IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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LAWYER DISCIPLINARY BOARD,
Petitioner,

VS. **No. 24-363**

BRIAN W. BAILEY,
Respondent.

BRIEF OF THE RESPONDENT

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I. STATEMENT OF THE CASE

A. Nature of Proceedings and Recommendation of the Hearing Panel Subcommittee

On or about May 5, 2025, following a nearly two (2) year process after your respondent appeared in front of the Office of Disciplinary Counsel (hereinafter ODC) to provide a sworn statement on June 14, 2023, the Hearing Panel Subcommittee adopted without a word of alteration the ODC's proposed findings of fact and conclusions of law. Your respondent had taken a cooperative posture through the entire proceedings with the ODC.

The Hearing Panel Subcommittee recommended that the Respondent's law license be annulled, that restitution be paid to the complainant Clifford Ellis, Jr. in the amount of $2,250.00; that the Respondent comply with the mandates of Rule 3.28 of the Rules of Professional Conduct (hereinafter "the Rules), and that the Respondent be ordered to pay the costs of the disciplinary procedure pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

It is from this Order that an objection was filed on June 6, 2025, and which was granted by the Honorable Justices on June 13, 2025, and from which the instant brief follows.

B. Findings of Fact and Conclusions of Law of the Hearing Panel Subcommittee

1. COUNT 1 I.D. NO. 22-05-56 Complaint of Tesla Lewis

This case was a will contest case, wherein the decedent executed a will days prior to his death, that removed Ms. Lewis from his will. Her aunt promptly reached out on an emergency basis to see if counsel could act, who filed a "Petition for a Preliminary Injunction," around July 25, 2019, along with a petition. This matter was filed within forty-eight (48) hours of the initial consultation. A hearing was held with respect to the animals

at issue, because they were in urgent need of care since the matter was disputed. Your respondent along with Ms. Lewis appeared in front of Circuit Judge Hall to litigate that matter, and it was determined that the matter of the will would have to go to the Upshur County Commission initially, pursuant to the West Virginia Code.

The Upshur County Commission held a very brief hearing, and simply probated the new will, to the detriment of Ms. Lewis' interests. As noted in the Petitioner's brief, on February 25, 2020, counsel filed another "Petition to Contest the Validity of the Will."

Shortly thereafter, the COVID-19 pandemic struck, and at that point in time, as the Justices will recall, the ordinary operation of Court procedures were delayed for some time. Regularly scheduled court proceedings only resumed around the first of July 2020. It was during this delay in regularly-scheduled court proceedings in which counsel for the defendants offered a settlement of $10,000 to attempt to resolve the matter.

Counsel conveyed the offer through his legal assistant, Ms. Heather Queen, and Ms. Lewis replied that she would not settle this matter. Ms. Lewis felt, rightly or wrongly, that the prior will which Mr. Casto had executed naming her as the sole beneficiary was the will which should have been probated. It should be noted that Ms. Lewis made it abundantly clear from the outset that she had no interest in a settlement.

Subsequent to these settlement discussions, the matter was eventually put on the Court's docket for a scheduling conference on or about January 2021, by which time court proceedings had returned to the ordinary course of events. Later on, as the matter approached a projected trial date of January 2022, the mediation deadline was extended by agreed Order between the parties on November 9, 2021 to extend the mediation until

December 3, 2021. In the interim, counsel for the Defendant's filed a "Motion for Summary Judgement." This hearing was held on October 25, 2021. By this time, Ms. Lewis' communication, which had been continuous and frequent with Ms. Queen, who acted as counsel's agent at all times named herein, had faltered, and your respondent advised Jackie Campbell, the aunt of Ms. Lewis that a "Motion for Summary Judgement" had been filed, and Ms. Lewis needed to get in touch. However, she did not reach out by either phone or text as had always been her practice before with all other communications.

Although she never did, counsel filed a "Response in Opposition to Motion for Summary Judgement," and a hearing was held in front of Judge Hall. At that time, the Court did inquire about Ms. Lewis' whereabouts, to which your respondent replied it was not my perception that she abandoned the case, because of the communication which counsel had with Ms. Campbell about the case. I adamantly deny making a "knowing misrepresentation" to the Court. At that time, the Court merely took the matter under advisement, and it was nearly a month later that the Court in writing GRANTED the "Motion for Summary Judgement."

I concede the point of not having a written fee arrangement with Ms. Lewis, as I did during the hearings in this matter held before the ODC, including in my sworn statements. I also conceded the point of not responding to the written interrogatories, in retrospect, but this was an accidental oversight.

My legal assistant's schedule changed and frequent absences from work occurred due to severe health issues that were developed by her late mother, Patricia Adams, and her late husband, Keith Queen, who passed away within six months of one another in 2021

into 2022. Simply stated, as a solo practitioner with one (1) assistant, while I was attending court every day of the week in multiple counties, my caseload was overwhelming me at that time, acknowledging, of course, that the buck stops with me for my errors and omissions.

2. COUNT 2 I.D. NO. 22-05-358 Complaint of Robert L. Moats

Mr. Moats retained your respondent to represent him not in a divorce proceeding as set forth in the ODC's Petition, but in a juvenile abuse and neglect proceeding and a criminal proceeding.

From the outset of this case, Mr. Moats had confessed to the West Virginia State Police to incestuous conduct with his daughter after an interview with Trooper Loudin. He asserted that I did not review the evidence with him in his case. The abuse and neglect proceeding was handled first. Pursuant to my legal advice, Mr. Moats voluntarily relinquished his parental rights, and even agreed to continue to pay child support for his children.[1] Also, he continued to be gainfully employed, and per my recommendation, he started working with Community Care on his deep-set issues, with a goal towards trying to get a better resolution of his criminal case. I met with him several times during the course of my representation, and he was in the office even more frequently than that, going over his case with my legal assistant Ms. Queen. As noted previously, Mr. Moats had confessed to sexual abuse, therefore, he entered a plea of guilty, and at his later sentencing hearing, despite my earnest requests that he be permitted to be placed on home incarceration with work release, considering his lack of criminal history and his good pretrial behavior, the

[1] It is the typical practice in this Judicial Circuit (now the 18th), that child support is either ended, or more recently, just set at $0, once a parent rights are either voluntarily relinquished or involuntarily terminated.

Court nevertheless denied and overruled his request, and he was sentenced to a term of I believe five (5) to twenty-five (25) years. It was only at this point when he began filing complaints on your respondent.

