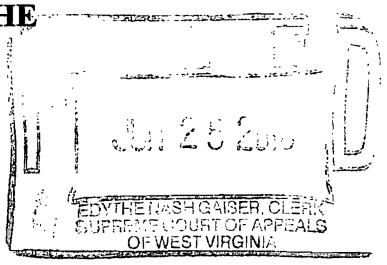
IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA



LAWYER DISCIPLINARY BOARD,

Petitioner,

v. **No. 17-0007**

KOURTNEY A. RYAN,

Respondent.

BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. STATEMENT OF THE CASE

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

This is a disciplinary proceeding against Respondent Kourtney A. Ryan, (hereinafter "Respondent"), arising as the result of a Statement of Charges issued against him and filed with the Supreme Court of Appeals of West Virginia on or about January 3, 2017. Respondent was served with the Statement of Charges on January 11, 2017.

Respondent did not file an Answer. The Office of Disciplinary Counsel (hereinafter referred to as "ODC") filed its mandatory discovery on January 31, 2017. Respondent failed to provide his mandatory discovery, which was due on or before March 2, 2017. Chief Disciplinary Counsel filed a Motion to Deem the Factual Allegations Admitted and Motion to Exclude Testimony of Witnesses And/or Documentary Evidence or Testimony of Mitigating Factors on April 20, 2017.

A pre-hearing on the was held on May 4, 2017, at which time, Respondent appeared personally and advised the Hearing Panel Subcommittee (hereinafter referred to as "HPS") and Chief Counsel that he was suffering from a medical condition that impaired his ability to participate in the upcoming evidentiary hearing. Respondent advised he would get a letter from a medical care provider to support his claim that he was unable to participate. Respondent represented to the HPS that he was no longer practicing law and was in North Carolina being cared for by his daughter. Respondent advised the HPS he was unable to attend the May 11, 2017 evidentiary hearing, but had no objection to ODC's request for the factual allegations to be admitted. Respondent further advised that he intended to contact the West Virginia State Bar to change his license status to "inactive." The motions were held in abeyance by the HPS at the May 4, 2017 pre-hearing pending the receipt of

medical information to be provided by Respondent and the parties agreed to reconvene on May 11, 2017.

After not receiving any medical records or any follow-up communication, ODC sent Respondent ~~an~~ email on May 10, 2017. Respondent did not reply. On or about May 11, 2017, a status telephone conference was held and the HPS, Chief Counsel and Respondent appeared by phone. Respondent represented that he was now with his sister in Florida and had been too ill to obtain a letter from a medical professional detailing his condition. Respondent's wife represented to the HPS that she would send a letter from a medical professional within two weeks. The HPS generally continued the evidentiary hearing so as to afford Respondent an opportunity to produce medical records to establish his condition.

On June 2, 2017, ODC sent a letter to Respondent again requesting an update as to the status of his medical condition. Respondent did not reply.

On or about August 23, 2017, ODC sent Respondent notice of a August 31, 2017 telephonic status conference via first class mail and electronic mail. The first class mail was not returned to ODC. ODC received no notification that the email was not successfully transmitted to Respondent. ODC sent a reminder email and left a detailed message on Respondent's voice-mail. Regardless, Respondent did not participate.

On or about September 11, 2017, ODC sent Respondent a letter via first class mail and via certified mail again requesting a status update as to his medical condition. ODC sent Respondent a medical authorization and release for his signature. On or about September 13, 2017, ODC sent Respondent notice of the October 2, 2017 pre-hearing and notice setting this matter for final hearing for October 20, 2017.

Respondent did not participate in the October 2, 2017 pre-hearing. After no reply from Respondent, on or about October 2, 2017, ODC sent a letter via first class and certified mail to both the Buckhannon, West Virginia address on file for Respondent and a post office box address in Palm Bay, Florida for Respondent. ODC again advised of the dates of the final evidentiary hearing in this matter. On or about October 19, 2017, the certified copy of the October 2, 2017 Palm Bay, Florida letter was returned to ODC marked "refused."

