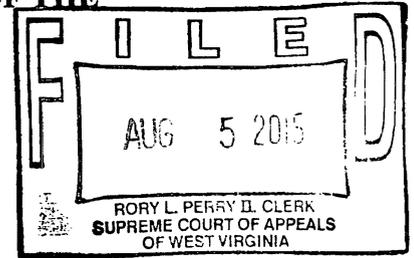


**BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 13-1128

JARRELL L. CLIFTON, II,

Respondent.

BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. STATEMENT OF THE CASE

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

Formal charges were filed against Respondent Jarrell L. Clifton, II, with the Clerk of the Supreme Court of Appeals on or about November 5, 2013, and served upon Respondent via certified mail by the Clerk on November 12, 2013. Disciplinary Counsel was granted an extension to file her mandatory discovery, and the same was filed on January 7, 2014. Respondent was granted an extension to file his discovery and his Answer to the Statement of Charges, and both were filed on or about February 28, 2014. Respondent waived the 120 day deadline by which to hold the hearing, and the matter was set for hearing on May 15 and 16, 2014. Due to issues with witness availability, Disciplinary Counsel moved for a continuance of the May hearing dates, and the matter was set for August 12 and 13, 2014.

Respondent's counsel filed a "Motion to Withdraw", and Respondent filed a "Motion to Dismiss Statement of Charges on Grounds of *Res Judicata*" and a "Motion to Continue". All of these motions were heard on July 28, 2014. Respondent's counsel were granted leave to withdraw, the motion to continue was granted, and a ruling on the motion to dismiss was held in abeyance. The hearing in this matter was rescheduled for November 10 and 11, 2014.

On July 17, 2014, Disciplinary Counsel filed a "Notice of Intent to Introduce Evidence Pursuant to Rule 404(b) of the Rules of Evidence. The Hearing Panel Subcommittee met in executive session to consider (1) Motion to Dismiss Statement of Charges on Grounds of Res Judicata; (2) Motion and Memorandum in Support of Motion to Dismiss Statement of Charges on Grounds of Res Judicata; (3) Respondent's Supplemental Motion Regarding Rule 8.4(B) of the West Virginia Rules of Professional Conduct; and (4) Disciplinary Counsel's Response to Respondent's

Supplemental Motion Regarding Rule 8.4(b) of the West Virginia Rules of Professional Conduct. By Order entered September 25, 2014, the Hearing Panel Subcommittee denied Respondent's Motion to Dismiss the Statement of Charges and Motion regarding 8.4(b).

On or about October 24, 2014, Respondent filed "Respondent's Motion to Exclude/In Limine" and "Respondent's Notice Under Rule 412(b)(2) of the West Virginia Rules of Evidence". Disciplinary Counsel wished to file responses thereto, so the motions were not heard at the October 29, 2014 prehearing. Disciplinary Counsel was directed to file response by 2:00 p.m. on October 30, 2014; and Respondent's counsel had until 4:00 p.m. on October 31 to file any reply. The parties were advised that the Hearing Panel Subcommittee would confer prior to the November 10, 2014 hearing and advise the parties of any rulings prior to the commencement of the hearing. Disciplinary Counsel filed her responses. Thereafter, Respondent withdrew his notice under Rule 412(b)(2) on October 31, 2014. Soon after, Disciplinary Counsel filed a Withdrawal of Notice of Intent to Introduce Evidence Pursuant to Rule 404(b) of the Rules of Evidence on November 5, 2014. On November 7, 2014, the Hearing Panel then denied Respondent's Motion to Exclude/In Limine which sought dismissal on the basis that the claims were not timely filed.

Just prior to the scheduled hearing, Respondent and Disciplinary Counsel entered into stipulations that the charge against Respondent relating to an alleged violation of the sexual imposition on an incarcerated person, under West Virginia Code 61-8B-10, located in Paragraph 49 of the Statement of Charges regarding a violation of Rule 8.4(b) of the West Virginia Rules of Professional Conduct be withdrawn and not offered for consideration of the Hearing Panel Subcommittee.

Thereafter, this matter proceeded to hearing in Charleston, West Virginia, on November 10, 2014. The Hearing Panel Subcommittee (hereinafter “HPS”) was comprised of Steven K. Nord, Esquire, Chairperson, James R. Akers, II, Esquire, and Dr. K. Edward Grose, Layperson. Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. Mark L. McMillian, Esquire, appeared on behalf of Respondent, who also appeared. The Hearing Panel Subcommittee heard testimony from T.N.S.¹, K.M., L.C., Jonathan G. Wilson, Rick Bennett, Davina Agee, Elissa Taylor, Lt. Robert J. Simon, Special Agent Frederick D. Aldridge, Brandy Moore, David Jonese, Dorothy Morgan, Maggie Feury and Respondent. In addition, ODC Exhibits 1-14, 17, 18, 20 bates stamp 1048-1097, and 22-35 were admitted, with the redactions to Exhibit 9. Also admitted were Respondent’s Exhibits 1-2 and Joint Exhibit J1-J2 were admitted into evidence.

On or about June 26, 2015, the HPS issued its decision in this matter and filed with the Supreme Court of Appeals of West Virginia its “Report of the Hearing Panel Subcommittee” (hereinafter “Report”). The HPS properly found that the evidence established that Respondent violated Rules 1.7(b), 8.1(a), 8.4(c) and 8.4(d) of the Rules of Professional Conduct.

The HPS issued the following recommendations for discipline:

- A. That Respondent’s law license be suspended for a period of two years;
- B. That Respondent be required to petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure;

¹ The victims are identified by their initials pursuant to Rule 40(e)(1) of the Rules of Appellate Procedure.

- C. That, upon reinstatement, Respondent's practice be supervised for a period of two (2) years by an attorney agreed upon between the Office of Disciplinary Counsel and Respondent;
- D. That at the conclusion of the period of suspension, prior to petitioning for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, that Respondent shall be required to undergo an independent psychological/psychiatric evaluation to determine whether he is fit to engage in the practice of law and is further required to comply with any stated treatment protocol;
- E. That Respondent be ordered to undergo an additional 12 hours of continuing legal education with a focus on legal ethics; and
- F. That Respondent be ordered to reimburse the Lawyer Disciplinary Board the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

On or about June 30, 2015, the Office of Disciplinary Counsel filed its formal objection to the HPS's Recommendation pursuant to Rules 3.11 and 3.13 of the Rules of Lawyer Disciplinary Procedure.

B. FINDINGS OF FACT

1. General.

Jarrell L. Clifton, II (hereinafter "Respondent") is a lawyer practicing in Marlinton, which is located in Pocahontas County, West Virginia. Respondent, having passed the bar exam, was admitted to The West Virginia State Bar on November 5, 2007. ODC Ex. 27, bates stamp 1325; 11/11/14 Hrg. Trans. p. 37. As such, Respondent is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.

Respondent served as an assistant prosecutor for Pocahontas County, West Virginia from late 2007 to the latter part of 2010. 11/11/14 Hrg. Trans. p. 38.

On or about August 7, 2012, Respondent was indicted for two counts of “sexual assault in the second degree” and two counts of “imposition of sexual intercourse on an incarcerated person” before the Pocahontas County, West Virginia Circuit Court. ODC Ex. 1, bates stamp 1-2; ODC Ex. 2, bates stamp 3-4; 11/11/14 Hrg. Trans. p. 39. Respondent self-reported the matter to Disciplinary Counsel and, on August 8, 2012, a complaint was opened in the name of the Office of Disciplinary Counsel. ODC Ex. 3, bates stamp 5-6; 11/11/14 Hrg. Trans. p. 41. By letter dated August 9, 2012, Disciplinary Counsel wrote to Respondent asking for a response to the allegations. *Id.* By letter dated August 21, 2012, Respondent invoked his Fifth Amendment Right until such time as the criminal matters were resolved. ODC Ex. 4, bates stamp 7; 11/11/14 Hrg. Trans. p. 41. Because Respondent invoked his Fifth Amendment Right, a stay of the disciplinary proceeding was ordered by the Investigative Panel on September 15, 2012. ODC Ex. 6, bates stamp 17.