I acknowledge, that once I received and responded to his complaint, that although I had prepared a "Motion for Reconsideration of Sentence," the motion did not get filed. Contrary to these allegations of inappropriate misuse of client's money, as I recall, one of his complaints was that I *stopped* taking his money, so as to deprive him of representation. At one point, his card was rejected for automatic payment. On several different occasions, he requested rescheduling of payments, to which I agreed, when he did not have sufficient funds. In short, I worked with him.

I also acknowledge that I did not have a proper fee arrangement with him, by not utilizing the services of my IOLTA account, which seems to be at the heart of most of these allegations.

In Mr. Moat's case, my remorse is that he was not given the opportunity to be placed on home incarceration, because I believe based upon his past lack of criminal history and his posture leading up to his sentencing, he would have been likely to be successful and maintain the ability to remain in the community on work release. Had this been the case, there is no doubt to me that I would not be responding to this complaint.

3. COUNT 3 I.D. NO. 23-06-157 Complaint of Clifford Ellis Jr.

Mr. Ellis filed his complaint on your respondent on or about April 17, 2023, following years of drawn-out litigation regarding a property dispute between him, his fiancée Ms. Hurley, and the plaintiffs, Mr. and Mrs. Browning.

The case began as a right of way dispute surrounding property Mr. Ellis owned in southern Upshur County adjoining Get Out Run Road. Mr. Browning contended that he had a right-of-way surrounding the farmhouse of Mr. Ellis, and he hired Attorney Phil Tissue from Fayette County, West Virginia to pursue his claim. Mr. Ellis subsequently hired your respondent at the agreed to flat fee rate of $3,000.00, as noted in the petitioner's brief, and as testified to by your respondent during his sworn statement, upon information and belief. Mr. Ellis subsequently counter-claimed through counsel that Mr. Browning had encroached by building upon his land, and asserted that Mr. Browning had fired gunshots towards his property.

From there, as noted, the case continued through several years of litigation, and as noted, two (2) separate mediations were attempted, both without success, and the matter ultimately came down to a bench trial, wherein Judge Reger made a decision from the bench. It is alleged that I "abandoned" these mediations; the fact of the matter is, on both occasions, I participated for over three (3) hours, before being forced to leave due to Court obligations, which take precedence over mediations. The mediations at that point had been essentially concluded.

It is also asserted that my office's communication with him was inadequate; in truth, there were hundreds of hours expended on Mr. Ellis in the attempt to resolve his case. It is even noted in the Petitioner's brief in a footnote that Mr. Ellis worked with Ms. Queen on the weekends.

I categorically deny the overpayments as alleged by Mr. Ellis. He has double counted his payments with my subsequent invoices, in an attempt to portray me in

a more negative light than he already has. Instead, I patiently allowed Mr. Ellis to make monthly payments to pay off his ultimate balance. It is also asserted that I "took the other side" on this case; as illustrated by the court-imposed settlement of $3,500 to Mr. Ellis instead of the $7,500 he initially demanded. The truth of the matter is that the $3,500 amount is what the Court ruled was fair and appropriate to settle the property dispute. The other side simply would not agree to our demand for $7,500 settlement.

Subsequent to the ultimate resolution of this case, the issue then in late 2022 and early 2023 whether or not Mr. Ellis would execute the deed. The deed was prepared by our office, and sent to Mr. Ellis and Mrs. Hurley for his signature on at least three (3) occasions by my assistant Ms. Queen. Counsel for the Respondent refused to use this deed, and demanded that he be the one to prepare the deed. Once Mr. Ellis received this deed, he alerted Ms. Queen to an erroneous property description, where 5/8' versus 5/8" had been used. It is then alleged that I waited almost seven weeks to respond to the corrections to opposing counsel, on or about February 24, 2023.

The fact of the matter is that at that point, I was trying to stop a "Motion for Contempt" going forward for Mr. Ellis' refusal to sign the property deed. On that occasion, I was successful in doing so, and the contempt hearing was taken off the docket at the last minute by the Court on Friday before a Monday hearing. The error in the deed was corrected by plaintiff's counsel on or about March 17, 2023. Mr. Tissue had admonished me many times, including during this phone call, over my "lack of client control," because Mr. Ellis would not sign the deed unless he was in person to receive the $3,500. Mr. Tissue refused to accommodate this request.

It was then in April 2023 that Mr. Ellis filed complaints against your respondent. Subsequently, Mr. Tissue, filed a second petition for contempt against Mr. Ellis in May 2023. A second contempt hearing was held on or about June 5, 2023, and at that time, as Mr. Ellis had filed a complaint against me for my representation; I admit that I was not present in the Courtroom. The Court did call me, and I listened to the hearing, and admit saying to the Court that I would rather not say anything on the record, exactly because the instant complaint had been filed against me. I have witnessed other attorneys follow the same procedure during my career when they had pending ethics complaints, and was under the assumption that was how to handle the matter at that point. Ultimately, the matter was resolved, with the Court making a correction to what it identified as a "scrivener's error" on the deed. Subsequently, the case concluded successfully.

4. COUNT 4 I.D. NO. 23-05-304 Complaint of Roger K. Stobart

Mr. Stobart's complaint resulted from post-conviction lack of action on his behalf, as he alleged. His case involved identity theft of an acquaintance of his by the name of Larry Lusk. The case went through pretrial motions; a plea offer was offered to a 2-10 year sentence exposure which Mr. Stobart rejected; and instead went to a jury trial, which was memorable because jury selection occurred at the Upshur County Armory due to COVID-19 precautions; followed by a jury trial during which Mr. Stobart was ultimately convicted on all counts of the indictment. The evidence adduced at the sentencing hearing was that Mr. Lusk came and testified he had been caused extensive grief through the theft of his identity for years and years by Mr. Stobart, including, for example, his arrest on warrants

that were the result of Mr. Stobart's actions.

Nevertheless, we went to trial, he was convicted, and upon his conviction, and a lengthy sentence[2] was imposed by the Court, I appealed his case to the West Virginia Supreme Court of Appeals. Despite Mr. Stobart's assertions, I sent him a copy of my appeal while it was pending, and at one point, in a letter he had written, he was complementary on the work in the appeal I had completed.

Mr. Stobart claims he wrote 'several' letters to me that I did not respond. I acknowledge receiving two (2) to which I did not respond, as I was awaiting a decision from the Supreme Court. With hindsight, the better response would have been a letter to him to acknowledge that I did not have anything yet to report. I waited for about one (1) year exactly before the Memorandum Decision upholding the Court below was issued. A letter with the Memorandum Decision was sent to him at that time forthwith.

