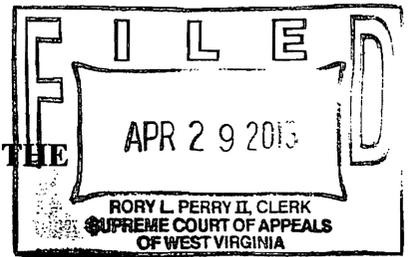


**BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 11-0729

WENDELYN A. ELSWICK,

Respondent.

BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. STATEMENT OF THE CASE

A. NATURE OF PROCEEDINGS

Wendelyn Elswick¹ (hereinafter “Respondent”) is a lawyer practicing in Charleston, Kanawha County, West Virginia, and, as such, is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia (hereinafter “Supreme Court”) and its properly constituted Lawyer Disciplinary Board. After successful passage of the West Virginia bar exam, Respondent was admitted to The West Virginia State Bar on September 29, 1999. This is a disciplinary proceeding against Respondent arising as the result of a Statement of Charges issued against her and filed with the Supreme Court on April 28, 2011. The Clerk obtained service of process on Respondent on or about May 3, 2011. Respondent filed her answer to the Statement of Charges on or about June 3, 2011. Disciplinary Counsel filed its mandatory discovery on or about May 23, 2011. Respondent filed her mandatory discovery on or about June 22, 2011.

Thereafter, this matter proceeded to hearing in Charleston, Kanawha County, West Virginia, on August 25-26, 2011, and May 1, 2012. The Hearing Panel Subcommittee (sometimes referred to herein as “the Panel”) was comprised of David A. Jividen, Esquire, Chairperson, Paul T. Camilletti, Esquire, and Larry A. Stricker, layperson. Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel (hereinafter “ODC”). Respondent appeared with counsel, Mark W. Kelley, Esquire. On August 25, 2011, the Hearing Panel Subcommittee heard testimony from Jane A. Brumfield Glaspell; Gregory Ayers, Esquire; Margaret Longwell; Mark Timothy Koontz, Esquire; and George Castelle, Esquire. On August 26, 2011, testimony was heard from George Castelle, Esquire; Dana December Smith; and Respondent.

¹At the start of the investigation, Respondent’s name that was registered with the West Virginia State Bar was “Wendelyn Campbell”.

Based upon a request for additional information from the members of the Hearing Panel Subcommittee, and agreement by both counsel, a request was made to the Kanawha County Public Defender's Office for an inventory of electronic mail still housed on the internal server that may pertain to Respondent and the relevant Statement of Charges. Specifically, the Office was asked whether back-ups are kept of emails; whether any of the back-ups had been corrupted or destroyed; and to produce emails pertaining to the Dana December Smith matter from 2004-2006. A search was conducted and emails (later redacted by agreement of counsel to exclude purely personal matters) were submitted to the Panel and identified as ODC Exhibit 44. At or about the same time the emails were produced, two witnesses in the matter, Peggy Longwell and George Castelle, submitted additional material to counsel, and based upon the submission of all the material, the Panel reopened the evidence in this matter and another day of evidentiary hearing was conducted on May 1, 2012, in Charleston, West Virginia.

On May 1, 2012, testimony was heard from Ronnie Sheets, Esquire; Jane A. Brumfield Glaspell; Margaret Longwell; George Castelle, Esquire; and Respondent. In addition, ODC Exhibits 1-41; Respondent's Exhibits 1-11; and Joint Exhibit 1 were admitted into evidence at the August 25-26 hearing and Exhibits 42-59 were admitted at the May 1, 2012 hearing.

On or about February 18, 2013, the Hearing Panel Subcommittee issued its recommendation in this matter and on or about February 22, 2013, filed with the Supreme Court its "Hearing Panel Subcommittee's Findings of Fact, Conclusions of Law and Recommended Sanctions." The Hearing Panel Subcommittee properly found that the evidence established that Respondent violated Rules 5.3; 3.3; 8.4(c); and 8.4(d) of the Rules of Professional Conduct with regard to Counts I and Rule 1.7(b) of the Rules of Professional Conduct with regard to Count II. In its Report, the Hearing Panel

Subcommittee also denied Respondent's motion to dismiss based on a statute of limitations argument.

On or about March 18, 2013, Respondent filed "Respondent's Objection to Hearing Panel Subcommittee's Findings of Fact, Conclusions of Law and Recommended Sanctions." On or about March 21, 2013, ODC filed its no objection letter. By Order entered March 22, 2013, this Honorable Court ordered the parties to submit briefs pursuant to Rule 3.13 of the Rules of Lawyer Disciplinary Procedure, and set this case for oral argument pursuant to Rule 20 of the Revised Rules of Appellate Procedure.

B. FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Count I Complaint of the Office of Disciplinary Counsel I.D. No. 09-03-246

On or about December 30, 1992, a Kanawha County petit jury found Dana December Smith guilty of two counts of murder. Upon his conviction, on or about January 23, 1993, Mr. Smith was sentenced to life imprisonment without the possibility of parole. State v. Dana December Smith, No. 92-F-11, Circuit Court of Kanawha County, West Virginia. On or about September 9, 1994, the Supreme Court refused Mr. Smith's direct appeal. State v. Dana December Smith, No. 940606. Upon denial of Mr. Smith's direct appeal, he filed several *pro se* petitions for *writ of habeas corpus*.

In or about 2003, his retained counsel, Attorney M. Timothy Koontz, filed an Amended Petition for *Writ of Habeas Corpus* and Memorandum in Support. State ex rel. Dana December Smith v. Trent, No. 97 Misc. 43, Circuit Court of Kanawha County. On or about January 20, 2004, the Circuit Court of Kanawha County appointed the Kanawha County Public Defender's Office to represent Mr. Smith in pursuit of his *writ of habeas corpus*. Attorney Koontz remained as co-counsel.

Respondent had been with the Kanawha County Public Defender's Office since 1999, within weeks of graduating from law school. ODC Exhibit 13 at 10; Transcript Day 2 at 198. At her request, she was transferred to the Appellate Division on or about January of 2004. ODC Exhibit 13 at 10; Day 2 at 199-200. The Kanawha County Public Defender's Office assigned Mr. Smith's case to Respondent in or about February 2004. ODC Exhibit 13 at 10. Respondent testified that because she had just begun working in the Appellate Division she had fewer cases than any of the other attorneys. ODC Exhibit 13 at 19.

The evidence was conflicting as how involved Mr. Castelle intended to be in the case. The Hearing Panel found that Mr. Castelle was equivocal about his level of involvement in the case. Day 2 Transcript at 93-94. However, Mr. Koontz testified that he believed Mr. Castelle had much greater initial involvement in the case as he testified that he (Mr. Koontz) was "the chief" and would handle "the bulk of the litigation" but the paperwork would be done by Mr. Castelle. Day 1 Transcript at 228-229. Respondent testified that Mr. Castelle advised her to keep very meticulous notes because he had prior "dealings" with Mr. Smith and he could be a "difficult client". ODC Exhibit 13 at 20.

Upon assignment to the case, Respondent began investigating one of the new grounds raised in Mr. Smith's *habeas* that there was newly discovered evidence that another person, Mr. Sells, had confessed to the murders for which Mr. Smith had been convicted. Although it is not disputed that Mr. Castelle testified that he did not review the entire file upon receiving the same from Respondent (Transcript Day 2 at 20), it is noted that Respondent also testified that she did not review the voluminous files that encompassed Mr. Smith's case either. Day 2 at 204.