A hearing on the criminal charges was held on December 6, 2012, in the Circuit Court of Pocahontas County, West Virginia, and by Order entered January 8, 2013, NPT 12/6/12, the criminal charges were dismissed with prejudice. ODC Ex. 5, bates stamp 12-14. At its April 27, 2013 meeting, the Investigative Panel ordered that the stay of the disciplinary proceeding be lifted. ODC Ex. 6, bates stamp 17. By letter dated May 14, 2013, Disciplinary Counsel wrote to Respondent asking for a response to the complaint. ODC Ex. 6, bates stamp 17-18, 11/11/14 Hrg. Trans. p. 43. By letter dated May 30, 2013, Respondent provided a response stating “[t]he allegations set forth in the indictment are false.” ODC Ex. 7, bates stamp 19. Respondent also provided a copy of the Order dismissing the criminal charges. ODC Ex. 7, bates stamp 19-23. Disciplinary Counsel obtained a

copy of the files concerning the investigation of the matter. Based on the information contained therein, she interviewed T.N.S., K.M. and L.C. ODC Ex. 9, bates stamp 25-98, 126.

2. Allegations concerning T.N.S.

On or about August 4, 2009, T.N.S. was indicted with two counts of “possession with intent to deliver a controlled substance” in the Pocahontas County, West Virginia Circuit Court Case No. 09-F-22. ODC Ex. 11, bates stamp 145. On or about November 6, 2009, T.N.S. pled guilty to one count of “possession with intent to deliver a controlled substance” and the remaining charge was dismissed. ODC Ex. 17, bates stamp 319-322. On or about March 19, 2010, T.N.S. was sentenced to one to five years incarceration, but the same was suspended for two years of probation and one year of participation in the Day Report Program. ODC Ex. 17, bates stamp 326-328. T.N.S. signed the terms and conditions for the Day Report Program on or about March 19, 2010. Id. The terms and conditions indicated that any violation of the terms and conditions could result in an arrest and incarceration without a hearing, until further order of the Court, as well as reinstatement of the original sentence (while T.N.S. was on probation and Day Report). Id.

In the summer of 2010, Respondent contacted T.N.S. on several occasions and asked her to come by his prosecutor’s office. 11/10/14 Hrg. Trans. p. 14-17. T.N.S. is unsure of the exact dates or number of times she went to Respondent’s office at the prosecutor’s office, but said she went around three or four times. 11/10/14 Hrg. Trans. p. 16. T.N.S. is unable to remember what happened at each meeting but Respondent asked to take naked pictures of T.N.S. which she did, and had T.N.S. perform oral sex on him. 11/10/14 Hrg. Trans. p. 17-21. She testified he threatened that she would go back to jail if she didn’t comply. 11/10/14 Hrg. Trans. p. 19-22.

After those initial meetings, T.N.S. was able to get out of meeting with Respondent by sending him numerous pictures and videos of her naked or scantily clad body, some of which were even taken while she was serving community service or Day Report, or when performing sexual acts. 11/10/14 Hrg. Trans. p. 22-34; p. 118-119; ODC Ex. 9, bates stamp 126. T.N.S. testified that she did these things because of Respondent's position as an assistant prosecuting attorney, which made her feel threatened. Hrg. Trans. pp. 127-128. On or about March 24, 2011, T.N.S. completed all requirements of the day report program, but remained on probation. ODC Ex. 17, bates stamp 329-332.

On or about August 15, 2011, First Lieutenant Robert J. Simon with the West Virginia State Police started an investigation against Respondent. ODC Ex. 9, bates stamp 30-31. In the spring of 2012, Respondent, who was no longer an assistant prosecuting attorney at that time, contacted T.N.S. through Facebook, requesting to meet with her. ODC Ex. 9, bates stamp 37. On or about April 17, 2012, Respondent contacted T.N.S. through Facebook. Id. T.N.S. emailed a copy of the chat to First Lt. Simon and Respondent asked T.N.S. if anyone had asked about him. Id. Respondent also wanted to meet with T.N.S. Id. Two days later, on or about April 19, 2012, T.N.S. struck up a Facebook conversation with Respondent and Respondent asked for more pictures of T.N.S. ODC Ex. 9, bates stamp 38. First Lt. Simon, Federal Bureau of Investigation Special Agent Fred Aldridge and West Virginia State Police Lt. D.B. Malcomb were present at T.N.S.'s residence when this occurred. Id., 11/10/14 Hrg. Trans. p. 340-341, 398-399. Respondent made it clear that he wanted T.N.S. to come by his office. ODC Ex. 9, bates stamp 38; 11/10/14 Hrg. Trans. p. 37, 399. T.N.S. informed Respondent that she had been contacted by investigators for interviews, Respondent then insisted that T.N.S. come to his office. ODC Ex. 9, bates stamp 38. T.N.S. signed a "consensual

monitoring form” with First Lt. Simon and agreed to wear a body recorder and meet with Respondent. Id. When T.N.S. appeared at Respondent’s office, he asked to take pictures of her and begged her to touch his penis. ODC Ex. 20, bates stamp 1066-1067, 1068, 1069, 1070, 1072, 1073, 1074, 1078, 1079, 1080, 1081, 1083, 1084, 1085, 1086, 1087, 1088; 11/10/14 Hrg. Trans. p. 37-38, 345, 403-404. The recorded conversation also involved what to tell people about why T.N.S. had stopped by Respondent’s office at the prosecutor’s office while he was an assistant prosecuting attorney. ODC Ex. 20, bates stamp 1075-1077, 1083-1084; 11/10/14 Hrg. Trans. p. 38-39, 345-347.

On or about May 29, 2012, after the recording of the conversation between T.N.S and Respondent, First Lt. Simon and Special Agent Aldridge interviewed Respondent. ODC Ex. 9, bates stamp 41, 56; 11/10/14 Hrg. Trans. p. 347, 404. These investigators were eventually led to Respondent via their work on a case against former Pocahontas County Sheriff’s Deputy Brad Totten. Mr. Totten and Respondent formerly worked together as Sheriff’s Deputies prior to Respondent’s completion of law school and admission to the West Virginia State Bar. Mr. Totten was accused of various sex crimes including, but not limited to, sexual intercourse with an incarcerated person. In the process of contacting alleged victims of Mr. Totten, investigators learned of some of Respondent’s alleged misconduct. ODC Ex’s 1, 9 (e.g. – bates stamp 36), 21; Hrg. Trans. 397-398. During the interview, Respondent described his relationship with T.N.S. as “professional acquaintances” as she spoke in the community about being drug free. ODC Ex. 9, bates stamp 41, 56; 11/10/14 Hrg. Trans. p. 348-349, 405. At first, Respondent indicated that he was not friends with T.N.S. ODC Ex. 9, bates stamp 41, 56; 11/10/14 Hrg. Trans. p. 348-349. Later in the interview, Respondent stated that he did not have a sexual relationship with T.N.S. but that they were friends. ODC Ex. 9, bates stamp 43, 58; 11/10/14 Hrg. Trans. p. 349, 406. When First Lt. Simon pointed out

the contradictions in his descriptions of the relationship, Respondent admitted that he exchanged photographs and videos with T.N.S. Id. Respondent was then informed that T.N.S. was wearing a wire when she appeared at his office on or about April 19, 2012. ODC Ex. 9, bates stamp 43, 58; 11/10/14 Hrg. Trans. p. 350. Respondent indicated that he knew that and that it was stupid of him to ask her to touch his penis. ODC Ex. 9, bates stamp 43, 58; 11/10/14 Hrg. Trans. p. 350, 406-407.