Despite multiple requests, Respondent failed to provide any medical documentation, failed to respond to any further requests for information from Chief Counsel, and failed to otherwise participate in the disciplinary matter. Thereafter, this matter proceeded to hearing in Charleston, West Virginia, on October 20, 2017. The HPS was comprised of Jay T. McCamic, Esquire, Chairperson, Richard Yurko, Esquire, and Rev. Robert R. Wood, Layperson. Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. Respondent did not appear. After delaying the matter for twenty minutes waiting for and/or trying to contact Respondent, the HPS heard testimony from Daya Masada Wright, Esquire and Complainant Dreama Cook. In addition, ODC Exhibits 1-6 and 8-21 were admitted into evidence and ODC Exhibit 7 was admitted Under Seal by Summary Exhibit. ODC renewed its motion to deem the factual allegations admitted and the HPS granted ODC's motion. On or about November 3, 2017, ODC submitted Exhibit 22 and moved the HPS to enter the same into the evidentiary record.

On or about December 19, 2017, ODC filed "Chief Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions." Respondent did not file a pleading at this stage.

On or about February 22, 2018, the HPS filed its "Recommended Decision of the Hearing Panel Subcommittee of the West Virginia Lawyer Disciplinary Board Findings of Fact, Conclusions

of Law and Recommended Sanctions" (hereinafter referred to as "HPS Report"). On March 16, 2018, Chief Counsel filed its consent to the HPS Report. Respondent did not file a consent or an objection to the HPS Report.

By ~~Order~~ entered May 9, 2018, this Honorable Court ordered this matter scheduled for oral argument under Rule 20 of the Rules of Appellate Procedure and set a briefing schedule for the parties.

B. FINDINGS OF FACT

At the time relevant to the Statement of Charges, Respondent was a lawyer practicing in Buckhannon, which is located in Upshur County, West Virginia. Respondent was admitted by diploma privilege to The West Virginia State Bar on May 17, 1988. 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. At the time of the filing of this pleading, Respondent's law license is suspended for failure to pay Bar dues and failure to complete the financial responsibility disclosure. His address on the Bar's website reflects a Florida address.

COUNT I
I.D. No. 15-03-042
Complaint of Daya Masada Wright

Pursuant to her reporting requirements under Rule 8.3 of the Rules of Professional Conduct, Daya Masada Wright, Esquire, filed this complaint against Respondent on or about January 28, 2015. [ODC Exhibit 1] On or about October 22, 2012, Respondent was appointed as a guardian *ad litem* for P.C. and L.C. in an abuse and neglect case arising from Upshur County Court Actions 12-JA-25 and 12-JA-26. [ODC Exhibit 1 and ODC Exhibit 7 at 34]. A final hearing was held on or about January 17, 2014, and a Final Order: Stipulated Disposition was entered on that same date. Permanent legal guardianship of the two minor children was granted to Terry and Brenda Crouse,

the maternal great uncle and great aunt. [ODC Exhibit 7 at 257 and 274] The Crouses continued to experience visitation issues with the paternal grandmother and father, and at some point, believed that they needed to retain counsel to protect their interests.

On or about June 16, 2014, according to Attorney Wright's verified complaint and testimony, Respondent directed Mr. and Mrs. Crouse to meet him at the Buckhannon Pizza Hut and to bring Two Thousand Five Hundred Dollars ($2,500.00) as a retainer fee for him to represent the Crouses in ongoing issues with P.C. and L.C.'s paternal grandmother and father. [ODC Exhibit 1] Respondent gave the Crouses a receipt for monies received reflecting the $2,500.00 retainer fee and the receipt indicated it was a case "involving child custody and visitation dispute." [ODC Exhibit 1 at 4]

On or about September 30, 2014, the paternal grandmother, Dreama D. Cook, filed a petition for contempt and sent a letter to the Court claiming that the Crouses were in contempt of the Court order in regards to visitation. [ODC Exhibit 7 at 277] On or about October 7, 2014, Ms. Cook requested the Court conduct an emergency hearing on the contempt petition. A hearing in the underlying abuse and neglect matter was scheduled for November 14, 2014, and the Crouses and Respondent in his capacity as the guardian *ad litem* for the children were noticed by the Court. Respondent appeared at the hearing in his capacity as the guardian *ad litem* for the children. At no time did he disclose to the Court that the Crouses had retained him and/or paid him a retainer fee. At the conclusion of this hearing, the Court did not alter the Order, but instead encouraged the parties to cooperate to ensure reasonable visitation. The Order, which maintained the existing guardianship and visitation, indicated that Respondent was the guardian *ad litem* for the children and the Crouses were *pro se.*

