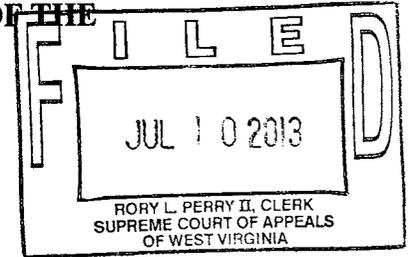


**BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 11-0729

WENDELYN A. ELSWICK,

Respondent.

REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD

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REPLY TO RESPONDENT'S BRIEF

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 a 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.

The Hearing Panel Subcommittee also 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.

A. Respondent's Statute of Limitations Argument Must Fail.

On or about May 6, 2009, pursuant to Rule 8.3 of the Rules of Professional Conduct, Mr. Castelle, who had "knowledge" of misconduct by Respondent that goes to her credibility and fitness

as an attorney, reported the same to the Office of Disciplinary Counsel. The undersigned outlined the history of Mr. Castelle's actions prior to filing the mandated report in the Brief of the Lawyer Disciplinary Board. (See Brief pages 14-18).

Although the disciplinary process and its promulgated rules are designed to protect the public, not lawyers, even considering Rule 2.14 of the Rules of Lawyer Disciplinary Procedure most favorably to Respondent, Mr. Castelle still timely reported the misconduct to the Office of Disciplinary Counsel. Rule 2.14 of the Rules of Lawyer Disciplinary Procedure mandates the dismissal of "[a]ny 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." It should be clarified that the limitation rule applies to the filing of the initial sworn complaint, not the filing of the Statement of Charges. *See, e.g., Walker v. W. Va. Ethics Commission*, 201 W.Va. 108, 492 S.E.d. 167 (1997).

To support the argument that this case is barred, Respondent claims that Mr. Castelle should have personally reviewed the entire contents of the voluminous file upon receipt of the February 7, 2006, recantation of Mr. Sells. As such, Respondent posits that had Mr. Castelle done the same would have discovered Respondent's misconduct. However, as the record reflects, it was not until on or about December 16, 2008, when 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. Since the file with the 61 letters was not kept with the

voluminous case file, even a personal review of the case file in February of 2006 would not have given Mr. Castelle knowledge that Respondent committed a fraud on the Court.

On the contrary, the only lawyer who was again made aware of the fraud that she perpetrated on the Court in 2006, was Respondent. On or about January 31, 2006, Respondent resigned from the Kanawha County Public Defender's Office. On February 2, 2006, the email exchange occurred between Respondent and Ms. Brumfield wherein Ms. Brumfield stated to Respondent:

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.

Again, 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. Instead, despite having a duty to report the same to either Mr. Castelle or the Court, she continued to conceal the fraud.

It was not until on or about March 16, 2009, that 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 she 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.

Again, relying upon Respondent’s representations, Mr. Castelle continued in the quest to zealously represent the client.

It later became clear to Mr. Castelle that despite Respondent’s representations to the contrary¹, she had filed a pleading with false representations to the Court in Mr. Smith’s case. Mr. Castelle promptly took remedial measures as required by the Rules of Professional Conduct and Mr. Castelle reported Respondent to ODC by letter dated May 6, 2009. ODC Exhibit 1. Even viewing the facts most favorably to Respondent, at best, it may be reasonable to believe that Respondent knew or should have known after a reasonable inquiry that Respondent committed a fraud on the Court and had an inappropriate relationship with Mr. Sells upon receipt of the separate file with the 61 letters on or about December 16, 2008. However, given that the complaint was filed within six (6) months of the receipt of that “Texas” file, the reporting of misconduct was still within the acceptable time-frame as outlined in Rule 2.14 of the Rules of Lawyer Disciplinary Procedure.

¹ While the Hearing Panel Subcommittee noted that the remorse expressed by Respondent was mitigating, the Hearing Panel Subcommittee also 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.

Moreover, Rule 2.14 incorporates the discovery rule applied to a variety of civil cases, such as torts and claims of fraud or fraudulent concealment. It is generally recognized that the discovery date presents a question of fact to be resolved by the trier of fact. Stemple v. Dobson, 184 W. Va. 317, 320-21, 400 S.E.2d 561, 564-65 (1990). After multiple days of testimony and reviewing voluminous documents, 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, 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). Respondent has presented no evidence to disturb this factual finding by the Hearing Panel Subcommittee.