Respondent contacted the television show 48 Hours to request a copy of the episode in which Mr. Sells confessed to the murders for which Mr. Smith had been convicted. Day 2 at 210-211. Respondent contacted the Texas Rangers to discuss and secure the confession of Mr. Tommy Lynn

Sells that occurred on or about April 12, 2000. Day 2 at 213. Respondent also verified with the Prosecutor from Del Rio, Texas, that he listed the West Virginia murders in question as 404(b) evidence against Mr. Sells. Day 2 at 220. Respondent sent several letters to Mr. Sells' attorney requesting permission to speak with his client about the West Virginia murders.

Respondent contacted and spoke to the author of a book written about Tommy Lynn Sells, which contained a paragraph about the confession to the West Virginia murders. Day 2 at 214-217. Respondent also spoke to the West Virginia Division of Corrections to determine whether Mr. Sells and her client were ever incarcerated at the same time and place in West Virginia. Day 2 at 221-222.

By letter dated April 20, 2004, Respondent wrote to Mr. Sells about coming to speak with him about "the deaths of two women in Cabin Creek, West Virginia". Respondent indicated that she represented the individual who was convicted of these murders, and that she believed he could provide "great insight into what occurred". Mr. Sells replied to Respondent by letter dated April 27, 2004, and indicated in pertinent part "and about this individual that you represent in this matter... Please tell him he's a lieing [sic] ass... may just let him rot... And another thing about the individual that you are represent in this matter if you really want to help him don't be so willing to jump on that wagon with the Texas Ranger. ..." ODC Exhibit 46 at 03283.

When discussing how she prepared for the trip to interview Mr. Sells, Respondent testified at her July 21, 2010 sworn statement that "George [Castelle] wrote out a list of questions for us to ask him." ODC Exhibit 13 at 44. As a reason for not asking if Mr. Sells and Mr. Smith knew each other or had even met, Respondent testified that she believed that Mr. Castelle "wrote out a list of questions" and "gave us a list of questions". At the hearing, she attempted to clarify that "I'm not sure if he wrote it out and handed it to me or if we sat there and I wrote out the questions as we talked." Day 2 at 226. However, Mr. Castelle denied that he wrote a specific list of questions for

Respondent for either the May 2004 interview or the September 2004 deposition. Hearing Transcript Day 1 at 356 and Day 3 at 162; ODC Exhibit 53 at 3349. At the August 26, 2011 hearing, upon examination by Disciplinary Counsel, Respondent vacillated and indicated that she may have written out the list of questions “based upon what he [Mr. Castelle] and I discussed.” Hearing Day 2 at 227. At the May 1, 2012 hearing, Respondent identified her handwriting on a list of questions that follow the September 24, 2004 deposition of Mr. Sells. ODC Exhibit 52 at 3228. Transcript Day 3 at 230. Mr. Castelle repeatedly denied ever giving Respondent a “script”. Day 1 at 356. The Hearing Panel Subcommittee found that Mr. Castelle did not give Respondent a typewritten list of questions, and further found that if he did, it does not release Respondent from any of her duties to be forthright with the Court. Hearing Panel Report at 11.

On or about May 9, 2004, Respondent and her assigned legal assistant, Ms. Jane Brumfield, flew to Texas to meet with and take the sworn statement of Mr. Tommy Lynn Sells. On or about May 10, 2004, Respondent and Ms. Brumfield met with Mr. Sells on death row in the Polunsky Unit in Livingston, Texas. During the initial interview Respondent and Ms. Brumfield were not physically situated in the same room with Mr. Sells. Instead, Respondent and Mr. Sells spoke through a “bean hole” in the glass. Transcript Day 2 at 230. During the initial interview, only Respondent questioned Mr. Sells, not Ms. Brumfield. Transcript Day 2 at 234. During that initial interview, Respondent took hand-written notes² and a portion of the same stated:

“.....Talked to Δ @ St. Albans other side of it... A bar had a few drinks
Δ bought drugs off Tommy—Became acquainted Δ told Tommy about
another place where he could get drugs w/o worrying about police

²Respondent testified both during her sworn statement taken on July 21, 2010, ODC Exhibit 13, and during her hearing testimony that she believed more notes of that initial meeting existed. Day 2 at 234-235; 240-241, 252. Mr. Castelle acknowledged in the May 1, 2012 hearing that he had access to 6 pages of Respondent’s notes when he filed the ethics complaint against Respondent, but chose to include the first page. Day 3 at 155-156

Met Pamela @ another bar– was partying, dancing, flirting– med.
height, darker brown hair, drinking longneck– was a slut.....”

ODC Exhibit 1 at 0046.

Despite testifying that she still did not recall Mr. Sells telling her that he knew Mr. Smith, Respondent agreed that her hand-written notes were clear, and that the same indicated quite contrary to the representations she had made to the Court. Transcript Day 2 at 243. However, at the hearing, Respondent maintained that despite the notes, that she does not recall Mr. Sells ever telling her that he knew Mr. Smith. ODC Exhibit 13 at 675; Day 2 at 241. Moreover, it is undisputed that Respondent did not raise any concerns about the statements Mr. Sells made about a relationship with Mr. Smith in her telephone conversation with Mr. Castelle that evening. Day 2 at 248-249. Furthermore, Ms. Brumfield also took notes, in both short-hand and long-hand, which stated in relevant part that:

“.....Cabin Creek---- St. Albans----other side of it----Met Dana
there—bought drugs off me– acquainted—”

ODC Exhibit 1 at 0047.

The Hearing Panel Subcommittee stated that it believed that Mr. Sells told Respondent that he knew Mr. Smith. Hearing Panel Report at 10.

On or about May 11, 2004, Respondent and Ms. Brumfield returned to death row in the Polunsky Unit in Livingston, Texas to take a tape-recorded statement of Mr. Sells. This time, Respondent and Ms. Brumfield were physically situated in the same room with Mr. Sells and spoke through a partition glass. Transcript Day 2 at 249-250. Ms. Brumfield conducted the recorded statement in Respondent’s presence.

Despite the discussion documented in Ms. Brumfield and Respondent’s hand-written notes from their initial interview regarding Mr. Smith and Mr. Sells’ relationship, no questions were asked

with respect to the prior relationship or Mr. Sells' interaction with Mr. Smith at the St. Albans bar. ODC Exhibit 1 at 76-88. Again, Mr. Sells again confessed to the murders of which Mr. Smith had been convicted. Statement of Charges and Response ¶ 22.

Prior to leaving death row, Mr. Sells inquired if he could mail Respondent and Ms. Brumfield his hand-written poems. Respondent agreed to re-type the same for Mr. Sells. Day 2 at 254-255. Upon Respondent's return from Texas, per their discussion, Mr. Sells began writing to Respondent at the Office of the Public Defender. On or about May 28, 2004, Mr. Sells mailed written correspondence to Respondent at the Kanawha County Public Defender's Office and a portion of the same requested that she "Please pass this on":

".....I do hope you done what I said he a lying ass pice of shit. And I do think I could of help more had he keep his word... like a C.B think the Bar was name Route Lounge.. the reason I remember Lounge was because that was the name of my Mother's Bar. Maby a VCR the car.. Remove ther clothes from below the waist. And i've done deside if you back. After thinking about it, And How nice you was And Jane.. that I would be more up front to the court reporter.. for yall not Dane.. anyway i'll make yall shin.. do my best at less..."

ODC Exhibit 1 at 0049-0050.

