearing; and (2) Respondent was sent a copy of the December 4, 2023, Order for Mr. Murray to be transported from MOCC to the Circuit Court of Kanawha County for the December 20, 2023, hearing. [ODC Ex. 140, Bates 2636, 2646].

Respondent acted carelessly if not knowingly by failing by failing to comply with the Court's scheduling deadlines set forth in the underlying abuse and neglect appeals. Respondent testified that he did not dispute that he received the orders in these matters. [Hrg. Tr. 158-59]. Accordingly, Respondent was aware of the deadlines set forth by the Court and he knowingly disregarded these deadlines because he was busy with other cases. Notably, in *In re A.B.*, No. 23-400, Respondent was held in contempt by the Court for his failure to perfect the appeal on behalf of his client and otherwise comply with orders of the Court. Respondent also acted knowingly in his multiple acts of failing to respond to the ODC's lawful requests for information. Respondent testified that he was

not going to dispute that the ODC sent him all the letters in the record and that he should have responded. [Hrg. Tr. 162]. Respondent acted negligently in providing Ms. Allison with incorrect information regarding her case when he advised her by email that he would need to refile her petition – despite never having filed it. Respondent testified that he inadvertently provided this incorrect information to Ms. Allison and that he may have been attempting to respond to another email. Although the record is void of any attempts to rectify any misunderstanding caused by this email, the record is also void of any facts which would tend to show that Respondent knowingly or intentionally provided this incorrect information to Ms. Allison.

C. There is actual and potential injury.

Injury as defined by the American Bar Association is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. *Annotated ABA Standards for Imposing Lawyer Sanctions*, Definitions (2015). The level of injury can range from serious injury to little or no injury. *Id.* Furthermore, potential injury is the harm to a client, the public, the legal system, or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct. *Id.*

Respondent's misconduct caused harm to his clients, the public, the legal system and the legal profession. Respondent caused undue delay in the resolution of Mr. Young and Mr. Murray's cases by failing to comply with the deadlines set forth by the Court. Moreover, Mr. Young and Ms. Allison testified that Respondent's conduct had a negative impact on their opinion of lawyers. Respondent's failure to keep the legal fees paid in advance by Ms. Allison in a client trust account separate from his own property led to these funds being spent by Respondent prior to being earned. Ms. Allison was deprived of these funds for more than 18 months until Respondent ultimately

provided her with a refund check at his disciplinary hearing. By failing to comply with the deadlines set forth in the underlying abuse and neglect appeals, Respondent placed an administrative burden on the Office of the Clerk and delayed permanency for the children involved in these matters. As the legal profession is largely self-governing, it is vital that lawyers abide by the rules of substance and procedure which regulate the legal system. Finally, Respondent's failure to comply with the deadlines set forth by the Court caused potential injury in that it could have resulted in the dismissal of the underlying abuse and neglect appeals.

D. The existence of aggravating factors.

The existence of any aggravating or mitigating factors shall be considered in determining the appropriate sanctions to be imposed upon Respondent. Aggravating factors are "any considerations or factors that may justify an increase in the degree of discipline to be imposed." Syl. Pt. 4, *Lawyer Disciplinary Bd. v. Scott*, 213 W.Va. 209, 210, 579 S.E.2d 550, 551 (2003). The aggravating factors present in this case are: (1) substantial experience in the practice of law; (2) pattern of misconduct; and (3) multiple offenses. Respondent has substantial experience in the practice of law as he has been practicing law for nearly 23 years. The record clearly establishes a pattern of misconduct. Respondent failed to comply with the filing deadlines set forth by the Court in five unrelated abuse and neglect appeals: (1) *In re* K.H., No. 22-0408; (2) *In re* B.S., M.S., and H.S., No. 22-0413; (3) *In re* A.B. and J.S., No. 23-140; (4) *In re* L.T., L.T., and J.T., No. 23-516; and (5) *In re* A.B., No. 23-400. Respondent also failed to comply with the filing deadlines set forth by the Circuit Court of Kanawha County in Mr. Young and Mr. Murray's *habeas* cases. Moreover, Respondent had a pattern of failing to respond to lawful requests for information from the ODC. The record establishes that Respondent failed to respond to 13 letters from the ODC in its investigation of the matters herein. The record also establishes that Respondent has committed multiple offenses.