The biggest complaint seems to be that Mr. Stobart did not receive his entire file from me. I also acknowledge this oversight, and note that it was sent out in its entirety to him following the hearing on these charges in January 2025. As of the preparation of this pleading, I have yet to see any kind of habeas corpus petition filed, ¾ of the year later. As noted, I did not send him the entirety of his file, although I would submit he had most of the file available to him from the appeal process.

5. COUNT V I.D. No. 23-02-376 Complaint of Lisa Thomas

This charge was not pursued at the request of the Complainant. In Ms. Thomas's case, I

[2] At this point, I cannot recall what his specific sentence was; but I recall that the Court ran nearly every count consecutively, for a total sentence exceeding ten (10) years on the front end. He is still serving this sentence as of this writing.

paid her back in full, so that she could take her case to another attorney; however, by that time it was being handled by the fiduciary commissioner. This was after my office had worked with her for approximately two (2) years. As I recall, her necessity to hire me was due to the refusal of a party to sign a deed, which had already been completed after extensive research, but which deal fell apart due to the refusal of one party to sign the deed. With respect to the letters sent to me from the ODC, I admit that I did not receive them, as it is certainly not my practice not to take requests for lawful information from the ODC seriously. As stated above, I have tried my best to cooperate in full with this investigation.

II. SUMMARY OF ARGUMENT

The Hearing Panel Subcommittee, after a one (1) day hearing wherein no evidence was adduced from your respondent other than hostile cross-examination from the ODC, and taking into no account any of my explanations or frankly giving me any opportunity to do so, found that I violated my duties to Ms. Lewis, Mr. Moats, Mr. Ellis, Mr. Stobart, and the profession, and that my actions caused actual harm. The Hearing Panel Subcommittee considered no mitigating factors or my cooperative posture. They Panel recommended annulment of my law license, restitution to Mr. Ellis, compliance with Rule 3.28 of the Rules of Lawyer Disciplinary Procedure, and payment of costs pursuant to Rule 3.15.

No account was taken of the fact that I offered evidence of personal difficulties related to health issues of Ms. Queen's late mother and late husband. No account was taken that I went from being one of three (3) mental hygiene commissioners in Lewis and Upshur Counties to the only one in the COVID year of 2020, which nearly tripled my work load at

that time. This occurred primarily due to the fact that Lewis County is where William R. Sharpe, Jr. Hospital is located, which necessitates a time intensive weekly workload of Final Commitment hearings, as Sharpe along with Bateman in Cabell County are the two (2) institutions in the State of West Virginia housing large numbers of long-term psychiatric in-patient respondents. The Panel ignored my relatively limited experience in civil litigation work, where I testified to handling about 20 cases over 20 years. Since the Ellis case, I no longer practice any civil litigation. My limited disciplinary record was not factored in recommending what essentially amounts to the legal death penalty in recommending annulment of my law license, rather than some lesser penalty, such as supervised practice, an admonishment, or even a suspension rather than simply disbarring me.

It is from this judgment which the instant appeal follows.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Honorable Court has noted in its Order of June 13, 2025, that the Clerk of the Court will provide at a later date a "Notice of Argument" under Rule 19(b).

IV. ARGUMENT

The standard of review for appeals from the Hearing Panel Subcommittee seems to be well-established law in West Virginia jurisprudence now. "A *de novo* standard applies to a review of the adjudicatory record made before the [Hearing Panel Subcommittee of the Lawyer Disciplinary Board ("HPS")] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the [HPS's} recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the

[HPS's] findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record." Syllabus point 1, *Lawyer Disciplinary Board v. Curnette,* No. 23-746 (W.Va. 2025); Syllabus point 3, *Committee on Legal Ethics v. McCorkle,* 192 W.Va. 286, 452 S.E. 2d 377 (W.Va. 1994); Syllabus point 1, *Law. Disciplinary Bd. v. Cain*, 245 W.Va. 693, 865 S.E. 2d, 95 (W.Va. 2021).

A. The Findings of the HPS were not supported in their entirety by reliable, probative, and substantial evidence.

In the case at hand, your respondent entered into certain admissions that were incorporated by reference by the Hearing Panel Subcommittee. The Office of Disciplinary Counsel prepared stipulations days before the actual hearing itself on January 14, 2025, giving your respondent little time to vet the accuracy of the stipulations. Taking it on good faith that the stipulations merely reflected what was agreed to by the parties, and after a fairly cursory review of the stipulations due to necessary time constraints, your respondent agreed to go along with the stipulations.

In fact, included in these stipulations were allegations of substantial overpayment by Mr. Ellis to the respondent. Counsel adamantly denies this, as Mr. Ellis would write a money order, which would be followed up days later by a receipt either by email or mail; in some instances, both from Ms. Queen. In other words, his statements are effectively double counted in his accounting. To the contrary, your respondent would assert that during his nearly five (5) year representation of Mr. Ellis in this property dispute, if anything, the respondent was substantially underpaid. It is not the practice of the respondent to keep demanding working people's money; in fact, I find it one of the most

disagreeable tasks of being an attorney is to keep hitting people up for more money. This certainly does not excuse subpar accounting practices, which have since been remedied. I deferred to the good faith of the Office of Disciplinary Counsel that the agreed stipulations were things that were actually agreed to between the Statement of Charges and your respondent's answer.

Furthermore, at the hearing held on January 14, 2025, the hearing began around 10:00 A.M. in the morning, and then lasted for the rest of the day, with the Office of Disciplinary Counsel running the entire show, including calling your respondent as a witness. At the end of the respondent's testimony, rather than be given an opportunity to explain the issues at hand, instead, the individual members of the subcommittee took the opportunity to lecture your respondent, rather than hearing any type of defense, or even being given the opportunity to put on mitigating factors which should have been considered.

In short, as the entire process was effectively one sided from the beginning until the end, your respondent respectfully prays that the Honorable Court reexamine the entirety of the evidence, and actually consider what your respondent has to say, rather than simply rubber-stamp the findings of the one-sided hearing. Indeed, as noted in the Petitioner's brief, it has been stated that: "The Supreme Court of Appeals is the final arbiter of formal legal ethic charges and must make the ultimate decision about public reprimands, suspensions or annulments of attorneys' license to practice law." Syl. Pt. 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E. 2d 671 (W.Va. 1984).