3. Allegations concerning K.M.

In the mid- to late 1990's, K.M. worked for Respondent at a bar and restaurant he formerly owned in Pocahontas County, West Virginia. This period of time pre-dated Respondent's completion of his law degree and admission to the West Virginia State Bar. 11/10/14 Hrg. Trans. p. 154-155. During that time, the two had a consensual sexual relationship. 11/10/14 Hrg. Trans. p. 154-155. On one occasion, and without K.M.'s knowledge, Respondent videotaped the two of them having sex at this business after hours. 11/10/14 Hrg. Trans. p. 155. Respondent later showed K.M. the videotape and she asked that it be destroyed. 11/10/14 Hrg. Trans. p. 157. Respondent told K.M. that the videotape had been destroyed. 11/10/14 Hrg. Trans. p. 162-163, 236-237.

In 2008, Respondent filed a lawsuit on behalf of K.M. against several individuals and Allegheny Echoes in the Pocahontas County, West Virginia Magistrate Court Case No. 08-C-113. 11/10/14 Hrg. Trans. p. 157-158; ODC Ex. 32, bates stamp 1425-1426. On or about March 27, 2009, Jonathan Wilson, son of K.M., was charged with the criminal offense of brandishing in Pocahontas County, West Virginia Magistrate Court Case No. 09-M-188. ODC Ex. 13, bates stamp 201-204. On or about March 29, 2009, K.M. signed a "Criminal Bail Agreement: Cash or Recognizance." ODC Ex. 13, bates stamp 197-198. A short time after March 29, 2009, K.M. approached Respondent

at a local grocery store about her son's criminal case. 11/10/14 Hrg. Trans. p. 158-160. Respondent asked K.M. to stop by his office. Id.

Shortly after K.M. approached Respondent at the local grocery store, K.M. went to Respondent's office at the prosecutor's office. 11/10/14 Hrg. Trans. p. 160-161. When K.M. entered Respondent's office, he told her that she caught him looking at porn. Id. After K.M. indicated that she was not there for that, Respondent began to talk about her son's case. 11/10/14 Hrg. Trans. p. 162. Respondent told K.M. about the witness statements in the file and that they did not match. Id. At that point, Respondent brought up the videotape of the sexual encounter and told K.M. that he did not destroy the videotape. 11/10/14 Hrg. Trans. p. 162-163. Respondent agreed to get rid of the videotape if K.M. would let Respondent see her naked body. 11/10/14 Hrg. Trans. p. 163, 239. When K.M. refused that request, Respondent stood up from his desk with his penis exposed. 11/10/14 Hrg. Trans. p. 163-164. Respondent requested K.M. to give him oral sex and to touch his penis. 11/10/14 Hrg. Trans. p. 164. Accordingly to K.M., she held Respondent's penis after Respondent continued to ask her and had her kiss it in an attempt to get oral sex. 11/10/14 Hrg. Trans. p. 165-166. K.M. was able to leave before anything went further. 11/10/14 Hrg. Trans. p. 166. When K.M. asked about her son's case again, Respondent indicated that she might want to get an attorney for her son, Jonathan Wilson, and that he could recuse himself from the case. 11/10/14 Hrg. Trans. p. 167. 11/10/14 Hrg. Trans. p. 168; ODC Ex. 9, bates stamp 97.

Shortly after K.M. went to Respondent's office, Respondent sent Facebook messages to K.M. informing her that her time was up. 11/10/14 Hrg. Trans. p. 168; ODC Ex. 9, bates stamp 97. On or about May 11, 2009, Christine Stump, Esquire, filed a notice of appearance in Mr. Wilson's case (K.M.'s son) along with a Demand for Trial by Jury and Motion for Discovery. ODC Ex. 13, bates

stamp 192-194. On or about May 12, 2009, the Magistrate Court sent a letter to Mr. Wilson, Ms. Stump and Respondent that the trial date set for May 20, 2009, was now a pre-trial conference. ODC Ex. 13, bates stamp 189. Several pre-trial conferences were set after May of 2009. ODC Ex. 13, bates stamp 172, 173-174, 178, 179-180, 181, 182-183, 191. On or about November 19, 2009, Ms. Stump filed a Motion to Withdraw Request for Jury Trial wherein she indicated that she had spoken with Respondent, who had no objection to the Motion. ODC Ex. 13, bates stamp 162-163. On or about December 3, 2009, Respondent filed a Motion to Dismiss Without Prejudice wherein it indicated that the State wanted to dismiss the matter because the victim was unwilling to cooperate. ODC Ex. 13, bates stamp 160. The motion was granted the same day. Id.

On or about June 28, 2010, an Agreed Order of Dismissal with Prejudice was entered in K.M.'s civil case against Allegheny Echoes. ODC Ex. 32, bates stamp 1428. K.M. testified she wanted her case settled, in part, because she no longer wanted to deal with Respondent. This stemmed from his alleged misconduct in his assistant prosecutor's office in April, 2009, described above in paragraph 31. Hrg. Trans. pp. 245-246.

4. Allegations concerning L.C.

In the past, L.C. was formerly know as L.B. 11/10/14 Hrg. Trans. p. 262. L.C. had a previous sexual relationship with Respondent. 11/10/14 Hrg. Trans. p. 262-263. In or around 2009, L.C. was a victim of theft. 11/10/14 Hrg. Trans. p. 263. L.C. approached Respondent at his office in the prosecutor's office seeking advice as to what she should do about the situation. 11/10/14 Hrg. Trans. p. 263-264. During that meeting, L.C. was told to perform oral sex on Respondent. 11/10/14 Hrg. Trans. p. 264-265. While testifying, L.C. admitted her embarrassment that she complied with Respondent's request while sitting in his assistant prosecutor's office. Id. Respondent's "authority"

influenced L.C. and she felt “intimidated” by him. Id. at pp. 291-292, 298. L.C. would not have provided Respondent with oral sex if he had not been an assistant prosecutor. Id. At 301.

On or about March 22, 2009, Ricky Bennett was charged with domestic battery in the Pocahontas County, West Virginia Magistrate Court Case No. 09-M-176, and brandishing in the Pocahontas County, West Virginia Magistrate Court Case No. 09-M-177. ODC Ex. 33, bates stamp 1545-1547. L.C. was the victim in both of those cases. Id. On or about May 3, 2009, L.C. was herself charged with the criminal offense of destruction of property in the Pocahontas County, West Virginia Magistrate Court Case No. 09-M-213. ODC Ex. 28, bates stamp 1383-1384. On or about May 20, 2009, Mr. Bennett entered into a diversion agreement regarding his criminal charges. ODC Ex. 28, bates stamp 1514-1515. Respondent was the prosecutor listed in the diversion agreement and signed the document. Id.

On or about June 8, 2009, L.C. entered into a pre-trial diversion agreement concerning the destruction of property charge against her, where she agreed to not violate the law for six months, pay restitution to the victim by the end of the diversion period, and to stay away from the individual. ODC Ex. 28, bates stamp 1362. Respondent, as prosecutor, signed off on the agreement. Id. On or about August 6, 2009, Respondent, as prosecutor, filed a Motion to Set the matter concerning L.C. for a bond revocation hearing wherein the grounds indicated that the “State believes there is information regarding defendant’s violation of her current bond.” ODC Ex 28, bates stamp 1357. Also, on or about August 6, 2009, a motion was filed by Respondent in Mr. Bennett’s criminal cases to withdraw the diversion agreement and to set the matters for trial. ODC Ex. 33, bates stamp 1480-1491. On or about August 12, 2009, an Agreed Order was entered that withdrew the State’s Motion and ordered that L.C. be released from the pre-trial diversion. ODC Ex. 28, bates stamp 1346-1347.

On or about September 16, 2009, the case against L.C. was dismissed. ODC Ex. 28, bates stamp 1344. On or about September 17, 2009, Mr. Bennett entered a guilty plea to battery and the brandishing charge was dismissed. ODC Ex. 33, bates stamp 1436-1437. Respondent was the prosecutor that appeared for that hearing. ODC Ex. 33, bates stamp 1435.