Despite her hand-written notes, her legal assistant's hand-written notes to the contrary, and a May 28, 2004 letter from Mr. Sells that indicated that he and Mr. Smith had some sort of deal that Mr. Smith broke, Respondent failed to advise Mr. Castelle or Mr. Koontz that Mr. Smith and Mr. Sells knew each other. In fact, Respondent testified that despite having concerns about the letter, she did not show the May 28, 2004 letter to Mr. Castelle. Day 2 at 263.

On or about June 9, 2004, Respondent filed a Motion for Leave of Court to Conduct Depositions and Memorandum of Law seeking to have Mr. Sells' confession taken under oath, subject to cross examination and therefore admissible in Mr. Smith's *habeas* proceeding.

Respondent attached a copy of the transcript of the recorded statement from May 11, 2004. ODC Exhibit 1 at 56-89. The Court granted Respondent's motion by Order entered July 19, 2004. ODC Exhibit 1 at 90-91.

On or about September 24, 2004, Respondent returned to the Polunsky Unit in Livingston, Texas, and again met with Mr. Sells on death row to take his video-taped deposition. The Kanawha County Prosecutor's Office appeared via video-conference. ODC Exhibit 1 at 0396. Respondent elicited the following relevant deposition testimony from Mr. Sells:

- Q. Did there come a time when you met a lady by the name of Pamela Castoneda from Cabin Creek?
- A. Yes, ma'am.
- Q. Do you remember where you met her?
- A. At a bar.
- Q. Do you remember the name of the bar?
- A. No, ma'am.
- Q. Do you remember anything about, like where the bar was located?
- A. I've given that a lot of thought since I was last at that neck of the woods. And, if I'm not mistaken, as I stated before, it was not in Charleston. Had it been, I'd probably remember it a little bit better. It was in St. Albans off of Highway 60, I believe.
- Q. And do you remember anything about the inside of the bar?
- A. Just another bar.
- Q. What about the parking lot, what was— do you remember what the parking lot looked like?
- A. Well, I didn't see the parking lot. I mean it was— it was just a park— a big parking lot. It wasn't small.
- Q. Okay. So, at this bar, how did you start to talk to Pamela?
- A. You mean, how— the conversation?
- Q. How did you approach her?
- A. I don't think I did approach her. I think she approached me. She heard that I had some cocaine for sale. I was going to sell the cocaine while I was at the bar and the word was kind of around.

ODC Exhibit 1 at 0410-0411.

- Q: Tommy, I'm going to switch gears for a minute and ask you if you know Dana December Smith?
- A: Not personally.

- Q Was Dana December Smith in the house when you killed the two women in Cabin Creek?
- A. Not that I know of, don't know – I– I'm being a smart-ass. No ma'am. No, is the answer to that.

ODC Exhibit 1 at 0423.

- Q. – do you know if Dana December Smith was being housed at Mount Olive, as well?
- A. Had – I– I would assume yes, but I hadn't – I never run across him. He didn't live in the same housing area I did.
- Q. Did you ever have a conversation with Dana December Smith while at Mount Olive?
- A. I never had a conversation with Dana that– that I can really remember, period.
- Q. Did you ever send messages to him through another person?
- A. I don't know him to.
- Q. Did he ever send messages to you?
- A. He don't know me.

ODC Exhibit 1 at 0425.

- Q. And the very last question I have is, Tommy, would you lie for Dana December Smith?
- A. No, ma'am.

ODC Exhibit 1 at 0427-0428.

The Hearing Panel Subcommittee found that Respondent induced these answers of Mr. Sells even though she knew the answers were false. Hearing Panel Report at 13.

In or about Spring of 2005, Respondent requested that she be relieved of counsel because of her perceived issues with her client, and Attorney George Castelle took over responsibility of the Smith *habeas* matter. However, despite being relieved of responsibility in the Dana December Smith *habeas* matter, it is noted that Ms. Brumfield sent an email to "kdolradio@livingston.net" on June 14, 2005 that stated:

“Please give a shout out to Tommy Lynn from his two favorite WV blondes”

ODC Exhibit 44 at 3227.

Ms. Brumfield sent another email to "kdolradio@livingston.net" on June 14, 2005 that stated:

"Please play Close Your Eyes Forever by Lita Ford with Ozzy Osoborne and give a shout out to Tommy Lynn from his WV blondes"

ODC Exhibit 44 at 03228.

Ms. Brumfield sent another email to "kdolradio@livingston.net" on June 24, 2005 that stated:

"Please play Motley Crue's Shout At the Devil and give a shout out to Tommy Lynn from his two mountain mamas in West Virginia. Please also let him know we are always thinking about him-"

ODC Exhibit 44 at 3229.

Ms. Brumfield testified at the May 1, 2012 hearing that she sent these e-mails to this radio station with Respondent's knowledge and at her direction. Day 3 at 54-56.

On or about December 6, 2005, Peggy Longwell, the investigator charged with organizing the file after Respondent and Ms. Brumfield were relieved, wrote an email addressed to Respondent, Mr. Castelle, and Ms. Brumfield which included what Ms. Longwell determined to be a "glimpse of Tommy". ODC Exhibit 44 at 3231. In response to this email, Respondent replied to all parties listed in Ms. Longwell's original email and stated "Jane and I have gone through all of Tommy's files at the clerk's office. We lived w/this case for over a year. WE sat and met w/him for hours on end. We are very familiar w/Tommy's story, but no one seemed overly interested when we kept trying to get people to listen to us, everyone acted like we were on a wild goose chase. I wish you all good luck. And I'm telling you Tommy committed this murder." Respondent testified that she was "frustrated" and felt like "nobody appreciated" what she had done on Mr. Smith's case. Day 3 at 212-213.

According to Ms. Brumfield, at Respondent's direction, Ms. Brumfield sent another email to "kdolradio@livingston.net" on December 30, 2005, that stated:

"Please give a shout out to Tommy Lynn from his WV friends."

ODC Exhibit 44 at 3233.

On or about January 17-18, 2006, evidentiary hearings were conducted in the Kanawha County Circuit Court. Prior to those hearings, Mr. Castelle met with Respondent and Ms. Brumfield to discuss the case, and at no time did Respondent or Ms. Brumfield advise Mr. Castelle of the May 10, 2004 notes or the correspondence between Respondent and Mr. Sells. At the hearings, Mr. Castelle called Ms. Brumfield as a witness and inquired whether she was able to discover any evidence that Mr. Sells or Mr. Smith had any contact with one another, and Ms. Brumfield answered no. ODC Exhibit 1 at 0491-0517. Mr. Castelle also introduced the September 29, 2004 deposition of Mr. Sells taken by Respondent. Respondent did not advise Mr. Castelle that she had hand-written notes that contradicted both her elicited deposition testimony of Mr. Sells and the *habeas* testimony of Ms. Brumfield.

On or about January 31, 2006, Respondent resigned from the Kanawha County Public Defender's Office. On February 2, 2006, the following email exchange occurred between Respondent and Ms. Brumfield:

From: Wendy Campbell [*email address left out by undersigned*]
Sent: Thursday, February 2, 2006 2:37 PM
To: Brumfield JX (Jane)
Subject: George called me about Dana

I guess I screwed up when I thought picture w/the afghan was at the victim's house, but Don thought so too, right? I'm not crazy. And the upstairs bedroom/bathroom thing was just mislabeled. Do you think he's mad? I hope not. They were both honest mistakes.

From: Brumfield JX (Jane)
Sent: Thursday, February 2, 2006 2:47PM
To: 'Wendy Campbell'
Subject: George called me about Dana

Absolutely, positively he is not mad. He was very, very nice to me.....

.....

