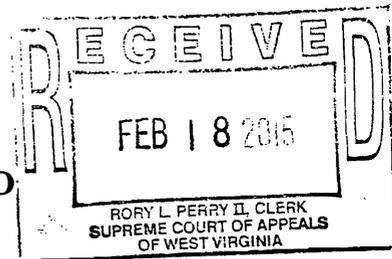


BEFORE THE LAWYER DISCIPLINARY BOARD
STATE OF WEST VIRGINIA



In Re: JARRELL L. CLIFTON, II, a member of
The West Virginia State Bar

Bar No.: 10616
Supreme Court No.: 13-1128
I.D. No.: 12-05-448

DISCIPLINARY COUNSEL'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED SANCTIONS

I. PROCEDURAL HISTORY

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 their notice under Rule 412(b)(2) on October 31, 2014. Soon after,

Disciplinary Counsel filed a Withdrawal of Notice of Intent to Introduce 404(b) 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 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-

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

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.

Based upon the evidence and the record, the Office of Disciplinary Counsel submits to the Hearing Panel Subcommittee of the Lawyer Disciplinary Board the following Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions regarding the final disposition of this matter.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. 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.
2. Respondent served as an assistant prosecutor for Pocahontas County, West Virginia from around 2007 to around the latter part of 2010. 11/11/14 Hrg. Trans. p. 38.
3. 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.

4. 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.
5. By letter dated August 9, 2012, Disciplinary Counsel wrote to Respondent asking for a response to the allegations. Id.
6. 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.
7. A stay of the disciplinary proceeding was ordered by the Investigative Panel on September 15, 2012. ODC Ex. 6, bates stamp 17.
8. A hearing on the criminal charges was held on December 6, 2012, and by Order entered January 8, 2013, NPT 12/6/12, the charges were dismissed with prejudice. ODC Ex. 5, bates stamp 12-14.
9. 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.
10. 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.
11. 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.

12. 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.

Allegations Concerning T.N.S.

13. 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.
14. 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.
15. 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. Id.
16. 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.

17. T.N.S. is unsure of the exact date or amount 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.
18. After those meetings, T.N.S. was able to get out of meeting with Respondent by sending him pictures and videos of her naked or scantily clad body or by performing sexual acts. 11/10/14 Hrg. Trans. p. 22-33; p. 118-119; ODC Ex. 9, bates stamp 126.
19. 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.
20. 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.
21. In the spring of 2012, Respondent contacted T.N.S. through Facebook requesting to meet with her. ODC Ex. 9, bates stamp 37.
22. 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.
23. 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 was present along with Federal Bureau of Investigation

Special Agent Fred Aldridge and West Virginia State Police Lt. D.B. Malcomb at T.N.S.'s residence when this occurred. Id., 11/10/14 Hrg. Trans. p. 340-341, 398-399. Respondent wanted T.N.S. to come by his office². 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 and Respondent 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. 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 conversation also involved what to tell people about why T.N.S. had stopped by Respondent's office at the prosecutor's office. ODC Ex. 20, bates stamp 1075-1077, 1083-1084; 11/10/14 Hrg. Trans. p. 38-39, 345-347.

24. On or about May 29, 2012, First Lt. Simon and Special Agent Aldridge interviewed Respondent. ODC Ex. 9, bates stamp 41, 56; 11/10/14 Hrg. Trans. p. 347, 404. Respondent described his relationship with T.N.S. as "professional acquaintances" as she spoke about being drug free. ODC Ex. 9, bates stamp 41, 56; 11/10/14 Hrg. Trans. p. 348-349, 405. Respondent, at first, 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

² By this time, Respondent had left his position as Assistant Prosecutor for Pocahontas County, West Virginia.

interview, Respondent stated that he did not have a sexual relationship with T.N.S. and 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 contradiction from the first statement and the Facebook chats, 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.

Allegations Concerning K.M.

25. K.M. had worked with Respondent over the years and had a consensual sexual relationship with him in the past. 11/10/14 Hrg. Trans. p. 154-155. However, during the past consensual relationship, Respondent videotaped a sexual encounter with K.M. without her knowledge. 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.
26. 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.

27. 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.
28. On or about March 29, 2009, K.M. signed a “Criminal Bail Agreement: Cash or Recognizance.” ODC Ex. 13, bates stamp 197-198.
29. Around a day or week after March 29, 2009, K.M. approached Respondent at a local grocery store about Mr. Wilson’s criminal case. 11/10/14 Hrg. Trans. p. 158-160. Respondent asked K.M. to stop by his office. Id.
30. Around a day or week 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. went into Respondent’s office, he indicated that she caught him looking at porn. Id. After K.M. indicated that she was not there for that, Respondent began to talk about Mr. Wilson’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. K.M. 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 Mr. Wilson's case again, Respondent indicated that she might want to get an attorney for Mr. 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.