L.C. believed her prior sexual relationship with Respondent was potentially beneficial if she “would’ve been in serious trouble.” Regardless, she was also afraid Respondent would pressure her for oral sex in the future. By example, Respondent’s assistant prosecutor’s office was across the hallway from the Pocahontas County Health Department. L.C. testified Respondent used to “linger” around the door during her visits to that facility. L.C. therefore asked the Department’s secretary to accompany her as she walked by Respondent’s government office. 11/10/14 Hrg. Trans. p. 271-273.

C. CONCLUSIONS OF LAW

The HPS found that Respondent violated Rules 1.7(b), 8.4(c) and 8.4(d)² of the Rules of Professional Conduct.³ This was based upon Respondent being an Assistant Prosecuting Attorney in Pocahontas county, West Virginia, when he required T.N.S., who was on probation and participating in the Day Report Program in Pocahontas County, to perform oral sex on him and

² **Rule 1.7. Conflict of interest: General rules.**

(b) A lawyer shall not represent a client if the responsibilities of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after consultation

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;

³ The Supreme Court of Appeals of West Virginia approved comprehensive amendments to the West Virginia Rules of Professional Conduct. The amendments became effective January 1, 2015; however, this document applies to the version of the Rules that was in effect at the time of Respondent’s transgressions. The substance of the new Rules would not result in a different disposition in this case.

provide him with sexually explicit photographs and videos. Respondent was found by the HPS to have violated Rule 1.7(b) and 8.4(d)⁴ of the Rules of Professional Conduct because he attempted among other things to require K.M to perform oral sex on him when she went to his office at the prosecutor's office about her son's criminal case. Respondent required L.C. to perform oral sex on him when she approached him as an Assistant Prosecutor when inquiring about a criminal matter, while she was both a defendant in a criminal matter and a victim in a criminal matter. According to the HPS findings, this violated Rules 1.7(b) and 8.4(d)⁵ of the Rules of Professional Conduct.

Respondent was found to have violated Rule 8.1(a)⁶ of the Rules of Professional Conduct by the HPS for providing false information to the Office of Disciplinary Counsel wherein he denied the conduct alleged in the indictment. Further, the HPS found that the information Respondent provided to the F.B.I. and the West Virginia State Police about his relationship with T.N.S. was false, in violation of 18 U.S.C. 1001(a)⁷ and West Virginia Code 15-2-16⁸, which adversely reflected

⁴ The provisions of Rule 1.7(b) and 8.4(d) are set forth in n. 2 *supra*.

⁵ The provisions of Rule 1.7(b) and 8.4(d) are set forth in n. 2 *supra*.

⁶ **Rule 8.1. Bar admission and disciplinary matters.**

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact;

⁷ 18 U.S.C. 1001(a) states that "[e]xcept as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully - (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both."

⁸ W.Va. Code 15-2-16 states that "[a]ny person who shall at any time intercept, molest or interfere with any officer or member of the department of public safety while on duty, or any state, county or municipal officer or person then under the charge and direction of some office or member of the department of public safety while on duty, or who knowingly gives false or misleading information to a member of the department, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than twenty-five dollars nor more than two hundred dollars, or imprisoned

on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.4(b)⁹ of the Rules of Professional Conduct.¹⁰

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).

The HPS of the Lawyer Disciplinary Board found that Respondent committed multiple violations of Rules 1.7(b) and 8.4(d) along with violations of Rules 8.4(c), 8.1(a), and 8.4(b) of the Rules of Professional Conduct. The HPS recommended that Respondent be suspended for two (2) years; that he be required to petition for reinstatement; that upon reinstatement, he undergo two (2) years of supervised practice; that prior to reinstatement, he undergo an independent psychological/psychiatric evaluation; that he take an additional twelve (12) hours of continuing legal education with a focus on legal ethics; and pay the costs of the disciplinary proceedings. Respectfully, ODC asserts that while there was no error in findings of fact made by the HPS, the

in the county jail for not more than sixty days, or both fined and imprisoned. It is noted that W.Va. Code 15-2-2 states that “[t]he Department of Public Safety, heretofore established, shall be continued and hereafter shall be known as the West Virginia State Police. Wherever the words “Department of Public Safety” or “Division of Public Safety” appear in this code, they shall mean the West Virginia State Police.

⁹ **Rule 8.4. Misconduct.**

It is professional misconduct for a lawyer to:

(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;

¹⁰ The Hearing Panel noted that Respondent had also knowingly provided false information in his Answer and Affirmative Defenses when he represented that he no longer possessed the videotaped sexual encounter between him and witness K.M. As discussed in the Hearing Panel Report and this brief, this was patently untrue. Respondent still possessed the videotape in question and even brought it with him to the parties November 10, 2014 hearing.

HPS's recommendation as to sanction is insufficient as applied to these facts and is inconsistent with relevant law.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 19 of the Revised Rules of Appellate Procedure, this Honorable Court's July 6, 2015 Order set this matter for oral argument on Tuesday, October 6, 2015.

IV. ARGUMENT

A. STANDARD OF PROOF

In lawyer disciplinary matters, a *de novo* standard of review applies to questions of law, questions of application of the law to the facts, and questions of appropriate sanction to be imposed. Roark v. Lawyer Disciplinary Board, 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 of Appeals gives respectful consideration to the Lawyer Disciplinary Board's recommendations as to questions of law and the appropriate sanction, while ultimately exercising its own independent judgment. McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381.

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

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

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

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

Syl. Point 4 of Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998) holds: Rule 3.16 of the Rules of Lawyer Disciplinary Procedure provides that when imposing a sanction after a finding of lawyer misconduct, the Court shall consider: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. A review of the extensive record in this matter indicates that Respondent has transgressed all four factors set forth in Jordan.

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

All lawyers owe duties of candor, loyalty, diligence and honesty to their clients. Members of the public must 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 evidence in this case establishes by clear and convincing proof that Respondent violated his duties owed to his client, the public, the legal system, and the legal profession.

The HPS found that Respondent as an Assistant Prosecuting Attorney for Pocahontas County, West Virginia, had a duty to his client, the State of West Virginia, to not engage in misconduct that constitutes a conflict of interest. Respondent created a conflict of interest when he engaged or initiated and engaged sexual contact with T.N.S. while she was on Day Report and probation. Respondent told T.N.S. on several occasions about not wanting to go back to jail when she was at his prosecutor's office. 11/10/14 Hrg. Trans. p. 118. Respondent's threat of jail caused T.N.S. to believe that she had to pose for nude photographs and provide oral sex to Respondent. Id. That belief was based upon T.N.S. previous revocation of her Day Report status for a false accusation of stealing handcuffs, which resulted in her spending five (5) months in jail. 11/10/14 Hrg. Trans. p. 119-120, 129-130. The director of the day report for T.N.S. provided testimony that a violation of Day Report resulted in T.N.S. going to jail. 11/10/14 Hrg. Trans. p. 319-320. The testimony from T.N.S. revealed that the public exposure of the nude photos and videos of her have made her feel "completely humiliat[ed]," and she no longer feels comfortable meeting alone with an attorney. 11/10/14 Hrg. Trans. p. 39-40.

Additional testimony was provided from Maggie Feury, a former friend of T.N.S., about T.N.S. going to the prosecuting attorney's office of Respondent during the summer of 2010. 11/11/14 Hrg. Trans. p. 224. Ms. Feury said that T.N.S. had related that she had sex with Respondent. 11/11/14 Hrg. Trans. p. 225. There were red friction marks on T.N.S.'s inner thighs and T.N.S. appeared to be sweaty according to Ms. Feury. 11/11/14 Hrg. Trans. p. 225-226.

Respondent engaged in sexual intercourse with T.N.S. while she was on Day Report and probation, and also demanded that T.N.S. provide sexually explicit photographs and videos to him. Respondent was in a position of power as an attorney and as an assistant prosecuting attorney. By requiring sex, photographs, and videos from T.N.S. while she was on Day Report and probation, Respondent's use of his position of power created a significant conflict of interest.