We really should have caught it Wendy-- the carpet was totally different that what was in the victims' house. George said they had other things to go on but wanted to correct the error. Don't worry about it.

From: Wendy Campbell [*email address left out by undersigned*]
Sent: Thursday, February 2, 2006 2:56 PM
To: Brumfield JX (Jane)
Subject: George called me about Dana

Oh, you know how I worry about everything. I'm glad he was nice. He was really nice when he called here. How is Greg today? If there's any problem you can blame it on me. The thing is we just got so excited about the information and stuff that we went wild. However, here's a question: was Tommy in the Wall's house? I know it's all just stuff to think about and we'll never have the answer but, ... Did Dana and Tommy know each other from the Walls? Remember Tommy's wife was from Logan? It's all very curious, huh? I know I'm speculating. How are you?

From: Brumfield JX (Jane)
Sent: Thursday, February 2, 2006 2:58 PM
To: Wendy Campbell
Subject: George called me about Dana

Wendy, I went back over my notes of our first meeting with Tommy and at that time he said he was at the bar with Dana. Remember that's when he said why should I help the SOB wouldn't help me. I won't blame anything on you--hell, they didn't prepare for this hearing and now it has caught up with them. Sort of funny-- don't you think.....

.....

ODC Exhibit 44 at 3239-3240. [Emphasis Added.]

At this point, Respondent did not call Mr. Castelle to advise him that she was made aware that Ms. Brumfield's hand-written notes contradicted both Mr. Sells' elicited deposition testimony and Ms. Brumfield's *habeas* testimony.

On or about February 7, 2006, Mr. Sells signed a letter which recanted his earlier confession.³

The February 7, 2006 letter (which was reprinted in the Supreme Court's opinion) stated as follows:

In the year 2000, I was in the Val Verde County Jail in Del Rio Texas and waiting for my trial. I received a letter from Indiana. I don't know if this letter was signed or not. The person writing this letter wanted me to take the blame for a murder in West Virginia. A Dana December Smith was already in jail for this murder. The writer wanted me to say that I had committed the murder and they gave me details about the murder. They promised to send me newspapers and magazines while I was in jail. This sounds like a small things but they are big things if you are locked up. They said I would be doing Smith a favor and one more wouldn't hurt me being that I had already admitted to so many murders.

The next day or so I met with the Texas Rangers and I told them I did this murder. I gave them the details that were in the letter. They talked to West Virginia and told me I had made the story up.

After I was on death row I received a letter from Windy Campbell. I received this letter from my attorney Terry McDonald. Windy had written the letter to McDonald and he passed it on to me. The letter was about the murder that Smith was in jail for. The letter gave details about the killing, who was killed and where. Between the two letters I had a lot of details about the murder.

Later Windy Campbell showed up at the prison and talked to me about the murder. Between the two letters and some good guesswork I admitted to the killing and gave he [sic] the details of the killings.

It was kind of like a chess game talking with her and I figured everyone had been messing with me so I messed with them back.

At this time I want to recant my confession. I did not kill these women. I never stayed at their house, I don't know where they lived and I never met them. I've got an execution date and I want to set the record straight.

ODC Exhibit 36, Record pp. 3055-3057.

After receiving this letter with its accusations concerning Respondent, Mr. Castelle reflected, in his complaint, that "it became an immediate priority to search out files for all records of

³Although both Respondent and Ms. Brumfield have speculated as to why Mr. Sells recanted, such thoughts are merely that – speculation. There is no evidence in the record, other than Mr. Sells' own words, that establishes why he recanted his confession.

communication between our office and Sells.” ODC Exhibit 1, Record p. 9. However, Mr. Castelle did not go back and review the file. Rather, he instructed his assistant Peggy Longwell to do so. Transcript Day 2 at 165, Transcript Day 3 at 169. Specific to this request, Mr. Castelle testified as follows:

Q. You didn't go back and read the entire file after receiving the recantation?

A. Oh, no. I asked Peggy Longwell, the investigator on the case, to track every piece of communication between our office and Texas. So she did it at my request. I didn't do it personally.

Q. Okay, did you ask her to review notes?

A. I asked her to review everything involving communication between us and Texas.

Q. Okay. so you asked her in 2006 to review everything regarding communications between Elswick – Ms. Elswick and Mr. Sells, and you believe that would have included notes that had been taken at that time?

A. And more than that. it would have included contacting Texas officials to see what records they have of communications.

Q. Did she deliver that note to you, the one we've spoke about this morning from Ms. Elswick's first trip to Texas?

A. No.

At the May 1, 2012 hearing, after reviewing the February 2, 2006 email exchange that again stated that Mr. Sells met Mr. Smith at the bar and again stated that both Respondent and Ms. Brumfield were made aware of this at the May 2004 initial interview, Respondent continued to maintain that Mr. Sells never advised her that he knew Mr. Smith in their first meetings. Transcript Day 3 at 220.

On or about February 10, 2006, the Kanawha County Prosecutor filed a new transcript from the February 7, 2006 statement Mr. Sells made to a Texas Ranger, which recanted his earlier confession. ODC Exhibit 1 at 519. Mr. Castelle continued to assert both in the Circuit Court and the Supreme Court that Mr. Sells' confession was valid and the recantation was false. Mr. Castelle further continued to assert that there was no evidence to establish that Mr. Sells and Mr. Smith knew one another.

By email to Respondent dated February 24, 2006, when speaking of Mr. Sells' recantation and Mr. Castelle's statement to the press about the same, Ms. Brumfield stated,

“[t]hey are so stupid they think Tommy recanted because it will delay his execution. Taint nothing going to delay that. Oh well, not my problem.” ODC Exhibit 3247. By email to Ms. Brumfield dated February 24, 2006, Respondent stated in relevant part “I think he recanted b/c I was taken off the case. I'd love to write him too, but I don't think I can either. There's so much to say.”

ODC Exhibit 44 at 3246.

The Circuit Court of Kanawha County denied Mr. Smith's *writ of habeas corpus* by Order entered September 17, 2007. In its Order, the Circuit Court first found that “Tommy Lynn Sells' ‘confession’, standing alone, pales when compared with the overwhelming and largely uncontested evidence [against Mr. Smith].” ODC Exhibit 36, Record pp. 2752-2753. The court further noted that Mr. Sells has recanted his confession on more than one occasion, and noted that Mr. Sells and Mr. Smith were housed together during Mr. Smith's “highly publicized trial” and later in the West Virginia penitentiary. Without specifically addressing Mr. Sell's letter of February 7, 2006 letter, the court characterized Mr. Sells' confession as having a “lack of integrity.” *Id.*, at 2753-2754.

On or about December 16, 2008, Mr. Castelle searched Ms. Brumfield's office and discovered an unmarked file that contained 61 letters between Respondent and Mr. Sells. ODC Exhibit 1 at 9-10. Because of the accusations that Respondent had provided information about the crimes, Mr. Castelle read each letter from Respondent to Mr. Sells to verify that she had not provided any details to Mr. Sells. ODC Exhibit 1 at 10. Mr. Castelle filed a petition for appeal with the Supreme Court of Appeals of West Virginia on or about January 31, 2008.

Oral argument was held before the Supreme Court of Appeals on February 24, 2009, and the Court issued its opinion denying Mr. Smith's appeal on March 12, 2009. State ex rel. Dana December Smith v. McBride, No. 34155 (March 12, 2009). ODC Exhibit 1 at 521.