In addition to their confusion about why Respondent did not represent their interest at the hearing, the Crouses were concerned with Respondent's representations to the Court regarding his actions as the guardian *ad litem* for the children. Specifically, Respondent stated that he met with the children, and the Crouses advised Attorney Wright at no time did Respondent see the children prior to the hearing. [Transcript at 30] On or about November 18, 2014, the father filed a petition to terminate guardianship. A notice of appearance of his counsel was filed on December 5, 2014. [ODC Exhibit 7 at 313]

An amended petition for contempt and a rule to show cause was filed by and through counsel for Dreama Cook on or about December 23, 2014. The petition clarified that the father and Ms. Cook were represented by the same counsel of record. [ODC Exhibit 7 at 319] Attorney Wright said she was subsequently retained by the Crouses to represent their interests in the petition for contempt and rule to show cause. Attorney Wright filed her notice of appearance on January 21, 2015. [ODC Exhibit 7 at 563] In her report to ODC, Attorney Wright stated upon learning that the Crouses had previously retained Respondent to represent their interests as the guardians in the abuse and neglect case, she discussed the matter with them and was advised that Respondent did not discuss a potential conflict of interest with the Crouses. She further stated that the Crouses did not give informed consent to any potential conflict of interest. Attorney Wright finally stated that since P.C. and L.C. are minors, they would be incapable of providing informed consent to any simultaneous representation by Respondent. [ODC Exhibit 1] Attorney Wright further stated the Crouses never received any billing information from Respondent regarding legal services performed by him on their behalf or the status of any remaining retainer moneys held by him. [ODC Exhibit 1]

By Order entered January 23, 2015, the Court, *sua sponte*, provided notice that a status hearing would be conducted on March 4, 2015. The Order reflects that Respondent is the guardian *ad litem* for the children. [ODC Exhibit 7 at 565]

By letter dated January 29, 2015, ODC sent a copy of this complaint to Respondent and requested a verified response to the same within twenty days of receipt of the same.[ODC Exhibit 2] On or about January 30, 2015, Attorney Wright filed an answer to the contempt petition and the petition to terminate the guardianship on behalf of the Crouses. The certificate of service reflects that Respondent is the guardian *ad litem* for the minor children. [ODC Exhibit 7 at 570]

On or about February 6, 2015, a supplement to the amended petition to terminate the guardianship was filed by the father, by and through counsel. The certificate of service reflects that Respondent is the guardian *ad litem* for the minor children. [ODC Exhibit 7 at 575]

Respondent filed a verified response to the complaint on or about February 13, 2015. [ODC Exhibit 3] In his verified written response to the ethics complaint and his subsequent sworn statement, Respondent stated the Crouses contacted him regarding issues they were experiencing with the father and paternal grandmother of P.C. and L.C. Respondent stated he advised the Crouses that while the guardianship matter was concluded, he could not represent them, as it would be a conflict of interest. Respondent said he could only represent the interests of the children. Respondent stated the Crouses nonetheless requested that he assist them regarding the issues they were having regarding visitation. [ODC Exhibit 3 and 20] Respondent maintained that at no time was he misleading or deceptive. He stated that all information or advice given to the Crouses was meant to be in the best interest of the children. He said he further advised the Crouses that if another action was pursued by the father and grandmother of the children, they would need to retain other counsel,

because Respondent's involvement "would always be representing the best interest of the children." [ODC Exhibit 3] Respondent stated he had since withdrawn as the guardian *ad litem* and returned the $2,500.00 to the Crouses by cashier check dated February 2, 2015. [ODC 7 at 592] By letter dated February 17, 2015, Respondent sent a letter to the Court and stated that based upon the existence of a conflict of interest, he believed that was proper and appropriate that he be relieved as the guardian *ad litem* and that new counsel be appointed. [ODC Exhibit 7 at 588]

On February 24, 2015, ODC filed a motion to obtain certified copies of the abuse and neglect file. An Order was entered February 26, 2015. [ODC Exhibit 4 and ODC Exhibit 6] By Order entered February 27, 2015, new counsel was appointed to serve as guardian *ad litem* on behalf of the minor children. [ODC Exhibit 7 at 594]