Respondent created another conflict when he coerced K.M. to kiss his penis when she sought him out at his office for advice about her son's criminal case. 11/10/14 Hrg. Trans. p. 172. K.M. began to have a fear about returning to Respondent's office by herself, but she also had concern about what would happen to her son's criminal case. 11/10/14 Hrg. Trans. p. 170. The thought of appearing in Respondent's prosecutor office after that incident terrified her. 11/10/14 Hrg. Trans. p. 171. K.M. testified that she "never expected that to happen to me in that office." 11/10/14 Hrg. Trans. p. 171. Not only does K.M. no longer go alone into an office with a man, but she also no longer trusts men in general. 11/10/14 Hrg. Trans. p. 172. K.M. also was concerned that her son would end up in jail if she did not follow Respondent's requests. 11/10/14 Hrg. Trans. p. 240. Respondent's misconduct in this matter is clearly prejudicial to the administration of justice.

Respondent also represented K.M. in a civil case, and she made no issue of Respondent continuing as her attorney in that case because there was a fear she had about her son's criminal case, as well as the money involved in the civil case. 11/10/14 Hrg. Trans. p. 242-243. The civil case was a lawsuit against Allegheny Echoes for an unpaid sum of Nine Hundred and Fifty Dollars (\$950.00). 11/10/14 Hrg. Trans. p. 185-186. The settlement of the civil case for half of what K.M. sued for was, in part, due to Respondent's misconduct in his office against K.M. 11/10/14 Hrg. Trans. p. 246.

L.C. was a victim in a criminal case before Respondent while he was an assistant prosecuting attorney, and when he asked for and received oral sex from L.C. 11/10/14 Hrg. Trans. p. 294-296. There was another incident of L.C. providing oral sex to Respondent when she had gone to Respondent's office at the courthouse because of she was victim of theft. 11/10/14 Hrg. Trans. p. 263. It was also noted that L.C. had pending criminal charges against her during the same period of time. L.C. did understand that it could be helpful to her if she provided oral sex to Respondent. 11/10/14 Hrg. Trans. p. 271-272. L.C. testified that she provided oral sex because she was "in an office with [Respondent] with authority." 11/10/14 Hrg. Trans. p. 291-292. L.C. felt "intimidated" by Respondent, 11/10/14 Hrg. Trans. p. 292, 298, and asserted that she would not have given Respondent oral sex if he had not been the assistant prosecutor. 11/10/14 Hrg. Trans. p. 301. Further, when questioned about whether this experience affected her opinion of attorneys, L.C. indicated that she does not "trust a whole lot of anybody." 11/10/14 Hrg. Trans. p. 275.

The witnesses describe multiple incidents of sexual misconduct by Respondent which were in direct conflict with his responsibilities as an assistant prosecutor representing the State of West Virginia. Respondent used the legal system and his position as a means by which he could have sexual contact with his victims. Some of the testimony was contested by Respondent, but much of it was not. For instance, Respondent admitted that T.N.S. had sent him nude photographs and nude videos. 11/11/14 Hrg. Trans. p. 46. In addition, those nude photos and nude videos were received by Respondent when he was a prosecutor. 11/11/14 Hrg. Trans. p. 51. Respondent further admitted that there was "sexual banter" between him and T.N.S., during that same period of time, with the sexual banter consisting of a "wide range of sex talk and fantasy talk." 11/11/14 Hrg. Trans. p. 46-47. Respondent also admitted to taking T.N.S.' cell phone and taking a picture of his penis.

Respondent's Affirmative Defenses, filed February 28, 2014; 11/11/14 Hrg. Trans. p. 47-48. Respondent asserted in his affirmative defenses that T.N.S. exposed herself in his prosecuting attorney's office. Respondent's Affirmative Defenses, filed February 28, 2014; 11/11/14 Hrg. Trans. p. 48-49. Respondent testified that he kept the nude photos and nude videos sent from T.N.S. because he liked them. 11/11/14 Hrg. Trans. p. 50. This conduct occurred while Respondent was an assistant prosecuting attorney and T.N.S., having been convicted and sentenced, was on probation and Day Report. Subsequently, during the April 19, 2012 meeting between Respondent and T.N.S., monitored by the FBI and State Police, Respondent asked T.N.S. to show him her genitals and in exchange he would show her his penis. 11/11/14 Hrg. Trans. p. 54-55. Respondent stated that he wanted T.N.S. to hold his penis during that meeting because he "wanted some reassurance that [he] didn't have anything to worry about and when it didn't come, [he] became more desperate." 11/11/14 Hrg. Trans. p. 59. Special Agent Aldridge testified that he believed Respondent was "trying to figure out which team she's on, kind of are you on Team Clifton or are you on Team US or the state government, whoever, and . . . from the dialogue, the logic if you read it is if she touches my penis, then she must not be working for the government." 11/10/14 Hrg. Trans. p. 407.

Respondent violated his duty to the general public by engaging in dishonest, fraudulent misconduct that interfered with the administration of justice. This included Respondent's position of power over the women who testified in this case. With T.N.S., who was on probation and Day Report, Respondent insinuated that she should perform sexual acts or she could go back to jail, so she continued sending him the sexually explicit photographs and videos. T.N.S. was concerned that she could end up back in jail. K.M. was worried about her son's criminal case because she never returned to Respondent's office after he had her kiss his penis. Respondent denied the incident and

testified that any conduct between occurred during their prior consensual relationship. And L.C. believed that having oral sex with Respondent could help her if she ever needed it. However, Respondent admitted that he filmed a sexual encounter with K.M. 11/11/14 Hrg. Trans. p. 62-63. Respondent asserted in the document entitled “affirmative defenses” that the videotape had been destroyed. Respondent’s Affirmative Defenses, filed February 28, 2014. However, during the hearing, Respondent testified that he had not destroyed the videotape and admitted that it was with him in the hearing room. 11/11/14 Hrg. Trans. p. 63, 140. Finally, L.C. believed that having oral sex with Respondent in his office, while he was assistant prosecuting attorney, could help her with the criminal matters she was facing.

The legal system and legal profession have been damaged by Respondent’s misconduct. Respondent did not operate within the bounds of the law when he provided false information to the State Trooper and the Special Agent of the Federal Bureau of Investigation. Lt. Simon of the West Virginia State Police testified that Respondent lied to him on May 29, 2012, by stating that there was no relationship between Respondent and T.N.S. 11/10/14 Hrg. Trans. p. 362. Special Agent Aldridge stated that Respondent first indicated that he and T.N.S. were professional acquaintances and he denied a sexual relationship. 11/10/14 Hrg. Trans. p. 405-406. Respondent admitted that he denied having a sexual relationship with T.N.S. when speaking with Lt. Simon and Special Agent Aldridge. 11/11/14 Hrg. Trans. p. 77. It is clear from the evidence in this case that Respondent did have a sexual relationship with T.N.S., and that he provided false information to a state trooper and a Special Agent of the Federal Bureau of Investigation, in violation of two criminal statutes as referenced in footnotes 7 and 8.

Importantly, Respondent was an assistant prosecuting attorney at the time these sexual encounters occurred in his office at the county courthouse. Respondent himself acknowledged that his conduct had “an inescapable negative reflection” on the legal profession. 11/11/14 Hrg. Trans. p. 248-249, 264. Although he testified that his wife now has full access to his phone, passwords, and computers (11/11/14 Hrg. Trans. p. 250), this raises a concern with respect to any confidential client material that may be kept on such devices. Importantly, Respondent admitted to and acknowledged responsibility for “[t]he sex talk, chat, online chat with [T.N.S.] and receiving photographs from her, welcoming them from her at a time whenever [he] represented the public as a prosecuting attorney and she was under the guise of the court system.” 11/11/14 Hrg. Trans. p. 261-262. Additionally, as to T.N.S. providing nude photographs and nude videos, Respondent testified that he did not dispute that “it was professionally inappropriate for a status offender to exchange nude photographs and pictures of herself with [him] while [he was] an assistant prosecuting attorney in Pocahontas County.” 11/11/14 Hrg. Trans. p. 163-164.