B. Analysis under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure

Rule 3.16 of the Rules of Disciplinary Procedure provides that when imposing a sanction after a finding of lawyer misconduct, the Court shall consider: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors." Syl. Pt. 4 of *Office of Disciplinary Counsel v. Jordan,* 204 W.Va. 495, 513 S.E. 2d 722 (W.Va. 1998).

Your respondent acknowledges fault, as set forth in the agreed stipulations, but respectfully asserts that errors were made due to negligence; the amount of actual injury was de minimus; and that the existence of mitigating factors was not even considered below. Therefore, your respondent respectfully disagrees with the gravity of the sanction sought by the Office of Disciplinary Counsel.

The four factors shall be examined going forth.

1. **Respondent violated duties he owed to a third party, the public, to the legal system, and to the profession.**

With respect to the issue of the IOLTA account, I have acknowledged my fault in this regard. As set forth during the proceedings below, the main reason I set up an IOLTA account was that the State Bar had an expectation that I do so. The fact of the matter is, 95% of my work has always been court-appointed. As noted, my civil experience was fairly limited. I wholeheartedly disagree that I misappropriated money from Mr. Ellis in the charges listed, as set forth above. To the contrary, I worked on his case for approximately five (5) years.

Since these charges were brought, during the couple of retained cases I have

accepted, my client's money has thus been deposited into the IOLTA account. I have done so pursuant to the advice of the Office of Disciplinary Counsel.

With respect to the failure to communicate with Mr. Ellis, it is true that my assistant Ms. Queen had a lot of the communications with him and Ms. Hurley, including on nights and weekends. With respect to the flawed deed, the Circuit Court itself exclaimed during the hearing complained of that "this is a scrivener's error" with respect to the 5/8' or the 5/8''. After once successfully getting a "Motion for Contempt and Sanctions" withdrawn against Mr. Ellis by the opposing counsel, Mr. Tissue sought a second motion, but this was after Mr. Ellis had filed a Complaint with the Office of Disciplinary Counsel. I admit with 20-20 hindsight that the better practice would have been to file a "Motion to Withdraw as Counsel." However, I would plead in mitigation that I have personally witnessed other counsel decline to address the Court after someone has filed an ethics complaint against them, so this was the course of action I chose to proceed with. At the end of the day, the Court from the bench changed the deed, and upon fulfillment of what was a court-imposed settlement, the Court dismissed the matter of sanctions.

In the case of Tesla Lewis, I again admit that my assistant handled most of the day to day discussions with her. Respectfully, as noted in my answer to the Statement of Charges, that contact was frequent and ongoing, and should not be construed as a failure to keep the client informed of substantive matters. Anything which Ms. Queen shared with Ms. Lewis had my imprimatur, which is my general practice, as she is my paralegal and my agent. I do admit that as a result of Ms. Queen's mother and her husband's health concerns, she was out of the office a good bit in 2021 and 2022. However, she still

maintained communication with clients, when there was something to communicate, and certainly remained in contact with me. A significant amount of work was done on her case from the very beginning; but at the end of the day, her case amounted to a will contest. It is a very tough road to hoe to determine the intent of a decedent who is not around to testify. I still believe she may have had a case of undue influence, but once the Court granted summary judgment, any ability to either mediate the case or to try it became an impossibility. Unfortunately, the hospice nurse who could have helped with the argument of undue influence would not cooperate with my investigation, and would only testify if required by a subpoena. At the end of the day, we never made it to that point in time.

With respect to Mr. Stobart, I admit that I did not respond to a letter he sent; and that I was late in getting the entirety of his file to him; but I would note that I sent him his appeal when it was filed, and sent him the results thereof after I finally received an Order from the Supreme Court of Appeals denying his appeal.

With respect to the entirety of his file, he already had almost every pleading at the time when I filed his appeal. The entire case file was sent to him shortly after the hearing with Panel. As of this pleading, I am awaiting the inevitable ineffective assistance of counsel allegations once he files his Writ of Habeas Corpus. In my (much more extensive) criminal case experience, this is usually the price to be paid upon the loss of a trial and an appeal, which is followed by a lengthy sentence. As noted, Mr. Stobart is still serving this sentence, and will be for several years to come, as the numerous issues of identify theft of Larry Lusk resulted in the Court imposing a long sentence.

Regarding Robert Moats, I also admit that I failed to timely file a "Motion for

Reconsideration of Sentence." At the time of the preparation of this pleading, it is believed that Mr. Moats is still serving his criminal sentence. During my representation of him, Mr. Moats was fairly cooperative with me, other than sending inappropriate messages to my assistant Ms. Queen, and his changing of payment arrangements.

Mr. Moats clearly confessed wherein the statement provided to the police officer was made after his *Miranda* rights were read to him; thus it remains my belief to this day that the plea he entered was in his best interests and was his best course of action. A trial would almost certainly have resulted in a much longer sentence. At the end of the day, we were subject to the mercy of the Court.

With respect to the allegations that I gave courts incorrect information to protect myself at my client's expense, I categorically reject that allegation. I did respond to the Court that it was not my perception that Ms. Lewis has abandoned her case, because in fact her aunt Ms. Campbell had reached out to me about her case. I do not lie to a Court of law; I never have, and I never would. I give the most precise answer to questions raised of me, as I always have.

I certainly agree that I rely to a heavy degree on my sole assistant and paralegal, Ms. Queen, and it is most unfortunate that she was unable to testify about these matters of which she had firsthand information to the Hearing Panel Subcommittee. I believe that a lot of the allegations of failing to communicate could have been rebutted, had she been allowed to do so. However, I would note that every action she takes is communicated to me, and she effectively helps my office function normally. I am not sure how other solo practitioner's do it without any assistance; I can only surmise it is because they only take

appointed cases, based upon my experience. However, even with just court-appointed cases, her assistance is necessary, as of course I have court-proceedings on nearly every business day. Upon my information and belief, I recall hearing at a conference that twenty (20) percent of the attorney's practicing in West Virginia were doing eighty (80) percent of the courtroom work. I am certainly included within that 20 percent.