Additionally, discovery rule in limitation rules should not be construed narrowly when the nature of the violations allege concealment. As noted by the Hearing Panel, the primary reason that Mr. Castelle had no knowledge of the 2004-2005 misconduct by Respondent is because even upon

inquiry by Mr. Castelle, Respondent chose to conceal the same. Respondent's concealment of the relevant facts and her continuing duty to disclose the same, coupled with her intention to mislead the Court and Mr. Castelle amounts to fraudulent concealment of her misconduct and should toll any limitations expressed by Rule 2.14 of the Rules of Lawyer Disciplinary Procedure. Even assuming *arguendo* that Mr. Castelle's "independent investigation"² of the relevant facts would not permit the limitation rule to toll, that doctrine is not an absolute defense. This Honorable Court stated in Trafalgar House Construction, Inc. v. ZMM, Inc., 211 W.Va. 578, 567 S.E.2d 294 (2002):

The "independent investigation" doctrine is not an absolute defense, and has a "long recognized qualification." Cordial v. Ernst & Young, 199 W.Va. at 132, 483 S.E.2d at 261. As we stated in part in Syllabus Point 3 of Horton v. Tyree, 104 W.Va. 238, 139 S.E. 737 (1927):

It is not necessary that the fraudulent representations complained of should be the sole consideration or inducement moving the plaintiff. If the representations contributed to the formation of the conclusion in the plaintiff's mind, that is enough[.]

We discussed this qualification to the independent investigation doctrine more fully in Cordial v. Ernst & Young, stating:

The mere fact, however, that some investigation is made by the representee is usually held, particularly in the late cases, not to amount in and of itself to a bar to the right to rely upon representations. The representee who attempts investigation may have a right to rely upon the representations where expert knowledge is necessary to an effectual investigation, which knowledge is possessed by the party making the

² See Syllabus Point 5 of Jones v. McComas, 92 W.Va. 596, 115 S.E. 456 (1922), when a plaintiff "undertakes to inform himself from other sources as to matters easily ascertainable, by personal investigation, and the defendant has done nothing to prevent full inquiry, he will be deemed to have relied upon his own investigation and not upon the representations of the seller."

representations, and not by the other. Moreover, if the representee, instead of investigating as fully as he may, makes only a partial investigation and relies in part upon such investigation and in part upon the representations of the adverse party, and is deceived by such representations to his injury, it is held that he has a right to rely on, and may maintain an action for, such deceit. This rule is particularly applicable where the representations were designed to deter further investigation. Furthermore, the fact that one makes an examination or inquiries does not necessarily show that he did not rely on the false representations of the other party.

Trafalgar 211 W.Va. at 585.

The evidence clearly demonstrates that Mr. Castelle returned to Respondent, the drafter and filer of the pleading, at each step of his investigation and clearly relied upon her repeated mantra that she knew this case and Mr. Sells better than anyone else as “she lived with the case for over a year” ODC Exhibit 44 at 3231. She repeatedly affirmed that Mr. Sells never said to her or Ms. Brumfield that he knew Mr. Smith. Accordingly, because the evidence is clear that Respondent fraudulently concealed her misconduct through April 17, 2009, she can not escape accountability by hiding behind the limitations rule.

Finally, in light of the principles of fairness and the purpose of lawyer disciplinary proceedings, public policy dictates that a lawyer accused of perpetrating a fraud upon the Court should not escape accountability for the same because she successfully concealed the same until the statute of limitations on prosecution for the fraud elapses.

B. Respondent’s Misconduct was proven by clear and convincing evidence.

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. Substantial deference is to be given to the Lawyer Disciplinary Board's findings of fact unless the findings are not supported by reliable, probative, and substantial evidence on the whole record. Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994) Id.; Lawyer Disciplinary Board v. Cunningham, 195 W. Va. 27, 464 S.E.2d 181 (1995).

At the Supreme Court, "[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. Respondent has not met the burden to set aside the factual findings of the Hearing Panel Subcommittee.

1. Count I of the Statement of Charges.

The Hearing Panel Subcommittee's findings of violations of Rules 5.3; 3.3; 8.4(c); 8.4(d); and 3.4 of the Rules of Professional were supported by clear and convincing evidence. In reference to the tape recorded statement of May 11, 2004, Respondent now claims that "there simply can be no violation as alleged here when the question was never asked." Respondent Brief at 33. A fraud on the Court can be perpetrated by overt actions as well through covert actions. Respondent, by and through her legal assistant, Ms. Brumfield, knowingly and intentionally adduced incomplete and incorrect evidence on the issue as to whether Mr. Smith and Mr. Sells knew one another. The question posed by Ms. Brumfield to Mr. Sells was "Were you with anyone else at the bar when you

first met her?” to which Mr. Sells answered “Next question.” Ms. Brumfield elicited information that both Ms. Brumfield, and more importantly, Respondent knew to be false. Instead of correcting the same, Respondent let the answer stand and subsequently asked the Court to rely on this false, incomplete evidence, to which the Circuit Court did rely upon the same.

The Court can be assured the same was “known” to Respondent by simply reviewing Respondent’s notes from the day prior to this recorded May 11, 2004, statement. During the May 10, 2004, interview, Respondent took hand-written notes 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 Met Pamela @ another bar— was partying, dancing, flirting— med. height, darker brown hair, drinking longneck— was a slut.....”

ODC Exhibit 1 at 0046.

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. 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. Mr. Sells again confessed to the murders of which Mr. Smith had been convicted. Statement of Charges and Response ¶ 22.