2. Respondent acted intentionally and knowingly.

Respondent clearly acted intentionally and knowingly with respect to the women who testified that he told them to perform sexual acts upon him. There is no evidence to suggest otherwise. As indicated previously, he admitted several of the allegations. Respondent intentionally used his position as assistant prosecuting attorney to obtain sexual favors from women who were connected in some manner to the criminal justice system. Respondent knew that he was in a position of power over the women who believed they would benefit by doing as he required. Respondent ignored the obvious conflicts of interest he created on multiple occasions. Respondent also failed

to consider the damaging effect his sexual misconduct has upon the legal system and legal profession.

3. The amount of real injury is great.

This misconduct by Respondent clearly demonstrates an appalling lack of good judgment, discretion and concern for his own personal integrity, and also calls into question his fitness as a member of the Bar. Likely, none of the women who testified will be trusting of lawyers or the legal system in the future. These acts, which took place at the courthouse, in the office of an assistant prosecuting attorney to whom these women came for help, not only caused significant damage to the reputation and integrity of the office of prosecuting attorney, but the legal profession, in general. Comment five (5) to Rule 8.4 of the Rules of Professional Conduct reads, for example, “Lawyers hold public office assume legal responsibilities going beyond those of other citizens. A lawyer’s abuse of public office can suggest an inability to fulfill the professional role of attorney.”

4. There are several aggravating factors present.

Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Court to examine when considering the imposition of sanctions. Elaborating on this rule, the Scott Court held “that aggravating factors in a lawyer disciplinary proceeding ‘are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.’” Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E. 2d 550, 557 (2003) *quoting ABA Model Standards for Imposing Lawyer Sanctions*, 9.21 (1992).

The multiple aggravating factors present in this case were Respondent’s selfish motive, pattern of misconduct, multiple offenses, vulnerability of the victims, and illegal conduct. Rule 9.22(c) of the *ABA Model Standards for Imposing Lawyer Sanctions* also indicates that a pattern of

misconduct constitutes an aggravating factor. Respondent has exhibited a pattern and practice of using the office of the prosecuting attorney for his own sexual benefit.

5. There are two mitigating factors present.

The Scott Court also adopted mitigating factors in a lawyer disciplinary proceeding and stated that mitigating factors “are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.” Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 214, 579 S.E.2d 550, 555 (2003). Respondent’s mitigating factors are an absence of a prior disciplinary record and inexperience in the practice of law.

A mitigating factor that cannot be used in this case is any claim of depression by Respondent. Respondent testified during the hearing that he suffered from depression but offered no medical testimony or evidence or witnesses to support that assertion. The Hearing Panel found that the undiagnosed depression alleged by Respondent was not sufficient to mitigate any sanction in this matter. The Hearing Panel pointed out that this Court has stated that “[i]n a lawyer disciplinary proceeding, a mental disability is considered mitigating when: (1) there is evidence that the attorney is affected by a mental disability; (2) the mental disability caused the misconduct; (3) the attorney’s recovery from the mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.” Lawyer Disciplinary Board v. Dues, 218 W.Va. 104, 624 S.E.2d 125 (2005). The Hearing Panel found that there was no clear and convincing evidence to establish that Respondent suffered any mental disability or that the alleged disability caused the misconduct because it appeared that Respondent never sought treatment. Likewise, Respondent could not show that any recovery was demonstrated by a meaningful and sustained period of successful rehabilitation

and no evidence was presented that the recovery arrested the misconduct and that recurrence of similar misconduct is unlikely.

C. SANCTION

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syllabus Pt. 3, *in part*, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), *cited in* Committee on Legal Ethics v. Morton, 186 W.VA. 43, 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).

This case involves an attorney who admittedly used his powerful position as assistant prosecutor to require sexual gratification from several women. Each victim went to him because he was the assistant prosecuting attorney, and because they were seeking help for either themselves or their family members. Once they were in his office, Respondent elicited sexual favors from them. The West Virginia Supreme Court has previously stated that “[e]thical violations by a lawyer holding

a public office are viewed as more egregious because of the betrayal of the public trust attached to the office.” Syl. Pt. 3, Committee on Legal Ethics of the West Virginia State Bar v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989), and Syl. Pt. 7, Lawyer Disciplinary Board v. Busch, 233 W.Va. 43, 754 S.E.2d 729 (2014). The West Virginia Supreme Court has routinely suspended prosecutors for misconduct. *See* Committee on Legal Ethics of the West Virginia State Bar v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989) (use of illegal drugs while being a prosecutor and being a mayor resulted in a three (3) year suspension); Committee on Legal Ethics of the West Virginia State Bar v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993) (use of illegal drugs while being a prosecutor resulted in a two (2) years suspension); Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E.2d 550 (2003) (presenting before the grand jury as a prosecutor after being notified that his license would be suspended, along with other misconduct resulted in a three (3) year suspension); Lawyer Disciplinary Board v. Amos, 233 W.Va. 610, 760 S.E.2d 424 (2014) (having contact with a represented person resulted in a seventy-five (75) day suspension); Lawyer Disciplinary Board v. Busch, 233 W.Va. 43, 754 S.E.2d 729 (2014) (making false representations to a court and opposing counsel, obstructing access to evidence, and failure to timely release exculpatory evidence resulted in a three (3) year suspension); *but see* Lawyer Disciplinary Board v. Sims, 212 W.Va. 463, 574 S.E.2d 795 (2002) (making extrajudicial statements that could have materially prejudice an adjudicative proceeding resulted in public reprimand after prosecutor was removed from office) and Lawyer Disciplinary Board v. Jarrell, 206 W.Va. 236, 523 S.E.2d 552 (1999) (conferring with a defendant without his counsel and false information regarding a plea agreement resulted in dismissal of charges because none of the misconduct was criminal, the attorney chose not to run for reelection, and the attorney had suffered from negative publicity).

Disciplinary Counsel would like to distinguish the events in this case from those in a recent disciplinary case in West Virginia involving an assistant prosecutor, who conversed with a respondent mother from an abuse and neglect case about the case and took her to a bar featuring nude female dancing, which resulted in a seventy-five (75) day suspension for the attorney. Lawyer Disciplinary Board v. Amos, 233 W.Va. 610, 760 S.E.2d 424 (2014). The victim in that case had reportedly said that the assistant prosecutor had made physical contact and made comments that “she interpreted to mean that he expected sexual favors in exchange for helping her with the abuse and neglect case,” along with requesting to have sex and kissing her on the cheek. Id. at 614, 428. The attorney resigned his position as assistant prosecutor and self reported the conduct. Id. The victim in that case did not appear at the hearing and there was “no affirmative evidence before the Hearing panel regarding [the victim’s] allegations of [the assistant prosecutor’s] sexual overtures, other than [the assistant prosecutor’s] denials of the same.” Id. The assistant prosecutor was found to have violated Rules 1.7, 4.2, and 8.4(d) of the Rules of Professional Conduct.

This case before the Supreme Court of Appeals of West Virginia is clearly distinguishable from the Amos case. The Amos case lacked any evidence of sexual contact. In this case, there were three (3) victims who all testified about having sexual contact with Respondent after they approached him at his prosecutor’s office for help or advice. They provided testimony about Respondent coercing them into sexual contact while in his office. Another distinguishable issue in this case that is different from Amos case is the fact that all of the sexual contact in this case occurred in the prosecutor’s office at the county courthouse. Here, multiple women seeking assistance went to Respondent’s office specifically because he was the assistant prosecuting attorney. Instead of

receiving assistance, their trust was abused by Respondent who required sexual favors, photographs and videos from them.