Attorney Wright testified that Ms. Crouse died three days before the final hearing in the guardianship case, but her husband was ultimately awarded permanent legal guardianship of the children. [Transcript at 26]

The vouchers submitted to Public Defender Services by Respondent do not reflect that Respondent was paid for any services after April 26, 2014. [ODC Exhibit 22]

COUNT II
I.D. No. 15-09-175
Complaint of Dreama D. Cook

Complainant Dreama D. Cook filed this complaint against Respondent on April 23, 2015. [ODC Exhibit 11] Complainant is the paternal grandmother of P.C. and L.C. Her complaint focused on Respondent's conduct as the guardian *ad litem* that occurred between December 2012 and January of 2013. [ODC Exhibit 11] This matter was initially closed by the Office of Disciplinary Counsel on April 28, 2015, as the allegations appeared to be time-barred pursuant to Rule 2.14 of

the Rules of Lawyer Disciplinary Procedure. [ODC Exhibit 12] On or about July 30, 2015, Complainant filed an appeal to the closure, stating that Respondent "took money to represent the Crouses" without disclosure to the Court or the parties and that she believed the same to be a conflict of interest. [ODC Exhibit 13-15] Complainant's appeal was presented to the Investigative Panel at its September 19, 2015 meeting. The Investigative Panel voted to reopen the complaint and direct Respondent to file a verified response.[ODC Exhibit 17]

By letter dated October 1, 2015, ODC sent a copy of this complaint to Respondent and requested a verified response to the same within twenty days of receipt of the same.[ODC Exhibit 18] In his October 22, 2015 verified response and subsequent sworn statement, Respondent denied Complainant's allegations and stated that he advised the Crouses that he was not the attorney to represent their best interests as he could only represent the interests of the minor children, and any advice he would give them would be focused on the best interests of the children. [ODC Exhibit 19]

Ms. Cook testified at the evidentiary hearing that "a guardian *ad litem* should be neutral..looking at the best interest of the children, like what the children want and what's the best outcome for the children. So he was again, siding with, you know the Crouses, took the money from them. So that was wrong." [Transcript at 57]

C. CONCLUSIONS OF LAW

Respondent was retained by the Crouses on June 16, 2014, and the simultaneous representation as the guardian *ad litem* of the minor children and their legal guardians is an non-consentable *per se* conflict of interest and is in violation of Rule 1.7, Rule 1.16(a)(1), and Rule 8.4(d) of the Rules of Professional Conduct.[1]

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[1] As this misconduct occurred before January 1, 2015, the former version of the Rules of Professional Conduct applies.

Respondent failed to advise the Crouses of the conflict of interest and, instead, bargained for and accepted a retainer fee for legal services in violation of Rule 1.4 and Rule 8.4(c) of the Rules of Professional Conduct.[2]

Rule 1.7. Conflict of interest: General rules.
(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
(2) each client consents after consultation.
(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.16. Declining or terminating representation.
(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
(1) the representation will result in violation of the rules of professional conduct or other law.

Rule 8.4. Misconduct.
It is professional misconduct for a lawyer to:
* * *
(d) Engage in conduct that is prejudicial to the administration of justice.

[2] As this misconduct occurred before January 1, 2015, the former version of the Rules of Professional Conduct applies.

Rule 1.4. Communication
(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 8.4. Misconduct.
It is professional misconduct for a lawyer to:
* * *
c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

After refusing to represent the interests of the Crouses, Respondent continued the representation as the guardian *ad litem* of the minor children until February 17, 2015, and the same is a violation of Rule 1.7, Rule 1.9, and Rule 1.16(a)(1) of the Rules of Professional Conduct.[3]

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[3] As this misconduct occurred before and after January 1, 2015, the former and current version of the Rules of Professional Conduct apply.