31. On or about a week and a half after K.M. went to Respondent's office, Respondent sent Facebook messages to K.M. about her time being up. 11/10/14 Hrg. Trans. p. 168; ODC Ex. 9, bates stamp 97.
32. On or about May 11, 2009, Christine Stump, Esquire, filed a notice of appearance in Mr. Wilson's case along with a Demand for Trial by Jury and Motion for Discovery. ODC Ex. 13, bates stamp 192-194.
33. On or about May 12, 2009, 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.
34. 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.
35. 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.

36. 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.
37. On or about June 28, 2010, an Agreed Order of Dismissal with Prejudice was entered in K.M.'s civil case. ODC Ex. 32, bates stamp 1428. The matter had been appealed to the Circuit Court of Pocahontas County, West Virginia.

Allegations Concerning L.C.

38. 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.
39. 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 as to what she should do about the situation. 11/10/14 Hrg. Trans. p. 263-264. L.C. performed oral sex on Respondent during that meeting in his office. 11/10/14 Hrg. Trans. p. 264-265.
40. 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.

41. On or about May 3, 2009, L.C. was 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.
42. 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.
43. On or about June 8, 2009, L.C. entered into a pre-trial diversion 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 an individual. ODC Ex. 28, bates stamp 1362. Respondent signed off on the agreement. Id.
44. On or about August 6, 2009, Respondent filed a Motion to Set the matter 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.
45. On or about August 12, 2009, an Agreed Order was entered that withdrew the State’s Motion and found that L.C. be released from the pre-trial diversion. ODC Ex. 28, bates stamp 1346-1347.
46. On or about September 16, 2009, the case against L.C. was dismissed. ODC Ex. 28, bates stamp 1344.

47. 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.
48. L.C. has indicated that she thought that if she provided Respondent with oral sex, it would be beneficial to her. 11/10/14 Hrg. Trans. p. 271-272.
49. Because Respondent was an Assistant Prosecutor when he had T.N.S., who was on probation and participating in the day report program, perform oral sex on him and provide him with sexually explicit photographs and videos, Respondent violated Rules 1.7(b), 8.4(c) and 8.4(d)³ of the Rules of Professional Conduct, which provide as follows:

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.

50. Because Respondent attempted to have K.M. perform oral sex on him when she went to his office at the prosecutor's office about her son's criminal case, Respondent violated Rules 1.7(b) and 8.4(d) of the Rules of Professional Conduct, as set forth above.
51. Because Respondent had L.C. perform oral sex on him when he was an assistant prosecutor and when she approached him as an Assistant Prosecutor when inquiring about a criminal matter, when she was a defendant in a criminal matter, and when she was a victim in a criminal matter, Respondent violated Rules 1.7(b) and 8.4(d) of the Rules of Professional Conduct, as set forth above.
52. Because Respondent provided false information to the Office of Disciplinary Counsel wherein he denied the conduct alleged in the indictment, Respondent violated Rule 8.1(a) of the Rules of Professional Conduct, which provides as follows:

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;

53. Because 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)⁴ and West Virginia Code 15-2-16⁵, which adversely reflected on his honesty,

⁴ 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;

trustworthiness or fitness as a lawyer, Respondent violated Rule 8.4(b) of the Rules of Professional Conduct, which provides as follows:

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;

III. DISCUSSION

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

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.”

⁵ 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 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.

(3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. *See also*, Syl. Pt. 4, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998).

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

Lawyers owe duties of candor, loyalty, diligence and honesty to their clients. Members of the public should be able to rely on lawyers to protect their property, liberty, and their lives. Lawyers are officers of the court and, as such, must operate within the bounds of the law and abide by the rules of procedure which govern the administration of justice in our state. Furthermore, a lawyer's duties also include maintaining the integrity of the profession. The 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.

As an assistant prosecutor, Respondent 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 by having sexual contact with T.N.S. while she was on day report and probation. T.N.S. testified that Respondent mentioned on several occasions when she was at his prosecutor's office that she did not want to go back to jail. 11/10/14 Hrg. Trans. p. 118. T.N.S. believed that if she did not pose for photographs or provide oral sex for Respondent, that she would go back to jail. *Id.* In fact, T.N.S. asserted that she was previously been falsely accused of stealing handcuffs which resulted in her being revoked from day report and placed in jail for five (5) months regarding the stolen handcuffs.