Respondent also committed a criminal offense when he provided false information to a West Virginia State Trooper and to a Special Agent with the Federal Bureau of Investigation during the course of their investigation. Additionally, false information was knowingly provided to the Office of Disciplinary Counsel concerning the conduct alleged in the indictment. When coupled with the evidence of his sexual misconduct while an assistant prosecutor, there is sufficient evidence to annul Respondent's license to practice law.

This Court has made clear that “[d]isbarment of an attorney to practice law is not used solely to punish the attorney but is for the protection of the public and the profession.” Syl. Pt. 2, In re Daniel, 153 W.Va. 839, 173 S.E.2d 153 (1970). While there is case law in West Virginia that suggests that a multi-year suspension is more appropriate for Respondent's misconduct when he was holding public office, the facts of this case are so egregious to warrant a more severe sanction. Disciplinary Counsel asserts that Respondent should be disbarred for his sexual misconduct regarding these three (3) female victims. As discussed, Respondent should be held to a higher standard because he was an assistant prosecutor in his office at the courthouse when the conduct in question occurred. Moreover, there is clear and convincing evidence of a pattern and practice because there are multiple incidents, involving three (3) victims who initially interacted with Respondent because of his position as an assistant prosecuting attorney. It is clear from the recorded conversation between Respondent and T.N.S. on April 19, 2012, that Respondent continually suggested sexual contact even when T.N.S. rebuffed him. Although that recorded conversation may have taken place after Respondent was no longer the assistant prosecuting attorney, it mirrors the

testimony provided by the women as to what happened in the prosecutor's office. Respondent did not stop with his repeated requests for sexual favors until they, in some manner, finally gave in to his request. As indicated previously, even after he was no longer a public official, Respondent still tried to get T.N.S. to provide sexual favors to him in his private office. Respondent used the vulnerability of the victims for his own sexual gain. Respondent used women who sought out Respondent due to his position as an assistant prosecutor. All three (3) victims went to Respondent's office at the courthouse for help with the legal system, and Respondent used his position to obtain sexual favors.

The *ABA Model Standards for Imposing Lawyer Sanctions* under Standard 4.31 provide that disbarment is generally appropriate when a lawyer, without the informed consent of a client, engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer, and causes serious injury to the client. This standard is relevant to the conflict Respondent had when handling criminal cases as an assistant prosecuting attorney, while forcing the sexual contact upon the three (3) victims. Standard 5.11 of the *ABA Model Standards for Imposing Lawyer Sanctions* indicates that disbarment is generally appropriate when a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, or the lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice. Respondent's criminal act in providing false information to the West Virginia State Trooper and the Special Agent of the Federal Bureau of Investigation is serious criminal conduct that calls into question his fitness to practice law. Further, Respondent was involved in misrepresentation and dishonesty by indicating that T.N.S. could go back to jail if she did not provide the sexual favors

to him. Lastly, the *ABA Model Standards for Imposing Lawyer Sanctions* Standard 5.21 states that disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself. Respondent obtained a significant benefit or advantage for himself by having the three (3) victims provide sexual gratification for him in his position as the assistant prosecuting attorney, while actually in his office at the courthouse.

“Disbarment of an attorney to practice law is not used solely to punish the attorney but is for the protection of the public and the profession.” Syl. pt. 2, In re Daniel, 153 W.Va. 839, 173 S.E.2d 153 (1970); and Syl. pt. 6, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998). 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 swiftly be removed from the practice of law. A severe sanction is also necessary to deter other lawyers from engaging in similar conduct.

Disciplinary Counsel points to a recent case out of Iowa that involved an attorney who sexually harassed at least five (5) clients, and coerced two (2) of them to engage in unwanted sex acts. Iowa Supreme Court Attorney Disciplinary Board v. Moothart, 860 N.W.2d 598 (Iowa 2015). The attorney in that case was sanctioned with a thirty (30) month suspension. Id. the Iowa Supreme

Court noted that while the attorney had a no prior discipline and had a good reputation in his community, the attorney “manipulated each woman for his own sexual gratification” which warranted “a lengthy suspension . . . to provide adequate deterrence and to protect future potential clients and the reputation of the bar, particularly in light of the seriousness of the offenses.” *Id.* at 617. The same happened in this case. Respondent “manipulated” the three (3) victims for “his own sexual gratification.” The additional factor in Respondent’s case is that he was an assistant prosecutor when he sought the “sexual gratification.” As previously suggested, misconduct by “a lawyer who holds public office is held to a higher standard simply because of his position of public trust.” Committee on Legal Ethics of the West Virginia State Bar v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993). Such misconduct by an attorney holding public office should enhance the sanction. While the attorney in Iowa faced a thirty (30) month suspension, disbarment should be the next step for someone who committed similar misconduct while holding public office.

Conduct similar to that of the Respondent has resulted in disbarment in other jurisdictions. A Pennsylvania disciplinary case resulted in the disbarment of an attorney who pled guilty to several criminal offenses that included endangering the welfare of children, while the attorney was chief deputy district attorney. Office of Disciplinary Counsel v. Cappuccio, 616 Pa. 439, 498 A.3d 1231 (2012). While Respondent herein did not plea guilty to a criminal offense, the evidence shows that Respondent engaged in criminal offenses, along with engaging in sexual contact with women connected to the criminal system while he was an assistant prosecutor. In Cappuccio, the Pennsylvania Supreme Court stated that the “resolution of the dispute turns on the significance of the fact of [the attorney’s] position as a public official, *i.e.*, the Chief Deputy District Attorney . . . , at the time he committed his criminal misconduct.” *Id.* That Court went on to state:

“[t]his Court takes this opportunity to make clear what should be self-evident: the fact that a lawyer holds a public office, or serves in a public capacity, as here, is a factor that properly may be viewed as aggravating the misconduct in an attorney disciplinary matter. This aggravation arising from public status is strong where the public position is that of prosecutor and the misconduct involves criminal actions, and it is particularly strong where, as her, the conduct involved crimes against individuals . . . We realize that many attorneys hold positions of trust with respect to individual clients. But, that trust is not the same as the broader public trust reposed in judges, prosecutors and the like. Indeed, the facts of this case bear out the consequences that may arise when a position of public trust is involved. The evidence reveals that [the attorney] gained access to his minor victims — access that allowed him to ply them with drugs and alcohol, and that led to his sexual encounters with victim #1 — because of his respected and trusted position as a Deputy District Attorney . . .”

Id. at 456, 1241-1242. It is clear from this case that Respondent gained access to his victims through his position as an assistant prosecutor or through the legal system. These three (3) women appeared in Respondent’s office at the prosecuting attorney’s office to seek assistance with respect to the criminal justice system. Instead of using his position to ensure the sanctity of a prosecutor’s office, Respondent used his position to obtain sexual gratification from vulnerable women.

A Georgia attorney was disbarred when he asked a client about oral sex, exposed his penis, tried to give her kiss, and touched her breasts. In re Hall, 295 Ga. 452, 761 S.E.2d 51 (2014). The attorney in Hall had plead guilty to sexual battery and public indecency. The Georgia Supreme Court found that maximum sanction of disbarment was appropriate because the “aggravating factors include that [the attorney] committed his illegal acts against a client and that he acted with a selfish motive”, in spite of mitigating factors that included “the lack of a prior disciplinary record and [the attorney’s] prior distinguished reputation.” Id. at 453, 52. While the three (3) victims in this case were not Respondent’s clients, they were members of the public who came to see Respondent because he was the assistant prosecuting attorney. While at Respondent’s prosecuting attorney’s

office, he, in essence forced them to provide sexual favors. He used these three (3) victims' vulnerable position to his advantage.