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 adduced these answers of Mr. Sells even though she knew the answers were false. Hearing Panel Report at 13. 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 228 W.Va 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 228 W.Va at 506. Respondent has a duty of candor to the Court. By attaching the May 11, 2004 transcript to her June 9, 2004 motion, Respondent knowingly offered false evidence to the Court. Respondent has a duty not to offer false evidence to the Court from a person who is not her client. She is duty bound to refuse to offer it regardless of the client’s

wishes. *See* Comments to Rule 3.3 of the Rules of Professional Conduct. A violation of the candor and deception rules can occur by acts of commission (filing the June 9, 2004 motion with the May 11, 2004 transcript attached and eliciting false testimony in the September 24, 2004 deposition) **and** omission (not correcting the known falsity of the original statements made in the May 11, 2004 transcript). An attorney's duty of candor should not be tempered by what it can slip past the Court.

2. Count II of the Statement of Charges.

The Hearing Panel Subcommittee's findings of a violation of Rules 1.7(b) of the Rules of Professional were supported by clear and convincing evidence. Mr. Smith filed the *habeas corpus* petition in 1997 and the same was amended several times. After being assigned to the case by Mr. Castelle, and learning of the Sells confession, Respondent labored much of 2004 and 2005 on establishing support that Mr. Smith should be granted a new trial based upon the newly discovered evidence³ of the confession of Mr. Sells. The Sells confession was the primary issue addressed by the Circuit Court, and the sole issue presented to this Court on appeal. The credibility of the confession was not only a material issue, it was the primary issue in the *habeas* matter and the appeal of the same.

The Rule forbids a lawyer from representing a client when her duties may be materially limited by the lawyer's responsibilities to a third person or their own interests, unless the lawyer reasonably believes the representation will not be adversely effected and the client consents after

³ In *habeas* matters, the standard in Circuit Courts for granting a new trial based on newly-discovered evidence is expressed In Re: Renewed Investigation of the State Police Crime Laboratory, Serology Division, 633 S.E.2d 762, 769 (W.Va. 2006). The first requirement is that the newly discovered evidence was discovered after the date of trial; the second is to demonstrate that such evidence could not have been discovered before the verdict; the third is that the evidence must be new and material; the fourth that the new evidence ought to produce an opposite result if a second trial is granted; and the fifth that the new evidence is not solely impeachment evidence.

consultation.⁴ While Respondent relies heavily upon what the Court deemed relevant in its decision to deny habeas relief to Mr. Smith, the Rule references what the lawyer reasonably believes about any adverse effect on the representation of the client. Without the knowledge and consent of her client, Respondent engaged in a relationship with the key witness in her client's case seeking *habeas* relief. By letter received September 24, 2004, five days before the video deposition conducted by Respondent, 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." Mr. Sells was clear with Respondent that he had feelings for her and would say what she needed him to say in the deposition, which of course, he did.

Ultimately, she terminated that relationship and she knew that her actions of terminating the relationship would ultimately harm her client's objectives. As evidenced by her own words, Respondent clearly believed that her actions adversely effected Mr. Smith's interests as she believed that Mr. Sells recantation in February 2006 was because she terminated the relationship with him. ODC Exhibit 44 at 03246. Ms. Brumfield testified that she believed that Mr. Sells recanted his confession because Respondent "quit writing". Day 3 at 65. 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.

⁴ It is undisputed that Mr. Smith was not aware of Respondent's actions at the May 11, 2004 interview or her subsequent relationship with Mr. Sells, thus as he was unaware and in no way consulted, he could not have consented to the same.

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.

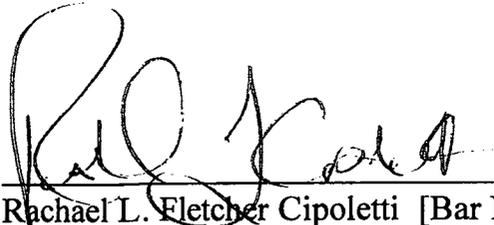
Finally, although it is certain by Mr. Smith's ethics complaint against Respondent that he believed she harmed his case, a violation of the Rules of Professional Conduct can occur without causing harm to a client. The harm or potential harm to the client for the violation is a factor to be considered in sanction, not as to whether a violation of the Rules of Professional Conduct occurred. *See* Rule 3.16 of the Rules of Lawyer Disciplinary Procedure.

CONCLUSION

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.

The Hearing Panel Subcommittee's recommendations are clearly supported by the evidence and fully warranted due to Respondent's misconduct.

By Counsel,

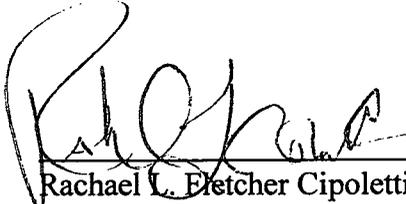


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CERTIFICATE OF SERVICE

This is to certify that I, Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 10th day of July, 2013, served a true copy of the foregoing "**REPLY 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:

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