On or about March 16, 2009, Mr. Castelle and the Deputy Public Defender in charge of the Appellate Division met with Ms. Brumfield and inquired about the 61 letters between Respondent and Mr. Sells. ODC Exhibit 1 at 11. Ms. Brumfield denied providing any details of the crime to Mr. Sells and then produced a file marked "Texas" that she had kept in her office at the Public Defender's Office. ODC Exhibit 1 at 11. On the same date, Mr. Castelle also contacted Respondent to inquire if upon being relieved as counsel, she had tendered the entire contents of the file to him. ODC Exhibit 1 at 11. On the same date, Mr. Castelle reviewed the "Texas" file and discovered Respondent and Ms. Brumfield's May 10, 2004 handwritten notes. ODC Exhibit 1 at 11.

On or about March 24, 2009, Respondent sent an email to Mr. Castelle that stated in relevant part:

..."When we first went to Texas, I sat in the visit room on the phone with Tommy while Jane was in the next room listening through a slot in the door. Tommy never said he met Dana at the bar."...

ODC Exhibit 1 at 559; ODC Exhibit 38 at 3090.

On or about April 9, 2009, Mr. Castelle met with Respondent, Ms. Brumfield, the Deputy Public Defender and another investigator to discuss the meaning of the May 10, 2004 notes. ODC Exhibit 1 at 11-12. On or about April 13, 2009, being satisfied with Respondent's explanation about her notes, Mr. Castelle filed a Petition for Rehearing with the Supreme Court. ODC Exhibit 1 at 561.

On or about April 17, 2009, Mr. Castelle then read the correspondence from Mr. Sells to Respondent and discovered the May 28, 2004 letter. ODC Exhibit 1 at 12. On or about April 22, 2009, Mr. Castelle sent an e-mail to Respondent requesting an explanation of her hand-written May 10, 2004 notes and the statement in Mr. Sells' May 28, 2004 letter. ODC Exhibit 1 at 583-586.

On or about April 24, 2009, Attorney Castelle submitted a written request to the Supreme Court of Appeals requesting that the consideration of the Petition for Rehearing be held in abeyance. On April 30, 2009, Attorney Castelle terminated Ms. Brumfield as an employee of the Kanawha County Public Defender's Office. ODC Exhibit 1 at 14. On or about May 6, 2009, Attorney Castelle filed a Motion to Withdraw Petition for Rehearing in Mr. Smith's case. ODC Exhibit 3 at 590. On the same date, Mr. Castelle also moved to withdraw as counsel of record on behalf of Mr. Smith. ODC Exhibit 3 at 593.

The Hearing Panel Subcommittee properly found that the evidence established by a clear and convincing standard that on or about May 11, 2004, Respondent knowingly and intentionally directed and/or otherwise permitted a non-lawyer assistant under her direct supervision to elicit a known false statement from a potential witness in a *habeas* matter in violation of Rule 5.3 of the Rules of Professional Conduct. The Hearing Panel Subcommittee further found that the evidence established by clear and convincing nature that on or about June 9, 2004, Respondent knowingly and intentionally filed a Motion for Leave of Court to Conduct Depositions and Memorandum of Law and attached a copy of the transcript of the known false statements from May 11, 2004, in violation of Rules 3.3; 8.4(c) and 8.4(d) of the Rules of Professional Conduct. Finally, the Hearing Panel Subcommittee found that the evidence established by a clear and convincing standard that on or about September 24, 2004, Respondent returned to the Polunsky Unit in Livingston, Texas and knowingly and intentionally elicited false statements from Mr. Sells during his video-taped deposition in violation of Rule 3.4(b) of the Rules of Professional Conduct.

Count II
Complaint of Dana December Smith
I.D. No. 09-03-291

On or about May 18, 2009, Complainant Dana December Smith (hereinafter “Complainant”) filed an ethics complaint against Respondent which alleged she suborned perjury, obstructed justice and tampered with a defense witness’ credibility. ODC Exhibit 22 at 1282. Complainant also maintained that Respondent engaged in a romantic “pen-pal” relationship with Mr. Sells, a key witness in the prosecution of his *habeas* matter, and that after Respondent severed the relationship, Mr. Sells became angry and recanted his confession. ODC Exhibit 22 at 1289-1290.

From the time Respondent initially went to see Mr. Sells until she returned to take his deposition, Mr. Sells and Respondent exchanged at least Twenty-Eight (28) known letters. ODC Exhibit 1 0109; Transcript Day 1 at 368. Respondent advised in her June 28, 2004 letter that “I want you to know that I am not just being nice to you for the depositions.” ODC Exhibit 1 at 0129. Respondent advised in her August 9, 2004 letter to Mr. Sells and inquires some about the case, but in an effort to prepare him for the upcoming deposition to deal with questions about one of the key issues in the case, she states in relevant part “[l]astly, I suspect the prosecutor is going to ask you if anyone was with you, just from my conversations with her I’m thinking that is the angle she is going to take. I know your feelings on this, but I wanted to prepare you.” ODC Exhibit 1 at 0193. The letters prior to the September 2004 deposition from Mr. Sells reference Respondent’s “tits” (ODC Exhibit 1 at 140; 0210; 0214); that Mr. Sells believes she is “sexy” (*Id.* at 0210); wanted to know if he could cut her and suck her blood (*Id.* at 0213); and her feelings about rough sex (*Id.*). In her September 9, 2004 letter, Respondent shares intimate details of her life, including that she had no

contact with her father, who never wanted children; that her step- father was an alcoholic; and how she felt “stupid” and “poor” in law school. ODC Exhibit 1 at 0222.

As requested in his May 28, 2004 letter (ODC Exhibit 1 at 0109), and his July 13, 2004 letter (ODC Exhibit 1 at 0159), and as promised in her September 7, 2004 letter (ODC Exhibit 1 at 0219) and her September 14, 2004 letter (ODC Exhibit 1 at 0224) to Mr. Sells, Respondent testified that she met with Mr. Sells prior to taking his September 29, 2004 deposition. Day 2 at 289-290. It was during this private meeting with Mr. Sells on September 28, 2004, that Respondent stated that Mr. Sells asked her to attend his execution and then later douche with his ashes. Transcript Day 2 at 291. It is noted that this is the only reference of an inappropriate nature by Mr. Sells towards Respondent to which Attorney Greg Ayers testified that he recalled Respondent bringing to his attention. Transcript Day 1 at 148-149.

By letter received September 24, 2004, Mr. Sells stated that “at the end of the day my heart gos [sic] pump pump pump as always for you..”(ODC Exhibit 1 at 0247) and “you just ask what you need Wendy... I’ll let the ideal run thru my mind of your question befor I do answer them.”

From the time Respondent returned from the September 29, 2004 deposition until March 19, 2005, Mr. Sells and Respondent exchanged at least Twenty-Nine (29) known letters. In the letter dated the same date as the September 29, 2004 deposition, Mr. Sells wonders “what I’m able to get of them 38C” (ODC Exhibit 1 at 0257) and if “[I] can tell [you] I love you...” (Exhibit 1 at 0258). In her October 8, 2004 letter Respondent advised Mr. Sells that in high school she only dated older men and understood that some people would say she was always looking for an “eternal father figure.” ODC Exhibit 1 at 0269.

In his October 24, 2004 letter, Mr. Sells asks Respondent if she knew that she “would not get killed, not hurt real bad... would you want someone let say walk in your office, you all deck out in

your court get up like was hear... they pull a gun/knife on you make you bend over your desk as he works you over I mean have a hand full of hair in one hand and just fucking drive the hell out of you... then after he's done just slip out of your office you see him no more.. You ever thing of just being took?" ODC Exhibit 1 at 0300-0301.