Further, an attorney in Maryland was disbarred for sexting with a client's opponent who was representing herself. Attorney Grievance Comm'n of Md. v. Marcalus, 112 A.3d 375, 442 Md. 197 (Maryland 2015). While the attorney initially had communication with the woman because she was representing herself against the attorney's client, the attorney began to text with the woman about modeling and being a "sugar daddy." Id. The attorney did have a meeting with the woman at a beach where she "modeled" some outfits for him. Id. The next day, after that meeting, the attorney texted the woman about what she would be willing to do with the "sugar daddy" and about whether toys could be used. Id. Further, there was conversation about the attorney having an erection when he woke up and the attorney indicating that the "sugar daddy" would provide money to watch the woman masturbate. Id. The attorney and the woman both testified that the conversations were a joke. Id. The Maryland court found that such misconduct, even if it was a joke and consensual, violated Rule 8.4(d) regarding conduct prejudicial to the administration of justice. Id. Further, the Court indicated that the attorney's misconduct was related to the practice of law in that the woman was the opposing party in a case against the attorney's client. In the case pending before this Court, it can certainly be said that Respondent's misconduct was related to the practice of law because of where the incidents occurred and why they occurred there. Again, all of the incidents occurred in Respondent's office at the courthouse when he was an assistant prosecuting attorney and because the three (3) victims went to that office to seek help with the legal system.

Another attorney was suspended for five (5) years after making sexual advances in person and through texts which lead to sexual contact with one (1) client in an unreported case out of North

Carolina. The North Carolina State Bar v. Christopher H. Rahilly, 14 DHC 4 (N.C. 10/27/14) (unreported). The attorney had denied the sexual contact in an interview during the investigation as well as when he submitted an affidavit. Id. The texts sent from the attorney included graphic pictures of the attorney. Id. The case stated that the attorney “elevat[ed] his sexual desires above the best interests of his clients.” Id. Further, the victims of the attorney had testified that they “will be more cautious about trusting lawyers in the future.” Id. Respondent’s misconduct is similar to the misconduct in this case, with the added fact that Respondent was a prosecutor when the misconduct occurred.

A case that is almost completely on point with this case is an unreported case out of Virginia, which revoked the license of an attorney who was an Assistant Commonwealth Attorney after he engaged in sexual relations with two (2) defendants. In the Matter of Zane Bruce Scott, 2001 WL 34402628 (Va.St.Disp.) (Va. 2/22/11) (unreported). In that case, the attorney had sex with one (1) of the defendants in his office. That case stated that “[t]he awesome powers of a prosecutor in relation to an accused place on the prosecutor the high duty to remain true to his oath. Misuse or abuse of these powers not only can result in harm to the accused, but also can result in improperly compromised prosecutions and/or faulty convictions.” Id. Further, “[a] prosecutor’s actions are constantly in the public eye. . . It is probable that his misconduct has undermined public confidence in the administration of justice. We believe it put the entire legal profession in a bad light.” Id. This case also stated that they felt that the attorney “coerced sex from [a victim] using not his charm, but only the power of his office.” Id. It is those same issues that put Respondent’s misconduct in this case at a level where he should be disbarred. Respondent had the power of the prosecutor’s office

behind him when he propositioned the victims. Those victims were unable to deny Respondent's sexual contact because he had such control over them.

The HPS indicated that they recommended a two (2) year suspension as opposed to annulment based on their belief that there were previous consensual relationships between Respondent and the three (3) victims. The HPS went on to state

“that even if the sexual acts in question were not forcible so as to constitute a crime, there is clear and convincing evidence they were improper under the Rules of Professional Conduct. All three victims testified that Respondent's position as an assistant prosecutor influenced their decision-making. Even if that had not been the case a lawyer, especially one who holds a public office, should not cross the line that was breached in this case. At some point during the relevant times in dispute, all three women were either victims, defendants, clients or on probation in matters over which Respondent had some degree of control, by virtue of his position as assistant prosecuting attorney.”

Footnote 7 of the Report of HPS filed on June 26, 2015. This is in contradiction to this Honorable Court's previous statement that they would protect “the vulnerable . . . from the lustful advances of attorneys.” Lawyer Disciplinary Board v. Stanton, 225 W.Va. 671, 680, 695 S.E.2d 901, 910 (2010). The Stanton case dealt with an attorney who gave false information in order to enter a correctional facility to meet a former female client to have sexual relations. Lawyer Disciplinary Board v. Stanton, 225 W.Va. 671, 695 S.E.2d 901 (2010). In that case, this Court stated that

“[a]t first glance, this case appears to related solely to the prurient acts of an attorney with a woman with whom he had a long-standing sexual relationship. From a legal disciplinary standpoint, however, this case is of greater moment. Without undue focus on the case's salacious details, this case distills down to the deliberate misrepresentations of a member of the State Bar to correctional officers of a secure prison facility in order to gain access to an incarcerated person in the State's custody, the subsequent abuse of trust occasioned by the attorney's taking advantage of the inmate and whether that conduct is a violation of the our Rules of Professional Conduct.”

Id. at 677, 907. While it may be asserted that Respondent was having sexual relationships with two (2) of the victims in this case because of his previous sexual relationship with them, the manner in which he forced them to have the additional sexual contact while he was an assistant prosecuting attorney is inappropriate because they had approached him in his prosecutor's office for help with the criminal system. The Stanton court stated that the attorney's

“conduct fell so far below what should reasonably be expected of attorneys as to be shocking to this Court. His actions fueled a wave of questions by the public, the incarcerated, jail authorities and fellow members of the legal profession. This Court is faced with having to reassure all affected parties that the likelihood of this conduct, and similar conduct by other members of the bar, is going to be met with harsh consequences. Furthermore, this Court must assist in protecting the vulnerable, especially those in State custody, from the lustful advances of attorneys . . .”

Id. at 679-680, 909-910. The reliance of the HPS on the past relationship the victims had with Respondent should not mitigate in Respondent's favor. As already found by the HPS and stated above, the vulnerability of the victims is an aggravating factor. These three (3) vulnerable victims were sexually abused by Respondent, an attorney who held a position of trust.

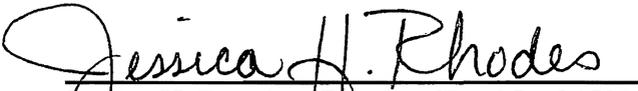
Respondent's conduct herein is egregious and touches the very essence of the public's perception of the legal profession. This is not a one (1) time event for Respondent. Respondent used his prosecuting attorney's office to force multiple women to provide him with sexual favors. Respondent used his position of power and his courthouse office, on multiple occasions, for his sexual gratification. Then, when speaking with law enforcement concerning one of the victims, Respondent provided false information. While this is Respondent's first offense, he committed significant violations of his obligations to the victims and to the public at large.

V. CONCLUSION

For the reasons set forth above, Disciplinary Counsel requests that this Honorable Court adopt the following sanctions:

- A. That Respondent's law license be annulled;
- B. That Respondent be required to petition for reinstatement pursuant to Rule 3.33 of the Rules of Lawyer Disciplinary Procedure;
- C. That, upon reinstatement, Respondent's practice be supervised for a period of two (2) years by an attorney agreed upon between the Office of Disciplinary Counsel and Respondent;
- D. That at the conclusion of the period of annulment, prior to petitioning for reinstatement pursuant to Rule 3.33 of the Rules of Lawyer Disciplinary Procedure, that Respondent shall be required to undergo an independent psychological/psychiatric evaluation to determine whether he is fit to engage in the practice of law and is further required to comply with any stated treatment protocol; and
- E. That Respondent be ordered to reimburse the Lawyer Disciplinary Board the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel


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CERTIFICATE OF SERVICE

This is to certify that I, Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 5th day of August, 2015, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" upon Mark L. McMillian, Esquire, counsel for Respondent Jarrell L. Clifton, II, by mailing the same via United States Mail with sufficient postage, to the following address:

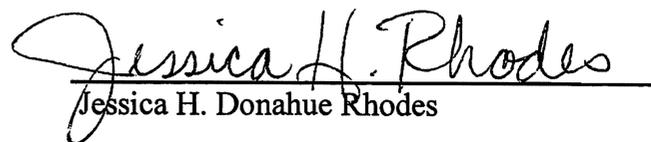
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And upon the Hearing Panel Subcommittee at the following addresses:

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