> **Rule 1.7. Conflict of interest: General rules.**
> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
> (2) each client consents after consultation.
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

> **Rule 1.7 Conflict of Interest; Current Clients.**
> **[Effective January 1, 2015]**
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
> (1) the representation of one client will be directly adverse to another client; or
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

> **Rule 1.9. Conflict of interest: Former client.**
> A lawyer who has formerly represented a client in a matter shall not thereafter;
> (a) represent another person in the same or substantially related matter in which the person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

Respondent had been retained by the Crouses and appeared as the guardian *ad litem* for the minor children at the November 14, 2014 hearing and he failed to disclose the same to the Court until February of 2015, in violation of Rule 3.3(a)(1), Rule 8.4(c), and Rule 8.4(d) of the Rules of Professional Conduct.[4]

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

Rule 1.9 Duties to Former Clients.
[Effective January 1, 2015]
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,
(1) whose interests are materially adverse to that person, and
(2) about whom the lawyer has acquired information protected by Rule 1.6 and 1.9 c) that is material to the matter unless the former client gives informed consent, confirmed in writing.
(c A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.16 Declining or Terminating Representation.
[Effective January 1, 2015]
(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
(1) the representation will result in violation of the Rules of Professional Conduct or other law.

[4] As this misconduct occurred before and after January 1, 2015, the former and current version of the Rules of Professional Conduct apply.

Rule 3.3 Candor toward the tribunal.
(a) A lawyer shall not knowingly:
(1) make a false statement of material fact or law to a tribunal.

II. SUMMARY OF ARGUMENT

ODC asserts that the findings of fact and conclusions of law made by the HPS of the Lawyer Disciplinary Board in its HPS Report were correct and supported by reliable, probative, and substantial evidence on the whole adjudicatory record. The HPS correctly found that Respondent committed multiple violations of the Rules of Professional Conduct and recommended that based upon the aggravating factors and the underlying misconduct, that Respondent's law license be suspended indefinitely. The HPS was clear that based upon his conduct in these proceedings that prior to petitioning for reinstatement after a period of at least 2 years from the date of suspension that Respondent be required to produce a medical opinion from an independent medical examiner indicating he is fit to engage in the practice of law. Although Respondent's law license is currently administratively suspended by the West Virginia State Bar, the HPS further recommended that Respondent be ordered to comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure in closing his practice. Finally, the HPS recommended that Respondent be

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Rule 3.3 Candor toward the tribunal.
[Effective January 1, 2015]
(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

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.

Rule 8.4. Misconduct.
[Effective January 1, 2015]
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.

ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.[5]

In ordering such sanctions in these proceedings, the Court will be serving its goals of protecting the public, reassuring the public as to the reliability and integrity of attorneys, and safeguarding its interests in the administration of justice.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Honorable Court's May 9, 2018 Order set this matter for oral argument on September 19, 2018, pursuant to Rule 20 of the Rules of Appellate Procedure.

IV. ARGUMENT

A. STANDARD OF PROOF

In lawyer disciplinary matters, a *de novo* standard of review applies to questions of law, questions of application of the law to the facts, and questions of appropriate sanction to be imposed. Roark v. Lawyer Disciplinary Board, 201 W. Va. 181, 495 S.E.2d 552 (1997); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994). The Supreme Court of Appeals gives respectful consideration to the Lawyer Disciplinary Board's recommendations as to questions of law and the appropriate sanction, while ultimately exercising its own independent judgment. McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381.

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[5] Rule 24(d) of the Rules of Appellate Procedure states that "[i]f the Court directs that costs be paid in connection with a lawyer . . . disciplinary action, disciplinary counsel shall, within twenty days of entry of the applicable order, memorandum decision, or opinion, provide the Court and the respondent in the disciplinary action with a certified statement of the costs as specified by the Court." Pursuant to the Supreme Court's directive to ODC, Respondent is advised that if a judgment is issued against him in which disciplinary costs are imposed then "post-judgment interest will accrue as per state Code....".

Substantial deference is to be given to the Lawyer Disciplinary Board's findings of fact unless the findings are not supported by reliable, probative, and substantial evidence on the whole record. McCorkle, Id.; Lawyer Disciplinary Board v. Cunningham, 195 W. Va. 27, 464 S.E.2d 181 (1995). At the Supreme Court level, "'[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board." Cunningham, 464 S.E.2d at 189; McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381.

The charges against an attorney must be proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. *See*, Syl. Pt. 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995).

The Supreme Court of Appeals is the final arbiter of formal legal ethic charges and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys licenses to practice law. Syl. Pt. 3, Committee on Legal Ethics v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984); Syl. Pt. 7, Committee on Legal Ethics v. Karl, 192 W.Va. 23, 449 S.E.2d 277 (1994).

