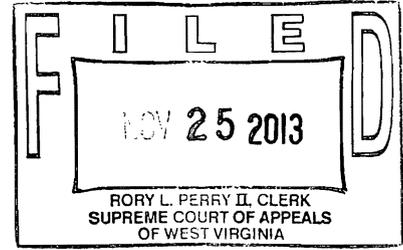


**BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 12-0174

RICHARD T. BUSCH,

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 that Respondent, the elected prosecuting attorney of Randolph County, West Virginia, violated, in both Count I and Count II, Rules 3.3(a)(1) and 3.3(a)(4) [Candor toward the tribunal]; 3.4(a) and 3.4(c) [Fairness to opposing party and counsel]; 3.8(d) [Special Responsibilities of a Prosecutor]; 8.4(c) and 8.4(d) [Misconduct] of the Rules of Professional Conduct. The Hearing Panel Subcommittee properly considered the evidence, the existence of both aggravating and mitigating factors, and the relevant case law and has recommended an appropriate sanction in this case.

Respondent's arguments in his brief to this Honorable Court essentially mirror that of the arguments made to the Hearing Panel Subcommittee, with exception to the request to permit the Court to view the time spent rendering the well-reasoned decision by the Hearing Panel Subcommittee favorably for Respondent.¹

The Lawyer Disciplinary Board is comprised of volunteer members of both the public and the West Virginia State Bar. These members are not compensated for their time. The lawyer members are active practicing lawyers. Many of its lay members take vacation time from their non-legal occupations to participate in these labor intensive, and often times,

¹ In his brief to the Hearing Panel Subcommittee, Respondent requested that the Hearing Panel Subcommittee view his resignation from the Office of the Prosecutor and that he has not practiced law since that resignation as a mitigating factor. The Hearing Panel Subcommittee made a specific finding of the same in its recommendation to the Court. Recommendation at 24. The Hearing Panel Subcommittee further noted that it viewed the presumptive sanction in this matter as disbarment, but based on the mitigating factors, they were instead recommending a lengthy suspension. Recommendation at 32.

emotionally charged hearings. The number of hearings before the Board have increased exponentially over the course of the past five (5) years and the Board has endeavored to ensure that it is diligent in meeting its deadlines. The recommendations made by the Board in this (and all) disciplinary matter(s) are made after a full consideration of the evidentiary record presented, the legal arguments made by the parties, and the relevant case law. It is undisputed that there was a delay by the Hearing Panel Subcommittee in issuing its recommended findings in this case, but Respondent presents no evidence of prejudice suffered by the delay. Moreover, Respondent took no available legal measure towards the Hearing Panel Subcommittee to address the delay in the adjudication.

The Hearing Panel Subcommittee has recommended an appropriate sanction in this matter and the same is consistent with the ABA Model Standards for Imposing Lawyer Sanctions that provides that absent any aggravating or mitigating circumstances, in cases that involve conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit or misrepresentation to a court that:

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

The Hearing Panel Subcommittee recommendation of a suspension is consistent with the relevant West Virginia case law that does not involve lawyers in a position of heightened scrutiny. 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); 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); and Lawyer Disciplinary Board v. Elswick,— S.E.2d—, WL 5433578 (2013): (attorney suspended for two years for violating Rules 5.3; 3.3; 8.4(c); 8.4(d); 3.4(b) and 1.7(b) for knowingly and intentionally permitting her assistant to elicit false statements from a potential witness; filing the same false evidence in court; failing to take any remedial measures regarding the false evidence and maintaining an inappropriate pen-pal relationship with the witness).

Finally, the recommendation of a three year suspension in on point with Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E.2d 550 (2003). In Scott, the Davis majority formally adopted the mitigating and aggravating factor analysis in disciplinary matters and reduced a prosecutor's sanction who committed twenty-two violations from disbarment to a three year suspension. Scott was a prosecutor at the time of the offenses, including lying to the Court, and had a wealth of mitigating factors, including inexperience as an attorney. Scott also resigned from the position of Prosecuting Attorney of Harrison County, West Virginia when he was the subject of the disciplinary complaints. The Davis

Court was “extremely disturbed” by Scott’s willingness to cover up his errors through dishonesty, but found the mitigating factors “compelled” the Court to impose a sanction less than disbarment. Scott, 213 W.Va. at 217-218 (2003). Evidence of mitigation does not and should exculpate an attorney from sanction for misconduct. The Hearing Panel relied upon the evidence of the mitigating factors by recommending that Respondent, a public official, receive the penultimate sanction of a lengthy suspension in *lieu* of annulment of his law license.

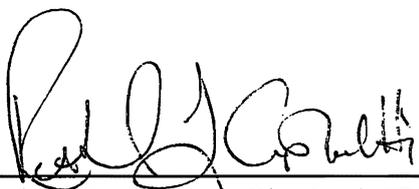
CONCLUSION

The Hearing Panel Subcommittee’s recommendations are clearly supported by the evidence and are appropriate in light of Respondent’s pattern of misconduct in a position of heightened scrutiny. In order to effectuate the goals of the disciplinary process, the Hearing Panel Subcommittee recommended that Respondent’s law license be suspended for three (3) years; that prior to petitioning for reinstatement that Respondent be evaluated by a licensed mental health provider and follow any protocol, if any, as directed by the mental health provider; that prior to petitioning for reinstatement that Respondent be ordered to undergo an additional twelve (12) hours CLE with a 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 petitioning for reinstatement that Respondent reimburse these costs to the Lawyer Disciplinary Board; and that if Respondent is successfully reinstated in the future, that upon reinstatement he be placed on two (2) years of probation with supervised

practice by an active attorney in his geographic area in good standing with the West Virginia State Bar.

As noted by the Hearing Panel Subcommittee, “[a]ny failure to hold Respondent accountable for his egregious actions sends the message to the public, the Bar, and, particularly, the citizens of Randolph County, West Virginia, that our Rules of Professional Conduct that govern this profession are no more than empty promises.” Recommendation at 37. Accordingly, Chief Disciplinary Counsel urges this Honorable Court to accept the recommendations of the Hearing Panel Subcommittee.

LAWYER DISCIPLINARY BOARD
By Counsel,

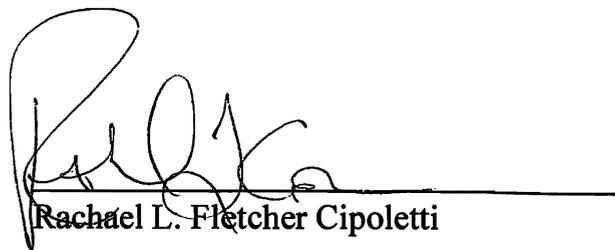


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CERTIFICATE OF SERVICE

This is to certify that I, Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 22nd day of November, 2013, served a true copy of the foregoing **"REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD"** upon, J. Michael Benninger, Esquire, counsel for Respondent, by mailing the same, United States Mail with sufficient postage, to the following address:

J. Michael Benninger, Esquire
Post Office Box 623
Morgantown, West Virginia 26507



Rachael L. Fletcher Cipoletti

Exhibits on File in Supreme Court Clerk's Office