11/10/14 Hrg. Trans. p. 119-120, 129-130. Even T.N.S.'s day report director testified that T.N.S. had gone back to jail for a violation of day report. 11/10/14 Hrg. Trans. p. 319-320. T.N.S. indicated that she would "feel more safe" with having somebody with her when she meets with an attorney and that she is "completely humiliat[ed] with the photos and videos being out in the public. 11/10/14 Hrg. Trans. p. 39-40.

Respondent had Maggie Feury testify that T.N.S. went to Respondent's prosecuting attorney's office in the summer of 2010. 11/11/14 Hrg. Trans. p. 224. T.N.S. went on to tell Ms. Feury that she and Respondent had sex. 11/11/14 Hrg. Trans. p. 225. Ms. Feury stated that T.N.S. was sweaty and had red friction marks on her inner thighs. 11/11/14 Hrg. Trans. p. 225-226. It is clear that Respondent had a conflict of interest in having sex with T.N.S. while she was on day report and probation. Further, he had forced T.N.S. to send him sexually explicit photographs and videos. This is a conflict in Respondent being an assistant prosecutor and having T.N.S. provide sex, photographs, and videos while she was on day report and on probation.

Respondent also had a conflict when K.M. went to Respondent's office to seek advice about her son's criminal case and Respondent forced her to kiss his penis. 11/10/14 Hrg. Trans. p. 172. K.M. vowed not to return to Respondent's office alone, but was concerned about her son's criminal case because she did not return to prosecutor's office. 11/10/14 Hrg. Trans. p. 170. In fact, K.M. was terrified to go back to the office Respondent had when he was prosecutor. 11/10/14 Hrg. Trans. p. 171. K.M. stated that she "never expected that to happen to me in that office." 11/10/14 Hrg. Trans. p. 171. K.M. said that she no longer trusts men and does not go into offices alone with men. 11/10/14 Hrg. Trans. p. 172. K.M. believed

that her son could go to jail if she did not do what Respondent wanted her to do. 11/10/14 Hrg. Trans. p. 240. Respondent's misconduct in this matter also is prejudicial to the administration of justice.

As for the civil case that Respondent was the attorney for K.M., K.M. asserted that she kept Respondent as her attorney in the civil case against Alleghany Echoes because she was in fear about her son's case, and also because of the money involved in the civil case. 11/10/14 Hrg. Trans. p. 242-243. K.M. testified that she had sued Alleghany Echoes for \$950. 11/10/14 Hrg. Trans. p. 185-186. Further, she ended up settling her civil case for half of what she sued for, in part, because of the incident in Respondent's office. 11/10/14 Hrg. Trans. p. 246. K.M. also knew that the civil case had taken years to settle. 11/10/14 Hrg. Trans. p. 185-186.

L.C. had oral sex with Respondent, an assistant prosecutor, when she was a victim in a domestic battery proceeding. 11/10/14 Hrg. Trans. p. 294-296. L.C. had gone to Respondent's office as prosecutor at the courthouse because she was a victim of a theft, and she ended up providing oral sex to Respondent. 11/10/14 Hrg. Trans. p. 263. L.C. was not only a victim in that theft case, but she was also a victim of domestic charges at the time she had oral sex with Respondent and she was a defendant in other criminal charges. L.C. testified that she believed that having oral sex with Respondent could help her in future cases. 11/10/14 Hrg. Trans. p. 271-272. L.C. stated 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. L.C. asserted that she would not have given Respondent oral sex if he was not the assistant prosecutor. 11/10/14

Hrg. Trans. p. 301. Further, when questioned about whether this experience affected her opinion of attorneys, she indicated that she does not “trust a whole lot of anybody.” 11/10/14 Hrg. Trans. p. 275.

This sexual misconduct by Respondent was a clear conflict with his responsibilities as an assistant prosecutor representing the State of West Virginia. It appears that Respondent used the criminal system as a way to make and have sexual contact with his victims. Respondent admitted that T.N.S. had sent him nude photographs and nude videos. 11/11/14 Hrg. Trans. p. 46. Further, 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., with the sexual banter consisting of “wide range of sex talk and fantasy talk.” 11/11/14 Hrg. Trans. p. 46-47. Respondent 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.

During the April 19, 2012 meeting between Respondent and T.N.S., Respondent asked T.N.S. to show him her genitals and 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 affected the administration of justice. Respondent, as an assistant prosecutor, had the position of power over all of the women named in this case in a way that affected the administration of justice. With T.N.S., Respondent insinuated that she could go back to jail and she felt that fear 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. And L.C. believed that having oral sex with Respondent could help her if she ever needed it. Respondent also 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 the videotape was with him in the hearing room. 11/11/14 Hrg. Trans. p. 63, 140.