E. The existence of mitigating factors.

Mitigating factors are “any considerations or factors that may justify a reduction in the degree of discipline to be imposed.” *Scott*, 213 W.Va. at 214 (quoting American Bar Association, *Standards for Imposing Lawyer Sanctions*, 9.31 (1992)).⁸ The mitigating factors present in this case are: (1) absence of a prior disciplinary record; (2) imposition of other penalties or sanctions; and (3) remorse. Respondent has been licensed to practice law since 2001, and throughout his career he has never been the subject of discipline by the Investigative Panel or the Supreme Court of Appeals. Regarding the imposition of other penalties or sanctions, by Order issued on February 22, 2024, the Court denied Respondent eligibility for any court-appointed cases until the ODC’s investigation into this matter and any resulting disciplinary action was fully concluded. Finally, Respondent acknowledged the wrongfulness of his conduct as related to his failure to abide by court orders, his mishandling of the legal fees paid by Ms. Allison, and his failure to respond to letters from the ODC. Moreover, Respondent extended an apology to Ms. Allison for the misunderstandings regarding the filing and service of her petition. The pattern established at the hearing of this matter was that the Respondent was handling more cases than he reasonably should have and doing so with a lack of due diligence much less any degree of urgency.

IV. CASE LAW PRECEDENT FOR SANCTIONS

“There is no ‘magic formula’... to determine how to weigh the host of mitigating and

⁸ In *Scott*, the Court held that mitigating factors which may be considered in determining the appropriate sanction to be imposed against a lawyer for violating the Rules of Professional Conduct include: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses. *Scott*, 213 W.Va. at Syl. Pt. 3.

aggravating circumstances to arrive at an appropriate sanction; each case presents different circumstances that must be weighed against the nature and gravity of the lawyer's misconduct." *Lawyer Disciplinary Bd. v. Sirk*, 240 W.Va. 274, 282, 810 S.E. 2d 276, 284 (2018). 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, *Committee on Legal Ethics v. Tatterson*, 173 W.Va. 613, 319 S.E.2d 381 (1984). Any discipline imposed should not only "appropriately punish the respondent attorney, but also [...] 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." Syl. Pt. 3, *Committee on Legal Ethics v. Walker*, 178 W. Va. 150, 358 S.E.2d 234 (1987). There is clear and convincing evidence that Respondent has violated numerous Rules of Professional Conduct in his representation of his clients in the underlying matters, and Respondent's conduct warrants a substantial sanction.

Respondent knowingly misappropriated and converted legal fees which had been paid to him in advance to his own benefit. Respondent acknowledged that the \$2,200.00 paid to him by Ms. Allison was a legal fee paid in advance to be billed against at a rate of \$200.00 per hour. This was also the intent (though with a different hourly rate) expressed in the unsigned fee agreement provided by Respondent. Notwithstanding the foregoing, Respondent deposited these funds into his operating account on August 23, 2021, an account which had a balance of -\$632.65 at the time and used these funds to pay personal expenses prior to earning the same. Respondent acknowledged that he had not earned these funds prior to depositing them into his operating account. Indeed, the time sheet submitted by Respondent confirms that he only worked on Ms. Allison's case for one and eight tenths of an hour and earned \$360.00 prior to depositing her \$2,200.00 check into his operating account.

The Supreme Court has consistently held that “[t]he general rule is that absent compelling extenuating circumstances, misappropriation or conversion by a lawyer of funds entrusted to his/her care warrants disbarment.” *Office of Disciplinary Counsel v. Jordan*, 204 W.Va. 495, 513 S.E.2d 722 (1998); *Lawyer Disciplinary Bd. v. Kupec (Kupec I)*, 202 W.Va. 556, 569, 505 S.E.2d 619, 632 (1998) (remanded with directions); *See Lawyer Disciplinary Bd. v. Kupec (Kupec II)*, 204 W.Va. 643, 515 S.E.2d 600 (1999); *See also Lawyer Disciplinary Bd. v. Wheaton*, 216 W.Va. 673, 610 S.E.2d 8 (2004); *Lawyer Disciplinary Bd. v. Duty*, 222 W.Va. 758, 671 S.E.2d 763 (2008). The Court recognized that:

The term misappropriation can have various meaning. In fact, the misuse of another's funds is characterized as misappropriation or conversion. Black's defines misappropriation as "[t]he unauthorized, improper, or unlawful use of funds or other property for purposes other than that for which intended ... including not only stealing but also unauthorized temporary use for [the] lawyer's own purpose, whether or not he derives any gain or benefit from therefrom.