In his October 26, 2004 letter, Mr. Sells discussed with Respondent her issues pertaining to a man with a drinking problem who likes to gamble, and he told her "had he really wanted to win you back he would of never keep doing what he was doing to lose you in the frist place." Exhibit 1 at 0307.

The letters that were submitted as evidence by Mr. Castelle from the file concluded in or about March of 2005. The letter inquired if Mr. Sells was in the "dog house" with Respondent; begged her to forgive him and indicated that he hoped to hear from her soon. ODC Exhibit 1 at 0394. In Spring of 2005, that Respondent requested to be removed from Mr. Smith's case, not because Mr. Sells was in love with her or sending her letters with detailed rape fantasies, but because Respondent felt threatened by statements Mr. Smith. Transcript Day 2 at 380-383.

At no time did Respondent advise Mr. Castelle or Mr. Ayers that Mr. Sells said he was in love with her (Transcript Day 2 at 429) or that Mr. Sells talked to her about masturbation (Transcript Day 2 at 431). Respondent admitted that she lied to Mr. Sells in the letters (Transcript Day 2 at 432) and acknowledged that she would say things to Mr. Sells to keep him happy. Despite her stated preference that she wished she could continue to write Mr. Sells, it appears as though her letters to Mr. Sells stopped in the Spring of 2005. Exhibit 44 at 03246.

Ms. Brumfield testified that she believed that Mr. Sells recanted his confession because Respondent "quit writing". Day 3 at 65. And as evidenced by Respondent's own words, Respondent also believed that Mr. Sells recanted because she was taken off the case. ODC Exhibit 44 at 03246.

The Hearing Panel Subcommittee properly found that the evidence established by a clear and convincing standard that Respondent, without the knowledge and consent of her client, engaged in a relationship with a witness in her client's case and that the unilateral termination of said relationship ultimately harmed her client's objectives in his *habeas* matter in violation of Rule 1.7(b) of the Rules of Professional Conduct.

II. SUMMARY OF ARGUMENT

The Supreme Court 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). In order to effectuate the goals of the disciplinary process, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board recommended that Respondent be suspended for a period of three (3) years; that prior to being reinstated to the practice of law, Respondent be evaluated by a licensed mental health provider and follow the protocol, if any, as directed by the mental health provider; that prior to being reinstated to the practice of law Respondent be ordered to undergo an additional twelve (12) hours of Continuing Legal Education with focus in ethics; that Respondent be ordered to pay costs of the disciplinary proceeding pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure; that prior to being reinstated to the practice of law Respondent reimburse said costs to the Lawyer Disciplinary Board; and that if Respondent is successfully reinstated in the future, that upon reinstatement she be placed on two (2) years of probation with supervised practice by an active attorney, in her geographic area, in good standing with the West Virginia State Bar.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 20 of the Revised Rules of Appellate Procedure, this Honorable Court's March 22, 2013 Order set this matter for oral argument for September 11, 2013.

IV. ARGUMENT

A. RESPONDENT'S MOTION TO DISMISS

It is noted that Respondent asserted a statute of limitations argument in this case and requested that the matter be dismissed. The Hearing Panel denied Respondent's motion to dismiss. Rule 2.14 of the Rules of Lawyer Disciplinary Procedure provides that: "Any complaint filed more than two years after the complainant knew, or in the exercise of reasonable diligence should have known, of the existence of a violation of the Rules of Professional Conduct, shall be dismissed by the panel." The Hearing Panel Subcommittee noted that the application of the statute of limitations was recently discussed in the case of Lawyer Disciplinary Bd. v. Smoot, 228 W. Va. 1, 716 S.E.2d 491, 493 (2010) cert. denied, 132 S. Ct. 94, 181 L. Ed. 2d 23 (2011), in which the respondent therein faced the same rules violations alleged in Count I of this case.

In Smoot, Respondent Smoot represented an employer that was challenging an employee's black lung claim. In 2001, the employer subjected the employee to an examination of by a physician of the employer's choosing. The physician issued a report consisting of "a two page report of arterial blood gas studies, eleven pages reporting results of pulmonary function tests, an ILO-UC form indicating [the doctor] made a reading of an x-ray showing 'Large Opacities Size A,' a one-page lab report showing carbon monoxide and hemoglobin levels, an eight-page exercise report of EKG and pulmonary readings, and a five-page narrative summary dated May 16, 2001, that included a finding that [the employee] suffered from complicated pneumoconiosis." Smoot, at 228 W. Va. 1, 716

S.E.2d 495. Later that same year, respondent submitted the doctor's findings to an administrative law judge, but removed the five-page narrative from the submission. *Id.* at 228 W. Va. 1, 716 S.E.2d 496. At this time, the employee was proceeding *pro se*. Later, the employee obtained counsel, who filed discovery requests, and in response to the requests, the five-page summary was turned over to the employee's counsel on September 20, 2004. *Id.* at 228 W. Va. 1, 716 S.E.2d 496. On August 30, 2006, a United States District judge entered an order referring the matter of the narrative to the Office of Disciplinary Counsel, and the district court's order and file were delivered to ODC on September 1, 2006. The ODC issued formal charges on February 2, 2009. *Id.* at 228 W. Va. 1, 716 S.E.2d 497.

Respondent Smoot similarly alleged that ODC's charges were barred by the statute of limitations because the alleged misconduct was "known" as of September 2004, that ODC did not bring charges until 2009, and that the employee's counsel was the true "complainant". The Supreme Court rejected this argument, finding that:

Because the United States district court brought the alleged misconduct to the attention of the ODC, that tribunal is the 'complainant' for purposes of Rule 2.14. . . Mr. Smoot has not alleged that the complaint of the United States district court was untimely.

Id., at 228 W. Va. 1, 716 S.E.2d 499.

In this case, it is noted that on May 6, 2009, Mr. Castelle reported this misconduct pursuant to Rule 8.3 of the Rules of Professional Conduct which requires a lawyer to report another lawyer to Disciplinary Counsel if a lawyer has "knowledge" that another lawyer has committed a violation of the Rules that raises a substantial question of that lawyer's fitness, trustworthiness or character. Mr. Castelle only reluctantly reported to ODC after he had performed several inquiries into the facts and circumstances and the conclusions as to Respondent's misconduct were clear, and sought an

opinion from Disciplinary Counsel as to his mandatory reporting duty. After reviewing Mr. Castelle's submission, ODC initiated the complaint for investigation against Respondent by letter dated May 12, 2009.

The Hearing Panel Subcommittee properly found that Mr. Castelle repeatedly inquired of Respondent as to the allegations about the relationship between Mr. Sells and Mr. Smith, and despite her and her legal assistant's notes to the contrary, Respondent repeatedly assured Mr. Castelle that she had no reason to believe that Mr. Sells and Mr. Smith knew one another or had conspired. In fact, it is noted that because Mr. Castelle believed Respondent's version of the events and had such great trust in her, Mr. Castelle tried to defend Respondent after the contents of the confession were restated in the Supreme Court's opinion. It is unfair to suggest that Mr. Castelle, the Chief Public Defender, should have to ferret out the truth on such a critical issue from one of his own trusted attorneys. The Hearing Panel Subcommittee noted that Respondent cannot now cloak herself in a statute of limitations argument when she was actively attempting to conceal her actions.

The Hearing Panel Subcommittee followed the framework set forth by the Supreme Court in Lawyer Disciplinary Board v. Smoot, rejected Respondent's argument and denied Respondent's motion to dismiss these charges. Lawyer Disciplinary Board v. Smoot, 228 W. Va. 1, 716 S.E.2d 491, 493 (2010) cert. denied, 132 S. Ct. 94, 181 L. Ed. 2d 23 (U.S. 2011).