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 also said 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 5 and 6.

Respondent was an officer of the court system, even more so because he was an assistant prosecutor at the time these sexual encounters occurred in his office at the county courthouse. Respondent acknowledged that his conduct had “an inescapable negative reflection” on the legal profession. 11/11/14 Hrg. Trans. p. 248-249, 264. Respondent stated that his wife now has full access to his phone, passwords, and computers. 11/11/14 Hrg. Trans. p. 250. This is a concern as confidential client material could be kept on such items, and his wife should not be privy to that confidential information. Respondent also 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. 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.

B. Respondent acted intentionally and knowingly.

Respondent clearly acted with the conscious objective and purpose to have these women perform sexual acts upon him. There is no evidence to suggest otherwise. Respondent intentionally used his position in the criminal system to obtain sexual favors from women who were connected to that criminal system. These women came to Respondent for help in dealing with the criminal system and Respondent then had them perform sexual favors. Respondent failed to see the inherent conflict of interest in having a sexual relationship with these women while also serving as an assistant prosecutor at the same time. Respondent also failed to consider the damaging affect of his sexual misconduct upon the legal system and legal profession.

C. The amount of real injury is great.

This misconduct clearly demonstrates an appalling lack of judgment, discretion and concern for his own personal integrity, and also calls into question his fitness as a member of the Bar. T.N.S. and K.M. both indicated that they would not want to be alone with an attorney after being made to provide sexual favors for Respondent. L.C. said that she has a lack of trust for anybody at this point. It must also be noted that all of these incidents of the three (3) victims providing sexual favors occurred in Respondent’s office at the prosecuting attorney’s office. This act of misconduct has tarnished the position of a prosecutor and called into question whether women are safe to go into Respondent’s office alone. The injury to the

integrity and reputation of the bar is great, however, the potential for injury for other vulnerable female victims is immeasurable.

D. 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 aggravating factors present in this case were 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* 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. This is clearly evident when T.N.S. came to Respondent’s office in 2012 and he continually asked for her to hold his penis or touch his penis.

E. There are several mitigating factors present.

Respondent’s mitigating factors are an absence of a prior disciplinary record and inexperience in the practice of law. While Respondent may have put forth some information about him dealing with his desire for pornography and other sexual issues during the time frame of these complaints, he did not present any medical testimony or evidence that he

sought treatment. Therefore, such is not sufficient to mitigate any sanction in this matter. In Lawyer Disciplinary Board v. Dues, 218 W.Va. 104, 624 S.E.2d 125 (2005), the Supreme Court of Appeals of West Virginia 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.” In this case, there is no clear and convincing evidence to establish that Respondent suffered any mental disability or that the alleged disability caused the misconduct, because it appears that Respondent never sought treatment. Likewise, Respondent’s cannot show that any recovery he may have had 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. The West Virginia Supreme Court recently did not consider depression to be a mitigating factor when the attorney “failed to present any medical evidence demonstrating that he suffered from depression, that the depression caused his misconduct, or that he sought treatment for his depression.” Lawyer Disciplinary Board v. Rossi, No. 13-0508 & 13-1148, Slip Op. (W.Va. Feb. 5, 2015).

IV. 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 abused his position as assistant prosecutor. In essence, Respondent used his prosecuting attorney's office to force women to provide sexual favors to him. Each victim came to his office because he was the assistant prosecutor and because they were seeking help for either themselves or their family members. Once they were in the prosecutor's office, Respondent then forced sexual favors from these women. 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). 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 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).

In the Amos case, which resulted in only a seventy-five (75) day suspension, the assistant prosecutor had conversations with a respondent mother from an abuse and neglect case about the case and took her to a bar that featured nude female dancing. 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.

Respondent’s case is clearly distinguishable from the Amos case. There was no evidence at the hearing in Amos of sexual contact. In this case, there were three (3) victims who all testified at the hearing in this matter of 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, the victims went to Respondent’s office specifically because he was the assistant prosecutor and they were subjected to sexual contact by Respondent. And this was not a case of a one (1) time isolated incident. It is clear in this case that Respondent was routinely using his prosecutor’s office to procure women to satisfy his sexual needs throughout the spring and summer of 2009.

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. As stated above in prior cases before the West Virginia Supreme Court, this violation alone while being an assistant prosecutor should result in a lengthy suspension for Respondent. However, when coupled with the evidence of his sexual misconduct while an assistant prosecutor, there is no choice but to disbar Respondent.