So far as responding to and cooperating with the Office of Disciplinary Counsel goes, I submit that I timely responded to every letter that I actually received from them. It would certainly have *not* been in my best interests to ignore them, obviously, and therefore, I reject the allegations that I have not been fully cooperative with them. If I received a complaint, I answered it. I appeared to give a Sworn Statement, as requested by subpoena. I answered the Statement of Charges, and even worked with the ODC to formulate agreed stipulations. As noted above, I only received these a few days prior to the hearing of January 14, 2025, but nevertheless, in an attempt to continue to maintain my cooperative posture, I agreed to them, which was obviously to my detriment with some of the charges.

I admit that I violated the Rules of Professional Conduct, during what was an extremely rough period of time. I deeply regret and wake up daily regretting these mistakes. One cannot even begin to quantify the amount of sleep lost over these matters, both with respect to the cases themselves, and to the consequences ensuing from them. However, I respectfully reject many of the allegations, as set forth above and below.

2. **Respondent acted "Negligently," not "Knowingly" nor "Intentionally" on the majority of the substantive violations**

The Office of Disciplinary Counsel lists a significant number of violations of the Rules of Professional Responsibility in their brief, and suggests that pursuant to Rule 1.0(f), a person's knowledge can be inferred from the circumstances. They go on to suggest that instead of evidence of knowing violations of the rules, instead, they draw the negative inference that there is no evidence to suggest that I did not act knowingly.

Accordingly, as set forth in *Office of Disciplinary Counsel v. Jordan,* 204 W.Va. 495, 513 S.E. 2d 722 (W.Va. 1998), the Court is required to make a determination as to whether the attorney acted intentionally, knowingly, or negligently in ascertaining the level of discipline to be attributed to an attorney. The Court has acknowledged a hierarchy of culpability as pertains to the mental state of the attorney, as previously set forth in *Law. Disciplinary Board v. Blyler:*

> "[t]he 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 the awareness of the nature of the acts or consequences of the conduct. However, with a 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, 787 S.E. 2d at 612 (W.Va. 2016).

In the cases as set forth, counsel would set forth that his violations were those involving negligence, as the complained of conduct is explained by acts of negligence. For example, it was due to outside circumstances with his paralegal's family which resulted in the issues coming to the fore in the Lewis case. Counsel simply was overwhelmed at that time with

work following the reopening of the Court system after the pandemic closures, which resulted in actions such as the failure to respond to an interrogatory. Nevertheless, counsel did brief the issue in response to the summary judgment motion, to rebut the motion, albeit unsuccessfully. With the added duties of a now two (2) county full-time mental hygiene commissioner which occurred after these cases began, responses were missed. Counsel certainly never attempted to knowingly or intentionally undermine his clients.

With respect to Mr. Ellis, as noted above, I submit that I should have filed a "Motion to Withdraw as Counsel" after he filed the foregoing ethics charges against counsel, but I also worked hard to keep Mr. Ellis out of contempt. His issues with counsel ultimately became hang up on the deed description, which was settled after lengthy litigation. Furthermore, I also asked Mr. Tissue, who prepared the deed, to correct the matter, but was met with an intransigent opponent. Ultimately, the matter was scheduled for a second contempt hearing, which I attended by phone after the Court called me about the case. However, counsel is in a very difficult spot once an ethics complaint complaining about the sufficiency of his work is involved, so of course I was reluctant to say much at that point in time. Please bear in mind this is after this case was mired in nearly five (5) years of ongoing litigation. Quite frankly, the situation counsel found himself in was an unprecedented one for him, and I fell back on observing what other attorneys had done in similar circumstances. I knew that the Court's primary interest in scheduling the matter was to get the matter settled and off its docket, and frankly, at the time the Court called the case, my recollection is that I was in another hearing at that time.

Mr. Moat's "Motion for Reconsideration of Sentence" was prepared; it simply did not get filed in a timely fashion. The chance of a reconsideration of sentence in such a case, which had a confession, based upon counsel's many years of criminal experience, was next to zero, especially after I had made my best pitch for an alternative sentence at sentencing; indeed, it is my recollection that the State agreed to stand silent at sentencing. Regardless, this does not excuse my failure to file it timely; I merely plead that this was a negligent oversight, rather than a conscious failure rising to the level of an intentional or knowing mistake.

Mr. Stobart's entire file was mailed to him after the proceedings in this case were instituted. The bulk of it had already forwarded to him during the appeal process, which as previously noted, took a significant period of time. This was again due to an oversight on the part of counsel, who was of the mistaken belief that the file *had* been mailed to him previously. As noted above, the case went through pretrial motions, went to trial, Mr. Stobart was convicted, an appeal was lodged, and counsel, to the best of my information and belief, even had a couple of votes[3] to reexamine the issue of "Forgery of a Public Document." Simply stated, this was something that I believed that was already done.

Finally, your respondent acknowledges that I did not a keep good record keeping system in place for those few civil actions I pursued. It is true that I did not deposit monies into my IOLTA account, and that I executed flat fee agreements. As I am not a trained civil litigator, but have rather had to learn by experience, this oversight was freely admitted to by myself.

[3] It was 3-2, to the best of my recollection.

As noted above, I have always had a difficult time asking hard-working people for their money; especially more than once. This was admittedly a violation of IOLTA record keeping. Subsequent to these filings, I have utilized my IOLTA account during one of my few ongoing retained cases (a criminal case, it should be noted.)

In that regard, I disagree with the assertions that *State ex rel. Nebraska State Bar Association v. Holscher,* 230 N.W. 2d 75 (Neb. 1975) is proper authority for this court to consider in imposing sanctions. It is clear from *Blyler*, from this own's courts authority, that this Court has treated knowing, intentional, and negligent conduct differently, and this Court has no need to look to a 50 year old Nebraska case for guidance in making its decisions.

3. Respondent's misconduct did not cause actual injury or harm.

The injuries complained of in the above-styled case were either non-existent, or merely speculative. Indeed, if the standard an attorney has to live up to is to not incur the risk of possibly losing a case, the profession is in a very dire straight.

In the case of Tesla Lewis, it is *possible* that had the hospice nurse been willing to avail herself of testimony without a necessary subpoena, that a possible jury issue could have been presented. But that would inevitably have run head long into the argument presented by the opposing side that the last signed will was controlling, as indeed the Upshur County Commission found without even having a cursory hearing. A will contest, of which your respondent has now participated in two (2) during his career, is indeed a fraught proceeding, and is difficult to prove in its very essence.