B. STANDARD OF PROOF

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

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, 207 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 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. 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 Supreme Court 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).

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

The Supreme Court 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: (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).

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

Lawyers owe duties of candor, loyalty, diligence and honesty to their clients. 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) (per curiam). The evidence in this case establishes by clear and convincing proof that Respondent violated her duties owed to her client, the public, the legal system, and the legal profession.

2. Respondent acted intentionally and knowingly.

The only evidence to contradict that Respondent's misconduct was intentional and knowing is her own testimony. There was no evidence presented that Respondent was impaired in any

meaningful way. There was no evidence presented that Respondent was an incompetent attorney. In fact, the evidence presented demonstrated that Respondent was a competent criminal defense attorney. Moreover, even assuming *arguendo* that Respondent simply forgot the key answer to the critical line of questioning when she filed the pleadings with the Court, when faced with the truth in February of 2006, Respondent still chose to continue to cover up her wrongdoing instead of advising Mr. Castle of her misconduct. ODC Exhibit 44 at 3239-3240. The fact that she chose to continue to conceal the same further demonstrates her conduct was intentional and knowing.

3. The amount of injury.

“Potential injury” is defined in the ABA Standards for Imposing Lawyer Sanctions as “the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct.” [Id.] “Injury” is defined as “harm to a client, the public, the legal system, or the profession which results from a lawyer’s misconduct.” [Id.] The actual damage that was done to her client, (i.e. the petition for his *writ of habeas corpus* petition was denied and the petition for re-hearing denied based partly on the discovery of Respondent’s conduct) Dana December Smith, may never be fully known but the legal and ethical ramifications to her supervising attorney and her co-counsel was very real and serious in nature. The real damage done in this case was the lack of truthfulness with the Courts and the failure to do so in any aspect of litigation can cause irreparable damage to the system of law.

4. Evidence of mitigating and aggravating factors.

Mitigating 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. The Scott Court 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. 216, 579 S.E.2d 550, 557 (2003). The mitigating factors present in this case are: 1. absence of a prior disciplinary record (and no other disciplinary history to date); 2. a cooperative attitude toward Disciplinary Counsel; 3. a good reputation at the time of the offenses; 4. despite her criminal law experience, both Respondent and Mr. Castle admittedly lacked experience in dealing with someone like Mr. Sells or Mr. Smith; and 5. while she kept the evidence of correspondence from her client, supervising attorney and the Court, she did not destroy the evidence; 6. a delay in the disciplinary proceedings; and 7. Respondent’s expressed remorse for her actions. Respondent further admitted her correspondence with Mr. Sells was, in hindsight, “pretty stupid.” She admitted that sending Mr. Sells “shout outs” to a local radio station was also not a good thing to do. Although Respondent has testified “over and over again” that she does not recall Mr. Sells’ saying in their first meeting that he knew Mr. Smith, she has acknowledged that she understands why someone else looking at her notes (at least the first page) could come to a different conclusion. Day 2, Transcript, p. 403. As Respondent stated during the August 26, 2011; hearing: “I am so sorry. You probably noticed that I cried a lot when Geor – or Greg and Peggy were in here at the beginning. The Public Defender's Office was my home. It’s where I started. I would never intentionally do anything to put any of them in any bad light or to put them in the position that they were in. And I am just so sorry. I never meant to hurt anybody in any of this case. And I was just -- I was stupid. I was stupid about the letters. But I really -- I really tried to do the right thing and do the best I could. And I’m sorry.” Day 2 Transcript, pp. 410-411.

Aggravating factors are the 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. 216, 579 S.E. 2d 550, 557 (2003). The aggravating factors present in this case are: 1. a pattern of misconduct; 2. multiple offenses; and 3. failure to acknowledge the wrongful nature of conduct.

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, 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), the Court stated:

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

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).

IV. SANCTION

Rule 3.15 of the Rules of Lawyer Disciplinary Procedure provides that the following sanctions may be imposed in a disciplinary proceeding: (1) probation; (2) restitution; (3) limitation

on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment.

Sanctions are not imposed only to punish the attorney, but also are designed to reassure the public's confidence in the integrity of the legal profession and to deter other lawyers from similar conduct. Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993); Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); 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. A severe sanction is also necessary to deter other lawyers from engaging in similar conduct.

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). This type of conduct has a dramatic impact on the public's confidence in the integrity of the Bar and a severe sanction is warranted. *See* Lawyer Disciplinary Board v. Wade, 217 W.Va. 58, 614 S.E.2d 705 (2005); Lawyer Disciplinary Board v. Daniel, Supreme Court Nos. 32569 and 32755; and Lawyer Disciplinary Board v. Askintowicz, Supreme Court No. 33070.

The Smoot Court reminds us that the “[p]ublic expects lawyers to exhibit the highest standards [of] integrity and honesty. Lawyers have a duty not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice. Lawyers are officers of the court and must operate within the bounds of the law and act in a manner to maintain the integrity of the Bar. Smoot at 506 quoting Lawyer Disciplinary Bd. v. Stanton, 225 W.Va. 671, 678, 695 S.E.2d

901, 908 (2010). Moreover, the Smoot Court noted that “[a] lawyer's duties to the public, the legal system, and the profession are further reflected in the Rules of Professional Conduct, which establish a duty of candor to a tribunal (Rule 3.3).” Smoot at 506.

Respondent knowingly and intentionally adduced incomplete and incorrect evidence, asked the Court to rely on this false evidence, to which the Circuit Court did rely upon the same and thereby and knowingly perpetrated a fraud on the Courts. Respondent took no remedial actions to correct this fraud. An isolated incident of this misconduct alone warrants suspension of her license. See generally Lawyer Disciplinary Board v. Edward R. Kohout, No. 22629 (WV 4/14/95): (law license suspended for two years for lying on Bar Application about law school expulsion and for being disciplined by United States Bankruptcy Court (*per curiam* Opinion); Lawyer Disciplinary Board v. Jeffrey A. Holmstrand, No. 22523 (WV 5/30/96): (law license was suspended for one year for creating false pleadings to hide his failure to answer civil actions timely, making a false affidavit concerning the genuineness of a pleading and making false representations to a court concerning the same (Unreported Case)); Lawyer Disciplinary Board v. Don A. Humberson, No. 25925 (WV 10/26/00): (law license suspended for 90 days for violations of Rules 8.4(c) and 8.4(d) by swearing to a false affidavit to be used in a drug case (Unreported Case)); Lawyer Disciplinary Board v. Ernest F. Hays, No. 28465 (WV 10/4/01): (lawyer reprimanded for violation of Rule 8.4(c) for signing another attorney’s name to two title letters for Respondent’s personal transaction (Unreported Case)); Lawyer Disciplinary Board v. David M. Ansell, 210 W.Va. 139, 556 S.E.2d 106 (2001): (law license suspended for 60 days for violation of Rule 8.4(d) for altering a signed court order); Lawyer Disciplinary Board v. Paul A. Billups, No. 32572 (WV 10/6/05): (law license suspended for 6 months because he falsely told his client that he had filed a lawsuit on his behalf, prepared false documents and advised the client that a settlement was reached, the Supreme Court found that

Respondent committed numerous violations of Rule 8.4(c) (Unreported Case)); Lawyer Disciplinary Board v. Larry E. Losch, 219 W.Va. 316, 633 S.E.2d 261(2006): (lawyer publicly reprimanded for violating Rules 8.4(c) and 8.4(d) when he altered a document after it was issued by the Circuit Court and then caused it to be served on an individual); and Lawyer Disciplinary Board v. Douglas Smoot, 228 W.Va. 1, 716 S.E.2d 491 (2010): (attorney suspended for one year for violating Rule 3.4(a), 8.4(c) and 8.4(d) for providing *pro se* claimant with a report of a medical examination prepared on behalf of the employer after removing the narrative portion of the report in which physician diagnosed claimant with complicated pneumoconiosis, violated rule prohibiting attorney from unlawfully obstructing another party's access to evidence or unlawfully altering, destroying or concealing a document or other material having potential evidentiary value).