Kupec I, 202 W.Va. at 568. Further, the Court has stated that **"the penalty for a misappropriation offense must be consistent with the level of intent by the lawyer and the level of injury."** *Kupec II*, 204 W.Va. at 648 (emphasis added). In this case, the record as a whole demonstrates that the Respondent deposited client funds in his business checking account with the rationale that he would earn those fees in the future. The actual intent to defraud the client may have been absent – though the action in and of itself – particularly considering the pre-earned use of the client's money for his own use – was intentional and worthy of punishment.

In terms of the level of injury, it is clear from the record that the fee paid by Ms. Allison was an advance legal fee that was improperly deposited into Respondent's operating account and spent by Respondent prior to being earned. Respondent's time records show that he ultimately earned \$1,740.00 in the case prior to being discharged by Ms. Allison on December 12, 2022. Moreover,

Respondent testified that he estimated that he would earn the entirety of this fee upon completion of Ms. Allison's matter, and that he does not charge clients large fees or ask clients for additional fees if his work in the matter exceeds the initial payment because of client's inability to afford legal services. The Respondent almost seemed to be working on a flat fee assignment basis – which is permitted under the Rules of Professional Conduct when properly communicated. However, the written “agreement” produced by the Respondent – which was never signed – contemplates that the lawyer's services would be billed against the retainer at \$250.00 per hour which is inconsistent with the testimony at the hearing. The Respondent may have not had evil intent, but his business practice in this instance fell woefully short of what is required by the Rules of Professional Conduct.

The fact that Respondent reimbursed Ms. Allison above and beyond the unearned portion of his fee by providing a full refund at the disciplinary hearing is appreciated – though such reimbursement by itself does not serve to mitigate any proposed sanction. *See* Syl. Pt. 8, *Lawyer Disciplinary Bd. v. Geary M. Battistelli*, 206 W.Va. 197, 523 S.E.2d 257 (1999). This refund was not timely and was made after the institution of disciplinary proceedings. While Respondent promptly agreed to refund the bulk of Ms. Allison's retainer after she discharged him on December 12, 2022, and testified that he attempted to mail Ms. Allison a refund check on two separate occasions, Respondent neglected to take any remedial measures after Disciplinary Counsel advised him by letter dated December 20, 2023, that Ms. Allison did not receive the second refund check, nor did he respond to this letter when directed to follow up regarding this matter.

In *Lawyer Disciplinary Board v. James B. Atkins*, Mr. Atkins admitted to violating Rules 1.3, 1.4, 1.15(d), and 5.3. The HPS also found that Mr. Atkins violated Rules 1.15(a) for failing to hold client funds in an account designated as a “client's trust account,” 8.1(a) for knowingly making a false statement of material fact, and 8.4(c) and 8.4(d) for wrongfully misappropriating and

converting funds belonging to his client or a third party to his own use. The HPS found that Mr. Atkins acted negligently in supervising his non-lawyer staff which resulted in \$14,807.55 of client funds being transferred to the law firm's operating account for use by the law firm. The Court adopted the findings of the HPS, apart from the HPS's recommended sanction, and imposed a nine-month suspension. *Lawyer Disciplinary Bd v. James B. Atkins*, 243 W.Va. 246, 842 S.E.2d 799 (2020).