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

The Supreme Court of Appeals of West Virginia has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but also to protect the public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard its interests in the administration of justice. Lawyer Disciplinary Board v. Taylor, 192 W.Va. 139,451 S.E.2d 440 (1994). Factors to be considered in imposing appropriate sanctions are found in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure. These factors consist of: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether

the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. *See also,* Syl. Pt. 4, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998). A review of the record in this matter indicates that Respondent has transgressed all four factors set forth in Jordan.

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

Respondent, a senior member of the Bar, while serving as guardian *ad litem* for minor children, negotiated for and received payment to become the lawyer for another party in the case -- namely the legal custodians of the minor children the Court entrusted him to represent without disclosing the same to the Court or the other parties. It is difficult to envision a more clear *per se* conflict of interest so rife with deception.

The duties of a guardian *ad litem* are laid out in Syllabus Point 5 of In re Jeffrey R.L., 190 W.Va. 24, 435 S.E.2d 162 (1993), *as quoted* by In re Christina W., 219 W. Va. 678, 684, 639 S.E.2d 770, 776 (2006):

> Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, *W. Va. Code,* 49–6–2(a) [1992] mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. Furthermore, Rule XIII of the *West Virginia Rules for Trial Courts of Record* provides that a guardian *ad litem* shall make a full and *independent* investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the *West Virginia Rules of Professional Conduct,* respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client. The Guidelines for Guardians *Ad Litem* in Abuse and Neglect cases, which are adopted in this opinion and attached as Appendix A, are in harmony with the applicable provisions of the *West Virginia Code,* the *West Virginia Rules for Trial Courts of Record,* and the *West Virginia Rules of Professional Conduct,* and provide attorneys who serve as guardians *ad litem* with direction as to their duties in representing the best interests of the children for whom they are appointed...

> Thus, the role of guardian *ad litem* extends beyond that of an advocate and encompasses also a duty to safeguard the best interests of the child[ren] with whose representation the guardian has been charged. Footnotes omitted and emphasis added.

Respondent accepted his appointment by the court and appeared as the guardian *ad litem* representing the interests of the two infant children. The parents of the children were the subject of abuse and neglect proceedings. The father was incarcerated and had a serious addiction problem, the mother suffered from serious depression and addiction and neither appeared to have been able to care for the children. There were competing interests from the father, the paternal grandmother, Ms. Cook and the maternal great Uncle and Aunt, Mr. and Mrs. Crouse, who all were in dispute regarding various aspects of the custody and visitation of the children.

Inconceivably, while this dispute was ongoing, Respondent represented to the Court that he was appearing as the guardian *ad litem* and did not disclose that he had taken a retainer fee from Mr. and Mrs. Crouse to represent their interests. He did not inform the Court that his role in the matter was anything but that of the guardian *ad litem.* Respondent took no action to correct the record on various notices and other pleadings where he was designated as the guardian *ad litem.* At an emergency hearing regarding the varied interests of the parties, the Crouses were surprised in the courtroom to find Respondent, their retained lawyer, take the table set aside for the guardian *ad litem* while they were left alone at a separate table set aside for them. They were also surprised to hear Respondent proffer to the Court that he had met with the children when they knew, as the custodian for the children, that no such meeting had taken place. The HPS determined that "Respondent's explanations for his actions relating to this clear conflict and lack of candor to the Court frankly make no sense." [HPS Report at 17]

Lawyers owe duties of candor, loyalty, diligence and honesty. Members of the public should be able to rely on lawyers to protect their property, liberty, and their lives. Lawyers are officers of

the court, and as such, must operate within the bounds of the law and abide by the rules of procedure which govern the administration of justice in our state. Furthermore, a lawyer's duties also include maintaining the integrity of the profession. The Supreme Court has noted that "[O]ur profession is founded, in part, upon the integrity of the individual attorney in his dealings with the public in general and his clients in particular." Office of Lawyer Disciplinary Counsel v. Tantlinger, 200 W.Va. 542, 490 S.E.2d 361 (1997).

2. Respondent acted intentionally and knowingly.

There is no evidence to contradict that Respondent's misconduct was intentional and knowing.