Our Supreme 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, 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. Respondent should be held to a higher standard because he was an assistant prosecutor in his prosecuting attorney’s office where all of the sexual contact occurred. Moreover, there is clear and convincing evidence of a pattern and practice because there is more than one (1) incident. There were three (3) victims of this sexual misconduct, and multiple occurrences with two (2) victims. 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. That recorded conversation mirrors the testimony provided by the women as to what happened in the prosecutor’s office. Respondent would not stop with his repeated requests for sexual favors

until they finally gave in to his request. Further, even though Respondent is no longer employed as an assistant prosecutor, he should still be disbarred. Respondent was not an assistant prosecutor during the April 19, 2012 meeting with T.N.S. and he still tried to get her to provide sexual favors to him even though he was no longer an assistant prosecutor and she was no longer on probation or day report.

The *ABA Model Standards for Imposing Lawyer Sanctions* provide under Standard 4.31 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 goes to the conflict Respondent had in handling criminal cases 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, misrepresentation 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, he was involved in misrepresentation by indicating that T.N.S. could go back to jail if she did not provide the sexual favors to him. And 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 in having the three (3) victims provide sexual favors for him in his prosecuting attorney's office.

A case out of Pennsylvania resulted in the disbarment of an attorney for pleading 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). Disciplinary Counsel certainly recognizes that in this case that Respondent did not plea guilty to a criminal offense but the evidence submitted in the criminal case 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 job 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 some help or advice about the criminal system. Instead of using his position to ensure the sanctity of a prosecutor’s office, Respondent used his position to obtain sexual favors from vulnerable women.

An attorney from Georgia 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 prosecutor. And while at Respondent’s prosecuting attorney’s office, he forced them to provide sexual favors. These three (3) victims were in a vulnerable position and subjected to Respondent’s lustful advances.

Disciplinary Counsel also notes that the West Virginia Supreme Court disbarred 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, the West Virginia Supreme 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 inthe State’s custody, the subseuqent 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 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 in 2009 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. Respondent must be given harsh discipline as a consequence for his misconduct in this case.

Respondent’s violations in this case are extremely egregious and touch the very essence of the public’s perception of the legal profession. This is not an one (1) time event for Respondent. Respondent used his prosecuting attorney’s office to force multiple women

to provide him with sexual favors. When speaking with law enforcement about the situation, Respondent provided false information. It cannot be stressed enough that while this is Respondent's first offense, these violations are grave indeed. For the public to have confidence in our disciplinary and legal systems, lawyers who engage in the type of misconduct exhibited by Respondent must be removed from the practice of law. A license to practice law is a revokable privilege and when such privilege is abused, the privilege should be revoked. Such sanction is also necessary to deter other lawyers from engaging in similar conduct and to restore the faith of the victims in this case and of the general public in the integrity of the legal profession.

V. RECOMMENDED SANCTIONS

Rule 3.15 of the Rules of Lawyer Disciplinary Procedure provides that the following sanctions may be imposed in a disciplinary proceeding: (1) probation; (2) restitution; (3) limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment. It is the position of Disciplinary Counsel that for his misconduct in using his position as assistant prosecutor to procure sexual favors from women connected to the criminal system who visited his office and providing false information to the law enforcement that Respondent's license should be annulled.

“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)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.

A principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999). This type of conduct has a dramatic impact on the public's confidence in the integrity of the Bar and annulment is the appropriate sanction. *See* Lawyer Disciplinary Board v. Wade, 217 W.Va. 58, 614 S.E. 2d 705 (2005); Lawyer Disciplinary Board v. Daniel, Supreme Court Nos. 32569 and 32755; and Lawyer Disciplinary Board v. Askintowicz, Supreme Court No. 33070.

For the reasons set forth above, the Office of Disciplinary Counsel recommends the following sanctions:

- A. That Respondent's law license be annulled;

- B. That Respondent be required to petition for reinstatement pursuant to Rule 3.32 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 3.32 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; 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 Office of Disciplinary Counsel
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 13th day of February, 2015, served a true copy of the foregoing "**DISCIPLINARY COUNSEL'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED SANCTIONS**" upon Mark L. McMillian, counsel for Respondent Jarrell L. Clifton, II, by mailing the same via United States Mail with sufficient postage, to the following address:

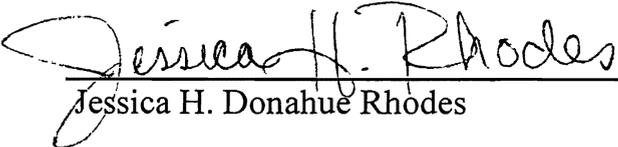
Mark L. McMillian, Esquire
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And upon the Hearing Panel Subcommittee via email and at the following addresses:

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