Respondent's conduct in knowingly making a false statement to Disciplinary Counsel at his sworn statement in an attempt to conceal his mishandling of funds paid to him by Ms. Allison is similarly serious. Lawyers have faced substantial sanctions for similar conduct. *See Lawyer Disciplinary Bd v. Haught*, 233 W.Va. 185, 757 S.E.2d 609 (2014) (one year suspension after lawyer failed to properly deposit client funds, lied to the ODC about how he handled those funds, and lied to ODC about the identity of his clients in a real estate transaction); *Lawyer Disciplinary Bd. v. Grindo*, 243 W.Va. 130, 842 S.E.2d 683 (2020) (two year suspension after lawyer overbilled PDS then lied to PDS and the ODC); *Lawyer Disciplinary Bd v. James B. Atkins*, 243 W.Va. 246, 842 S.E.2d 799 (2020) (nine month suspension after lawyer failed to safeguard client funds and knowingly made a false statement during his sworn statement regarding the same).

Respondent's repeated failure to comply with the Court's orders alone warrants sanction. *Lawyer Disciplinary Bd. v. Conner*, 234 W. Va. 648, 769 S.E.2d 25 (2015) (ninety-day suspension followed by two years of supervised practice, in part, for failing to timely perfect an appeal on behalf of her client and being held in contempt by the Supreme Court following the issuance of a rule to show cause); *Lawyer Disciplinary Bd. v. Jonathan D. Fittro*, No. 20-0542 (W.Va. 4/15/21) (six-month suspension stayed for lawyer to complete two years of supervised practice for failing to comply with the scheduling order in a criminal appeal and being held in contempt by the Supreme

Court following the issuance of a rule to show cause); *Lawyer Disciplinary Bd. v. Matthew E. DeVore*, No. 22-599 (W.Va. 5/12/23) (six-month suspension after being held in contempt by the Supreme Court for failing to file a brief as a guardian *ad litem* in an appeal of an abuse and neglect matter); *Lawyer Disciplinary Bd. v. Dennis J. Willett*, No. 21-1032 (W.Va. 1/18/23) (indefinite suspension with right to petition for reinstatement after one year for failing to perfect an appeal and being held contempt by the Supreme Court and failing to appear at his disciplinary hearing). Unlike the lawyers in the preceding cases, the Court issued Rules to Show Cause in unrelated five abuse and neglect appeals for Respondent's failure to timely perfect appeals on behalf of his clients. Although Respondent was only held in contempt in one of those cases, the record and Ms. Stern's testimony reflects that Respondent failed to comply with at least one, and typically two court orders (the scheduling order and the notice of intent to sanction) in each of these cases, prior to the issuance of a Rule to Show Cause.

Respondent's failure to communicate with Mr. Young and comply with the filing deadlines set forth by the Court in Mr. Young and Mr. Murray's *habeas* cases is indicative of Respondent's pattern of disregarding court orders. Lawyers have received sanctions for similar conduct. *Lawyer Disciplinary Bd. v. Richard W. Hollandsworth*, No. 14-0022 (W.Va. 9/18/14) (ninety-day suspension followed by one year of probation with supervised practice for failing to communicate with his client and pursue his client's petition for writ of *habeas corpus* and disregarding the circuit court's instructions); *Lawyer Disciplinary Bd. v. Sturm*, 237 W. Va. 115, 785 S.E.2d 821 (2016) (ninety-day suspension followed by two years of supervised practice, in part, for failing to timely file her client's petition for writ of *habeas corpus*, failing to respond to her client's requests for information, failing to deposit all of the retainer fee into a client trust account, and failing to file a criminal appeal in another matter). *Lawyer Disciplinary Bd. v. Holly Wolfe Hinerman*, No. 21-0614

(W.Va. 9/20/22) (ninety-day suspension followed by two years of supervised practice for failing to communicate with clients in two *habeas* cases and failing to respond to requests for information from the ODC).

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 causes injury or potential injury to a client.

Standard 6.22. Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

Respondent has demonstrated, and the evidence clearly and convincingly establishes, a pattern of neglect by ignoring the ethical standards to which he and all lawyers are held.