3. The potential amount of real injury was great.

The potential for real injury to the parties in this case, specifically the infant children, and the legal system was enormous. While, it is noted that upon his withdrawal as guardian *ad litem,* Respondent returned the retainer fee to the Crouses after the conflict was detected which neutralized the real financial injury suffered by the Crouses, more Court proceedings were necessary to address the conflict of interest and Respondent's actions as the guardian *ad litem* delayed permanency for his clients.

> As should be apparent to any guardian *ad litem*, needless delay is not only a gross disservice to his or her infant client, but also actively perpetuates the continuing harm occasioned by the lack of permanency. Unjustified procedural delays wreak havoc on a child's development, stability and security. When that delay is directly attributable to the dereliction of the court-appointed guardian ad litem, the guardian has abdicated his or her responsibilities to the child so fully that it is difficult to surmise of a more egregious failure within our abuse and neglect system.

Lawyer Disciplinary Bd. v. Cooke, 239 W. Va. 40, 53, 799 S.E.2d 117, 130 (2017) *citing* Syl. Pt. 1, in part, In re Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991). Indeed, it was only because

Attorney Wright brought the conflict to the attention of the Court, that additional injury to the children was mitigated by the appointment of a new guardian *ad litem* to protect their interests.

In a recent disciplinary opinion sanctioning a guardian *ad litem* Chief Justice Workman opined in her opinion wherein she concurred in part, and dissented in part from the majority that:

> There can be no question that court-appointed infant clients in abuse and neglect matters are the most vulnerable victims in our judicial system. They deserve the very best of any lawyer who is appointed as a guardian *ad litem*: the most conscientious, deliberate, thoughtful, and mature representation. These children should not be relegated to those unable—either emotionally or professionally—to represent their interests with a high degree of competence, compassion, and vigor. Nor should they be placed at the bottom of the heap in this Court's prioritization of the importance of the protection of the public generally. Tragically, these proceedings all too frequently have life-or-death consequences, as illustrated in many cases where children have died as the result of abuse and/or neglect.

Lawyer Disciplinary Board. v. Thompson, 238 W.Va. 745, 773, 798 S.E.2d 871, 899 (2017). Respondent's conduct in this case falls woefully short of the representation the most vulnerable in our justice system demands.

Because the legal profession is largely self-governing, it is vital that lawyers abide by the rules of substance and procedure that shape the legal system. Indeed, the rules enacted by the Supreme Court of Appeals governing the practice of law and conduct of lawyers have the force and effect of law. *See* W.Va. Const. Art. VIII, §3. Respondent's noncompliance with the Rules of Professional Conduct, as exhibited in the record, is clearly detrimental to the legal system and legal profession, and his conduct has brought the legal system and profession into disrepute. The conduct exhibited by Respondent is driven by financial greed and undermines the integrity of the profession and public confidence in the administration of justice.

4. The existence of any aggravating factors.

Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Court to examine when considering the imposition of sanctions. Elaborating on this rule, the Scott Court held that aggravating factors in a lawyer disciplinary proceeding are any considerations, or factors that may justify an increase in the degree of discipline to be imposed. Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E. 2d 550, 557 (2003) *quoting ABA Model Standards for Imposing Lawyer Sanctions,* 9.21 (1992). The aggravating factors present in this case are 1. substantial experience in the practice of law; 2. multiple offenses constituting a pattern of misconduct; 3. failure to participate in the disciplinary proceedings; and 4. and, the most critical, the misconduct occurred while he was serving in the position of guardian *ad litem* for minor children in an abuse and neglect matter.

5. The existence of mitigating factors.

In addition to adopting aggravating factors in Scott, the Scott court also adopted mitigating factors in a lawyer disciplinary proceedings and stated that mitigating factors are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E.2d 550, 557 (2003) *quoting ABA Model Standards for Imposing Lawyer Sanctions,* 9.31 (1992). It should be clear that mitigating factors were not envisioned to insulate a violating lawyer from discipline.

During the pendency of this matter the HPS did its best to accommodate Respondent who made vague references to alleged medical problems he was having. Respondent referred to serious medical problems dating back to 2003 that apparently had long been resolved and then later seemed to indicate that those or other medical problems had reoccurred. Simple verification of those current problems was requested in various forms and was never received in any form. Respondent did admit

the factual allegations of the instant complaint but refused to participate in general and specifically in the evidentiary hearing or otherwise respond to numerous notices and requests for information. As such, the HPS determined there are no mitigating factors present in this case.