As noted during the correspondence with ODC during this proceeding, a settlement offer

of $10,000 was presented at a very early juncture to Ms. Lewis; but she had made it clear to counsel and his office that the matter was one of principle for her. That makes for tough negotiations at the very least; indeed, the offer was swiftly declined because of principle. I acknowledge her hurt and sorrow over the result, of which I certainly shared in during her case, but the fact remains that it is pure speculation as to how the matter might have been decided by a jury. Indeed, she retained another attorney to pursue her appeal, at which time the case file was turned over to the other lawyer promptly, and the appeal was taken, which resulted in the same result as below. Simply stated, any damages which were incurred are merely speculative under these circumstances.

In the case of Mr. Ellis, his case was mediated on two (2) occasions, and countless man power hours were expended in developing his case. This included a law-enforcement assisted home visit to the property in controversy. Ultimately, there was no possibility of settlement in this case due to the posture of both the plaintiff and the defendant. Therefore, the case went to a bench trial, and the Court ruled that Mr. Browning's property encroachment amounted to a $3,500 settlement award. Counsel's problems in this case began *after* that time, at which time the controversy over the 5/8' or 5/8'' reared its ugly head. As noted above, counsel was able to get opposing counsel to hold off on a contempt hearing in February 2024, which was withdrawn by opposing counsel, but when Mr. Ellis would not sign the new deed, the matter was brought back before the Court for a second motion for contempt. By this time, as noted above, Mr. Ellis had already filed this instant ethics complaint against counsel, which resulted in counsel's reluctance to continue to represent Mr. Ellis. Indeed, after the Court had the hearing on the matter, it corrected the

deed by hand, and the matter was settled between the parties. At no point in time did the Court find Mr. Ellis in contempt. The Court simply wanted the matter resolved, settled, and off its active docket, which is quite understandable, for it had been litigated for years at that point in time. No damages were incurred by Mr. Ellis; and as stated above, counsel adamantly denies that he was overpaid by Mr. Ellis in this case.

With respect to Mr. Stobart, he remains incarcerated after his trial, his sentence, and his appeal. He indeed has the remedy remaining to him of filing a "Writ of Habeas Corpus," of which counsel expects will be filed at some point soon. As he had the bulk of his court file all along, it is unclear to your respondent what he was lacking in filing his *Losh v. McKenzie* checklist to file a habeas. *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E. 2d 606 (W.Va. 1981). That matter remains ripe for Mr. Stobart to pursue for as long as he remains incarcerated. Furthermore, I would expect that the bulk of his complaint would be along the lines of an "ineffective assistance of counsel" claim at this point in time, in view of the present posture of this proceeding. Counsel remains available to testify in that case once it is properly presented to the Circuit Court.

With respect to Mr. Moats, the chances of a "Motion for Reconsideration of Sentence" being successful in the 18th Judicial Circuit, based upon counsel's years of criminal experience, were next to zero. As stated above, his case involved a post-Mirandized confession to the West Virginia State Police, which made the possibility of successfully trying his case remote indeed. So far as his surprise at his sentence goes, several conversations were had with Mr. Moats that his best bet was to attempt to get into therapy with Community Care, to express remorse, to agree to continue to pay child support, and

remain cooperative with the Court. All of which, to his credit, he did. So I likewise share in his disappointment with the Court's sentence, but there is a difference between hoping for a different result, and actually obtaining a different result, obviously.

Finally, with respect to the IOLTA account, this account was sparingly used, admittedly, because to make a long story short, I am not nor never have been a civil litigator, primarily. I acknowledge in hindsight I should have been a better steward of client payments through the IOLTA system, but would also add that flat fees, with flexible payments made by the clients, which was the case with all the complainants in this action did not result in overpayments. In a rural state such as West Virginia, for some one who took only a few civil actions over the years, expecting clients to keep topping off their IOLTA trust accounts upon performance of services is just something I wasn't very familiar with. I would expect that this is something experienced civil litigators or family court attorneys would be much more intimate with than myself, until I have had to learn the hard way through this action.

4. There were mitigating factors that should have been considered, but of which counsel had scant opportunity to present below.

At no point during the hearing before the Hearing Panel Subcommittee given the opportunity to present mitigating factors which are set forth in caselaw, because the evidence presented by the Office of Disciplinary Counsel took up the entire day allotted for the hearing. Case law has made clear that mitigating factors can be considered by the Court:

> "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."

Syllabus Point 3, Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E. 2d 550 (W.Va. 2003).

In the above-styled cases, several of these factors should have been applicable to counsel below.

(1) Absence of prior disciplinary record/limited disciplinary measures

In the above-styled case, the Office of Disciplinary Counsel seeks the annulment of the respondent's license to practice law. This sanction is akin, as noted at the outset, to what amounts to a legal death penalty for the respondent. In the footnotes of the Petitioner's brief, ODC refers to two (2) prior "warnings," one for a "need to be true and accurate in his billings," and in *Max Lee v. Brian Bailey*. These events were from 2019 and 2021 respectively. It then references an "admonishment" in *Everett Davis v. Brian Bailey*.

We then move on to the ultimate penalty sought by ODC in these particular cases, without any intermediate steps. However, Rule 3.15 of the Rules of Lawyer Disciplinary Procedure sets forth at length what permissible sanctions may follow a hearing:

> "**Rule 3.15. Permissible Sanctions.**
> A Hearing Panel Subcommittee may recommend or the Supreme Court of Appeals may impose any one or more of the following sanctions for a violation of the Rules of Professional Conduct or pursuant to Rule 3.14: (1) probation; (2) restitution; (3) limitation on the nature or extent of future law practice; (4) supervised practice; (5) community service; (6)

> admonishment; (7) reprimand; (8) suspension; or (9) annulment. When a sanction is imposed, the Hearing Panel Subcommittee or the Court shall order the lawyer to reimburse the Lawyer Disciplinary Board for the costs of the disciplinary proceeding unless the panel or the Court finds the reimbursement will pose an undue hardship on the lawyer. Willing failure to reimburse the Board may be punished as contempt of the Court."

Michie's West Virginia Code, State Court Rules (2018).

While counsel would acknowledge these prior cases referred to in a footnote by the ODC, counsel would posit that moving on from two (2) warnings to an admonishment to an annulment skips quite a number of possible lesser sanctions.[4] Instructive in this regard is a recent case the Court has considered. In *Lawyer Disciplinary Board v. Curnutte,* No. 23-746 (opinion issued July 8, 2025), the Court ultimately imposed a six-month suspension on Attorney Curnutte for a four (4) count violation of the Rules of Professional Responsibility.