V. RECOMMENDED SANCTIONS

In this case, the Office of Disciplinary Counsel recommends annulment of the Respondent's license. The Respondent, conversely, argues that the mitigating factors present should yield, at most, probation and/or an admonishment by the Court. The former recommendation metes out punishment with no mercy. The latter recommendation requests mercy with very little punishment which is warranted in this instance.⁹

⁹ The word "mercy" was utilized by Justice Hutchinson in his recent dissent in the case of *Lawyer Disciplinary Board v. Robert L. Greer*, Supreme Ct. No. 23-82. That is the real rub of all of the cases which come before a Hearing Panel of the Lawyer Disciplinary Board – recommending sanctions which appropriately punish the wrongdoer and protect the public against this thing called "mercy." The case decisions as to sanctions show that this "rub" yields varying results on a case-by-case basis depending on the facts of each individual case. There is no "one size fits all" in lawyer disciplinary proceedings.

The failures to act timely and with due diligence and to communicate with clients in these cases are well-established and serious violations of the Rules. The misappropriation of client funds in the Marjorie Allison case was intentional.

While the Respondent's 24 years of practice is an aggravating factor to consider – it is less so when considering the mitigating factor that he has practiced so long without any documented disciplinary record. Surely, there are clients whom this Respondent has helped – and he has done so on financial terms which allow clients representation when they might not otherwise receive the same. His proffers on being “overworked” and “understaffed” have caused him to not accept habeas corpus cases. His failures have caused the local Circuit Court to deny Respondent eligibility for any court-appointed cases until the ODC's investigation into this matter and any resulting disciplinary action are fully concluded.

Neither the recommendation of the Office of Disciplinary Counsel nor those of the Respondent, when considering the record as a whole, seem to promote a result which effectively punishes the offender and protects the public adequately for the legal missteps which were serious in nature and also numerous – with an acknowledgment of the mitigating factors in play. Perhaps the biggest failure¹⁰ by the Respondent, and the hearing testimony and evidence supports this conclusion, was that he, like many lawyers, exhibited an absolute inability to say “No.” There seemed to be a reluctance to communicate by the Respondent with his clients either because the desires of some of them conflicted with what he believed to be in their best interests or because the course to a legal remedy seemed to be an uphill battle. Had the Respondent said “No” to taking new clients or communicating that word effectively when a client's request conflicted with

¹⁰ The failures to respond substantively and timely to notices and inquiries from the Office of Disciplinary Counsel and the West Virginia Supreme Court of Appeals, on numerous occasions, is a close and disturbing second biggest.

what he believed to be the appropriate legal course of action many of the complaints herein would have not occurred. Moreover, when he became overwhelmed with cases and corresponding staffing issues, the Respondent should have sought intervention from the Court in the form of a Motion to Withdraw from representation. He did neither of these things well and, as a result, he leaves behind a host of unhappy former clients.

Rule 3.15 of the Rules of Lawyer Disciplinary Procedure provides that the following sanctions may be imposed in a disciplinary proceeding: (1) probation; (2) restitution; (3) limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment. For the reasons set forth above, the Hearing Panel Subcommittee recommends the following sanctions:

- A. That Respondent's law license be suspended for eighteen (18) months;
- B. That Respondent be ordered to comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure, and also be directed to promptly surrender all papers and property in his possession to which his clients are entitled;
- C. That the Respondent be required to Petition the Court for reinstatement and that he complete 12 hours of CLE devoted solely to Office Management/Ethics prior to submitting said Petition; and
- D. That Respondent be ordered to reimburse the Lawyer Disciplinary Board the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Dated this the 10th day of January, 2025.

Charles R. Steele, Esq., Chairperson
Hearing Panel Subcommittee

Margaret Chapman Pomponio
Hearing Panel Subcommittee

Nicole A. Cofer, squire
Hearing Panel Subcommittee

CERTIFICATE OF SERVICE

This is to certify that I, Lauren M. Hall, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 14th day of January, 2025 served a true copy of the foregoing **"REPORT OF THE HEARING PANEL SUBCOMMITTEE"** upon Respondent Benjamin R. Freeman, Esquire by mailing the same via United States Mail with sufficient postage, to the following address:

Benjamin R. Freeman, Esquire
PO Box 234
Hurricane, WV 25526

Notice to Respondent: for the purpose of filing a consent or objection hereto, pursuant to Rule 3.11 of the Rules of Lawyer Disciplinary Procedure, either party shall have thirty (30) days from today's date to file the same.



Lauren Hall Knight [Bar. No. 13405]