Additionally, 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.

The ABA Model Standards for Imposing Lawyer Sanctions further provides that absent any aggravating or mitigating circumstances, the following sanction is generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit or misrepresentation to a court:

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 to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

However, the sustained fraud on the court in this case must be viewed in conjunction with Respondent's inappropriate relationship with Mr. Sells, which created a conflict of interest and ultimately damaged a potential viable ground in Mr. Smith's petition for *writ of habeas corpus*. The inappropriate relationship created a conflict of interest and the same harmed the client and discipline is warranted. (See Lawyer Disciplinary Board v. Perry, 10-4006 (WV 11/22/2011): (lawyer was suspended for a minimum of three years for attempting to have a sexual relationship with his incarcerated client's wife and then withdrawing as counsel at a time that harmed his client in violation of Rule 1.7(b) and Rule 8.4(d), lawyer also lied to ODC about the same and ultimately abandoned his law practice. (Unreported Case)). Additionally, the ABA Model Standards for Imposing Lawyer Sanctions provide that absent any aggravating or mitigating circumstances, the following sanction is generally appropriate in cases involving conflicts of interest:

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.

This relationship was more than just the cultivation of a relationship with witness as Respondent would suggest. From the outset, Respondent failed to recognize the danger in which she placed her client's case by engaging in such a relationship with Mr. Sells, a key witness in Complainant Smith's case. In fact, the evidence reflects that Respondent encouraged the relationship with Mr. Sells, and often times shared intimate details of her personal and professional life with Mr. Sells. The relationship quickly rose to the level of a *per se* conflict of interest. Respondent's actions jeopardized her client's case and the witness's credibility, as well as her own credibility. This ongoing pattern of behavior, and Respondent's refusal to recognize the clear conflict of interest that she created, calls into question Respondent's overall fitness to practice law.

While the Hearing Panel Subcommittee noted that the remorse expressed by Respondent was mitigating, the Hearing Panel Subcommittee noted that Respondent's testimony "very much bothered this panel when the Respondent denied on direct questioning that she was aware of the fact that Mr. Sells and Mr. Smith knew each other even when it is clearly set forth in her own handwriting in her initial notes". Hearing Panel Report at 42. Additionally, it is noted that at no time did Respondent take remedial steps to correct the fraud on the court. She took no action to advise Mr. Castelle, Mr. Koontz or her client that there was any error or misconduct on her part. Even when Ms. Brumfield advised her in writing in the February of 2006 email what Mr. Sells said in that initial interview about his relationship with Mr. Smith, she continued to sustain the fraud. In fact, to date, despite overwhelming evidence to the contrary, she refuses to admit that Mr. Sells advised her that he knew Mr. Smith.

In State v. Layton, the Supreme Court said:

In adopting the Code of Professional Conduct, this Court has attempted to insure that an attorney's participation in legal matters occurs in a lawful way which promotes the ends of justice, within limits generally considered proper and moral by society as a whole. The Rules of Professional Conduct adopted by this Court recognize, as did the Supreme Court of the United States, that the elucidation of true testimony is a circumstance which promotes the fair administration of justice, and, conversely, the Rules implicitly recognize that the elucidation of false evidence frustrates the proper administration of justice. It is for that reason that Rule 3.3 of the Rules of Professional Conduct circumscribes an attorney's right to elucidate false evidence.

State v. Layton, 189 W. Va. 470, 483-484, 432 S.E.2d 740, 753-754 (1993).

The Supreme Court further noted in Gum v. Dudley, 202 W.Va. 477, 487, 505 S.E.2d 391, 401 (1997) that:

Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process

which is designed for the purpose of dispensing justice.... Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.

[Scott, 579 S.E.2d at 558 *quoting* Dudley, 202 W.Va. at 487 (*quoting* United States v. Shaffer Equipment Co., 11 F.3d 450, 457 (4th Cir. 1993))].

Honesty must always be preeminent in West Virginia's legal system. The Preamble to the Rules of Professional Conduct begins by stating that "[a] lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibilities for the quality of justice." The Preamble of the West Virginia Rules of Professional Conduct recognizes that "[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. . . . Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules." Respondent's violations in this case touch the very essence of the public's perception of the legal profession. It cannot be stressed enough that Respondent's violations are grave.

The Hearing Panel Subcommittee noted that even given the mitigating factors (particularly Respondent's youth at the time of the offense, her good reputation prior to this incident, her cooperation with disciplinary counsel, her inexperience with such a complicated case and witness such as Mr. Sells, and her remorse) the dictates of the Scott case demand that the Hearing Panel Subcommittee considers annulment of her license.⁴ However, the Hearing Panel Subcommittee

⁴The ABA Model Standards for Imposing Lawyer Sanctions also provide that absent any aggravating or mitigating circumstances, the following sanction is generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit or misrepresentation to a court: Standard 6.11.

found that after a review of the case law that a suspension for a period of three (3) years is the most appropriate sanction. The Hearing Panel Subcommittee further noted that prior to being reinstated to the practice of law, Respondent should be evaluated by a licensed mental health provider and follow any protocol, if any, as directed by the mental health provider; that prior to being reinstated to the practice of law that Respondent be ordered to undergo an additional (12) hours with focus in ethics; that Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure; that prior to being reinstated to the practice of law that Respondent reimburse said costs to the Lawyer Disciplinary Board; and that if Respondent is successfully reinstated in the future, that upon reinstatement she be placed on two (2) years of probation with supervised practice by an active attorney in her geographic area in good standing with the West Virginia State Bar.

V. CONCLUSION

It is this Honorable Court's inescapable and unenviable duty to protect the public and preserve the integrity of its Courts and our system of justice. Based on the totality of Respondent's misconduct, the aggravating factors in this case, the relevant case law and the guidelines from the ABA Model Standards for Imposing Lawyer Sanctions, 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 severely sanctioned. A license to practice law is a revocable privilege and 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

Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

the general public in the integrity of the legal profession. Accordingly, the undersigned requests that this Honorable Court adopt the recommendations of the Hearing Panel Subcommittee in this case.

Respectfully Submitted,
By Counsel.

A handwritten signature in black ink, appearing to read "Rachael L. Fletcher Cipoletti", written over a horizontal line.

Rachael L. Fletcher Cipoletti [Bar No. 8806]
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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 Disciplinary Counsel, have this day, the 29th day of April, 2013, served a true copy of the foregoing "**BRIEF OF THE LAWYER DISCIPLINARY BOARD**" upon Mark W. Kelley, Esquire, counsel for Respondent, Wendelyn A. Elswick, by mailing the same, United States Mail with sufficient postage, to the following address:

Mark W. Kelley, Esquire
109 Capitol Street, Suite 700
Charleston, West Virginia 253



Rachael L. Fletcher Cipoletti

Exhibits on File in Supreme Court Clerk's Office