Mr. Curnutte had argued that an admonishment should suffice, but the court decided to impose the six (6) month sanction sought by the ODC. In Mr. Curnutte's case, as noted in the written opinion; "Critically, Mr. Curnutte also has been subject to prior disciplinary action. In 2020, this Court suspended his law license for ninety days for falsely reporting to the State Bar that he was covered by professional liability insurance when he knew that information was false. He also provided false policy information to a lawyer he hired to work in his firm, causing her to misrepresent that coverage to the State Bar." *Curnutte,* at pp. 23-24.

[4] Counsel must set forth for the record that in the matter of *Everett Davis*, one free walk-in consultation was had with Mr. Davis, who, upon respondent's information and belief, subsequently obtained retained another law firm to pursue his dispute. No money was ever exchanged during this brief interaction.

In the above-styled cases, your respondent has never been through this full-blown process before. Critically, there are several steps that have been skipped between an admonishment and a recommendation of an annulment. For instance, your respondent is willing to accept the consequences of his actions, but the matter could be handled by either probation; supervised practice; an agreement not to participate in civil litigation going forward; or a reprimand. Even a suspension would be more just than the draconian sanction of annulment of the respondent's law license. Considering that Attorney Curnutte was evidently previously suspended, and was given another suspension, your respondent would submit that the proposed discipline outlined by the ODC under the facts and circumstances of these cases is extremely draconian, and would ask the Court to consider a lesser suspension.

(2) Personal or Emotional Problems.

The Panel below didn't even seem to consider the circumstances as outlined below the respondent in his responses to the complaints filed or at the hearing. In short, the circumstances of the respondent's office were scarcely considered. Counsel operates as a solo practitioner who employs one legal assistant to help him with his entire law practice, which has been the case now for over seven (7) years. Ms. Heather Queen, who is alluded to many times in the complaints, has been employed in total for over ten (10) years. This is the extent of your respondent's law practice.

Your respondent has for twenty (20) years been involved in criminal law, either as a court-appointed defense attorney, or as an assistant prosecuting attorney, and a mental hygiene commissioner. During that time, your respondent's civil practice has been fairly

limited. This was a necessary precaution. Your respondent only took what he considered to be small civil actions, because of the large amounts of time that must be invested in civil actions.

My practice picked up around 2018-2019. During this time, counsel and Ms. Queen were working very long hours to attempt to manage the practice. It was around this time that the Lewis will contest matter and the Ellis property dispute were taken on. Around that time, countless hours were expended on those cases, as well as the seeming never ending supply of juvenile abuse and neglect cases, criminal cases, and my part-time work as a mental hygiene commissioner. In 2020, a couple of different things happened. First, as everyone recalls, around March 2020, the nation went into what was effectively "lockdown" mode; this spared nobody, including the Court system, which was shut down for a few months. By necessity, once the Court's reopened, civil cases were placed on the backburner, due to priority with juvenile abuse and neglect cases and incarcerated inmates. Also around 2020, the two (2) other mental hygiene commissioners in this judicial circuit left. One gentleman retired, and the other commissioner took a job as the Assistant Prosecuting Attorney of Lewis County, West Virginia. Around the same time, the time of the beginning of the pandemic, William R. Sharpe, Jr. Hospital resumed its prior practice of committing mental health patients for final commitments.[5] Within a matter of a few weeks, my caseload had expanded exponentially due to necessity. I was the only attorney handling the mental hygiene work in two (2) counties, including weekly final commitments.

[5] Upon counsel's information and belief, Sharpe Hospital had lost its certification for a few years. It evidently regained it around February 2020, which was the time period when weekly final commitment hearings resumed.

In 2021 and 2022, in fact, over 400 cases were handled each year. These obligations within a short period of time quickly ended up taking up nearly forty (40) percent of my time.

Furthermore, as alluded to above, in 2021 and early 2022, Ms. Queen lost both her mother and her husband. Both passed after extended periods of illness, which frankly necessitated her absence from the office for various periods of time. To say that I was left short-handed in this situation is an understatement. Unfortunately, this situation was to the detriment of my law practice, and there was little that could be done in the short term, because a fill in was not a viable option. I did the best I could possibly do with going to court daily, meeting with clients, answering correspondence, and keeping my practice active. But it was certainly a struggle. Ultimately, I took remedial measures and took myself off the list of appointments in a couple of counties and stopped accepting civil cases altogether. I regret not doing so earlier, but it was only with hindsight did I recognize that I was overwhelmed by the practice of law.

(3) Full and Free Disclosure to Disciplinary Board or Cooperative Attitude Towards Proceedings

During all of the proceedings below, I have maintained a cooperative posture towards the Office of Disciplinary Counsel. I have worked cooperatively with counsel for the Petitioner; including, but not limited to, going to Charleston to provide a sworn statement and appearing for the hearing in front of the Hearing Panel Subcommittee. Prior to the hearing, upon representations by ODC that stipulations would be prepared as agreed between the Statement of Charges and the Answer filed, days prior to the hearing in January 2025, agreed stipulations were submitted to counsel. Taking it on good faith that

these stipulations were as agreed, I signed off on them.

With respect to answering complaints, it has always been my practice to take a complaint very seriously, even if I find it to be unjustified or frivolous. As the Court is well aware, anyone claiming an attorney-client relationship can file a complaint, and it almost always be responded to. Over the years, I have indeed done so. There are allegations by the ODC that I did not respond to some of these complaints. In fact, if that is the case, it is because I never actually received them. If I receive them, I answer them.

During the actual hearing in front of the Hearing Panel Subcommittee, the petitioner proceeded to take evidence during the entire one (1) day allotted for the hearing. In trying to defend myself during the proceedings, I find myself instead accused of "trying to blame my clients." In fact, my goal is merely to explain my actions, including all shortcomings, whether that is recognized or not.

When it came time to submit proposed findings of fact and conclusions of law, the ODC submitted around a 70-page brief, while I replied with somewhere around a 20-page brief in response. The Hearing Panel Subcommittee adopted the Petitioner's brief without considering a word of my response, or my pleas in mitigation.

I have never been through this process before. It has been an incredibly eye-opening experience for me, regardless of the outcome.

(4) Character or Reputation

As noted above, counsel has had limited disciplinary measures filed against him in the past. It is difficult for someone to write about their own "character or reputation," particularly in a context such as this, but it should be noted by the Court that I believe I

remain a trustworthy attorney, one who is still handling the Court's mental hygiene proceedings in two (2) counties, as well as one who remains on the list of appointed attorneys in Upshur and Lewis counties, which are relatively rural areas, with a relatively small bar. I also do a small amount of federal criminal defense work, which is anything but easy.