V. SANCTION

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syllabus Pt. 3, in part, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), *cited in* Committee on Legal Ethics v. Morton, 186 W.Va. 43, 45, 410 S.E.2d 279, 281 (1991). In addition, discipline must serve as both instruction on the standards for ethical conduct and as a deterrent against similar misconduct to other attorneys. In Syllabus Point 3 of Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987), this Court stated:

> In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.

Moreover, a principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344,518 S.E.2d 101 (1999).

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

> Standard 4.32. Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

Although ODC submits the misconduct was knowing and intentional, a lawyer need not act with the objective to cause injury to warrant a suspension. Suspension under this Standard is generally appropriate when the lawyer knows of the conflict and fails to reveal it and a lawyer's knowledge can and should be inferred from the circumstances.

The *ABA Model Standards for Imposing Lawyer Sanctions* also provide that absent any aggravating or mitigating circumstances, the following sanction is generally appropriate in cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client:

> Standard 4.62. Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

A lawyer's failure to disclose information to a client regarding a conflict of interest or the failure to disclose a material fact, such as the impermissibility of the dual representation by law, constitutes deception warranting suspension under this Standard.

Finally, the Standards further indicate that:

> Standard 6.12. Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party or to the legal proceeding, and causes an adverse or potentially adverse effect on the legal proceeding.

Misconduct under this Standard is not limited to affirmative false statements, but also may arise from a lawyer's knowing failure to act, whether the lawyer intends to deceive the Court.

VI. CONCLUSION

For the public to have confidence in our disciplinary and legal systems, lawyers who engage in the type of conduct exhibited by Respondent must be removed from the practice of law for some period of time. A license to practice law is a privilege that can be revoked. When such privilege is abused, the privilege should be revoked. Such sanction is also necessary to deter other lawyers from engaging in similar conduct and to restore the faith of the victims in this case and of the general public in the integrity of the legal profession.

The principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Syl. pt. 3, Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); and Syl. pt. 2, Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999).

A sanction is to not only punish the attorney, but should also be designed to reassure the public confidence in the integrity of the legal profession and deter other lawyers from similar conduct. Syl. pt 2, Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993);. Syl. pt 3, Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Syl. pt. 5, Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Syl pt. 3, Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); and Syl pt. 3, Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000). For the public to have confidence in our disciplinary and legal systems, lawyers such as Respondent must be removed from the practice of law for a period of time. A severe sanction is also necessary to deter lawyers who may be considering or who are engaging in similar conduct.

A review of the record clearly indicates that the Hearing Panel Subcommittee properly considered the evidence and made an appropriate recommendation to this Court.The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syl.pt. 3, in part, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), *cited in* Committee on Legal Ethics v. Morton, 186 W.Va. 43, 45, 410 S.E.2d 279, 281 (1991). Respondent, a lawyer with considerable experience, has demonstrated conduct which has fallen below the minimum standard for attorneys, and discipline must be imposed.

In reaching its recommendation as to sanctions, the HPS considered the evidence, the facts and recommended sanction, the aggravating factors and mitigating factors. ODC recommends that this Honorable Court impose the following sanctions:

1. That based upon the aggravating factors and the underlying misconduct, that Respondent's law license be suspended indefinitely;

2. That Respondent must comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure;

3. That Respondent may not attempt to petition the Court for reinstatement of his license to practice law for a minimum of two (2) years;

4. That, prior to petitioning for reinstatement, Respondent be required to produce a medical opinion from an independent medical examiner indicating he is fit to engage in the practice of law; and

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

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel

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CERTIFICATE OF SERVICE

This is to certify that I, Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 25th day of June, 2018, served a true copy of the foregoing **"Brief of the Lawyer Disciplinary Board"** upon Kourtney A. Ryan, Esquire, by mailing the same via electronic mail and United States Mail with sufficient postage, to the following address:

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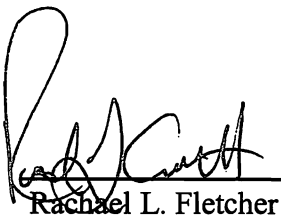

Rachael L. Fletcher Cipoletti