The biggest issue I take with these allegations from ODC is that I overcharged my clients. That is just simply not the case. I have always previously sought to provide affordable legal services to local citizens. This is certainly not an occupation for which one becomes fabulously wealthy in a state like West Virginia. If I were in a better financial position, I would have long ago provided my assistant a raise, and wouldn't have had to continue to grind for as many years as I have. This has been my profession. It is one in which I continue to take great pride. There are certainly better avenues to go and make more money than doing primarily court-appointed work.

Not being one who likes to brag on myself, for this is not my nature whatsoever, I also am compelled by these circumstances to point out that I have volunteered for West Virginia Tuesday legal connect for the last couple of years. I have found this sort of work to be rewarding, even if I do not have all the answers; it is nice to be able to speak to people to at least attempt to point them in the right direction. I have of course also helped countless people over the years unpaid with legal issues as well. I have found that this is just the nature of the beast, when people find out you are an attorney. Suffice it to say that it is hard to speak of one's character and reputation when you find yourself in a situation such as this case.

(5) Delay in Disciplinary Proceedings

On or about June 2023, as previously noted, I appeared in Charleston, West Virginia, to provide a sworn statement as requested by the Office of Disciplinary Counsel. And then, I awaited my fate. And waited some more. An entire year passed, and in late June 2024, the present "Statement of Charges" was filed by the Office of Disciplinary Counsel. As required, I answered the charges, and then a hearing was scheduled finally for January 2025. After the hearing in January, around March of 2025, the present recommendations were filed by the Office of Disciplinary Counsel, to which I responded. Much to my dismay, but in retrospect not to my surprise, considering the way the proceeding was conducted, the Hearing Panel Subcommittee adopted the ODC's recommendations verbatim.

Subsequently, I lodged my objection, which has triggered the Petitioner's brief and this response. As of the preparation of this pleading, I have waited for over two (2) years for some kind of resolution to these charges.

On a purely personal level, I cannot even begin to quantify the amount of lost sleep, stress, worry, uncertainty, and dread the length of this proceeding has caused me. During the entire time I have been dealing with the consequences of my actions, I have maintained a full-time law practice to continue to assist my clients. I have become engaged to a wonderful woman, and have a family with her eleven (11) year old daughter as part of the equation, but have had to necessarily delay marriage plans and plans to start our lives together due to the level of uncertainty involved in this process. But once again, I only state this because this is listed as a mitigating factor, not because I like to talk about my personal business.

(6) Remorse

The petitioner's brief makes light of my remorse for these cases. I deeply regret the loss of my cases. With respect to Ms. Lewis, I deeply regret the outcome of her case, because I believe she was wronged by unscrupulous people, however hard that fact would have been to prove in a court of law. Contrary to what has been set forth by the ODC, at no point did I abandon her case. I accept that I missed one deadline, and that my communication could have been better towards the end of the case.

With Mr. Ellis, I should have appeared at his contempt hearing, notwithstanding his ethics complaint against me at that time. It was indeed a highly contentious case, as illustrated by the need to have law enforcement involved in a simple property view, and should have taken the appropriate step of filing a "Motion to Withdraw as Counsel."

Mr. Stobart received my best legal advice and work; the primary contention in his case is that I did not respond to some letters he wrote to me. I acknowledge that I did not do so, at least to the ones I received, because I simply had no information to provide him at that time, as I was awaiting the Court's resolution of his appeal. The better practice obviously would have been to respond to him that I had no information to provide, rather than to move on to my next task. I do submit that he remains in the same position he was at the time of his complaint, for he remains free to file his "Writ of Habeas Corpus" to challenge his incarceration due to the length of his sentence.

As for Mr. Moats, I did my best to represent him, and put him in the most favorable position possible for his sentencing hearing, as set forth above. I acknowledge that I failed to file his "Motion for Reconsideration of Sentence," and accept that I should have do so. I

made the best argument for him I could have, and believed his lack of criminal history made him a good candidate for an alternative sentence. However, despite his taking all my legal advice, things did not turn out favorably for him. That ultimately is the Court's prerogative, which was explained to him throughout my representation.

In summary, I sincerely regret my mistakes, and how they have affected my clients. I have always strived to do my best, and continue to do so, even when my actions fell short of what was necessary.

V. The Recommended Sanction Below was Excessively Harsh Under the circumstances presented

Your respondent would submit that under the circumstances as contemplated by Rule 3.16 of the West Virginia Rules of Professional Conduct, the sanction recommended below was excessively harsh. While counsel acknowledges and has acknowledged that he violated the Rules of Professional Conduct, as contemplated by the first prong of the factors, he submits that he did so negligently, not knowingly or intentionally, as contemplated by the second prong. Considering the amount of actual or potential injury caused by the respondent's misconduct, as set forth in the third prong, counsel would submit that at most the potential harm was theoretical, and not actual. Furthermore, as outlined above, counsel submits that he did not even have the opportunity below at the HPS to set forth any mitigating factors; the record will reflect that the hearing ended with counsel being lectured, rather than being given an opportunity to respond to the allegations. Counsel would submit that the failure to consider any mitigating factors was clearly erroneous, and results in their wholesale adoption of ODC's proposed findings of fact and conclusions of law not being supported by reliable, probative, and substantial

evidence on the whole record. See Syllabus Point 3, *Committee on Legal Ethics v. McCorkle,* 192 W.Va. 286, 452 S.E. 2d 377 (W.Va. 1994); Syllabus Point 1, *Law. Disciplinary Bd. v. Cain*, 245 W.Va. 693, 865 S.E. 2d 95 (W.Va. 2021).

VI. Conclusion

Your respondent submits that the appropriate sanction should have been a lesser penalty such as a reprimand; legal probation through supervised practice; the prohibition of civil litigation practice going forward; community service with participation in further ethics classes; or even a shorter period of suspension; rather than the effective death penalty of annulment asked for by the ODC.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I, Brian W. Bailey, Respondent, on this the **17th** day of **September**, **2025**, hereby certify that I served a true copy of the foregoing "Brief of the Respondent" upon the Petitioner, Kristin P. Halkias, electronically via File & Serve Xpress to the following e-mail address: khalkias@wvodc.org.

/s/ Brian W. Bailey
Respondent