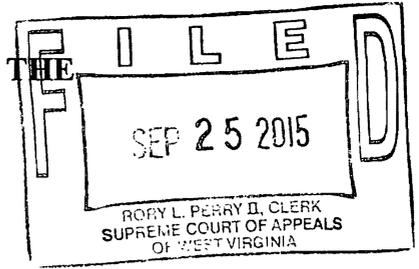


ARGUMENT
DOCKET

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.

REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. REPLY TO RESPONDENT'S BRIEF

This matter is before the Court pursuant to the "Report of the Hearing Panel Subcommittee" issued on June 26, 2015, wherein the Hearing Panel Subcommittee properly found that the evidence established that Respondent committed violations of Rules 1.7(b), 8.1(a), 8.4(c) and 8.4(d) of the Rules of Professional Conduct. At this stage in the proceedings, this Court has held that "[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." Lawyer Disciplinary Board v. Cunningham, 195 W.Va. 27, 34, 464 S.E.2d 181, 189 (1995); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 290, 452 S.E.2d 377, 381 (1994). Respondent has not shown that the factual findings in this case are incorrect.

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Committee on Legal Ethics v. Keenan, 189 W.Va. 37, 40, 427 S.E.2d 471, 473 (1993) (*per curiam*); quoting Syl. Pt. 3, in part, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984). It cannot be said that Respondent's conduct in this case conforms to the expectations of the profession as stated in the Rules of Professional Conduct. The evidence clearly establishes that Respondent acted in a manner which was intentional and knowing and deviated from the standard of behavior that a reasonable lawyer would exercise in that situation. Respondent's misconduct is egregious in relation to the position he held not only as an attorney, but also the position of an assistant prosecutor.

A. RULE 2.14 OF THE RULES OF LAWYER DISCIPLINARY PROCEDURE DO NOT PRECLUDE THE ALLEGATIONS REGARDING K.M. AND L.C.

Rule 2.14 of the West Virginia Rules of Lawyer Disciplinary Procedure states that "[a]ny complaint filed more than two years after the complainant knew, or in the exercise of reasonable

diligence should have known, of the existence of a violation of the Rules of Professional Conduct, shall be dismissed by the Investigative Panel.” The Complainant in this matter was the Office of Disciplinary Counsel. Respondent self reported his possible violation of the Rules of Professional Conduct due to an indictment being issued against him on or about August 9, 2012. ODC Ex. 3. The original letter dated August 9, 2012, sent to Respondent specifically stated that Disciplinary Counsel had “opened a complaint by the Office of Disciplinary Counsel.” ODC Ex. 3, bates stamp 5. The indictment involved the allegations against Respondent by T.N.S. ODC Ex. 1. In response to the original letter dated August 9, 2012, Respondent asked for a stay of the investigation by the Office of Disciplinary Counsel until the criminal matter was resolved. ODC Ex. 4. The investigation by the Office of Disciplinary Counsel was stayed on September 15, 2012. ODC Ex. 6, bates stamp 17. That stay was lifted on April 27, 2013. Id. As part of the investigation involving Respondent, Disciplinary Counsel requested a copy of any police reports or any other documents concerning the investigation of Respondent. ODC Ex. 8. On or about June 14, 2013, Disciplinary Counsel received a copy of the criminal investigation against Respondent. ODC Ex. 9. Lt. Simon with the West Virginia State Police was assigned to the investigation on or about August 15, 2011. ODC Ex. 9, bates stamp 27; 11/10/14 Hrg. Trans. p. 339. It was during the review of the criminal investigation against Respondent that Disciplinary Counsel discovered that there were other possible victims of Respondent. Id. Those other victims were K.M. and L.C. Id. Respondent never disclosed that there were other potential victims of his misconduct. The Statement of Charges was filed against Respondent on or about November 5, 2013, and served upon Respondent on or about November 12, 2013. There was no delay in the Office of Disciplinary Counsel investigating and charging Respondent. This is well within two years of the opening of the complaint against Respondent.

Further, Respondent testified during his hearing that K.M. was listed as a 404(b) witness in his criminal case, and he continued to keep the sex videotape he made of himself and K.M. after his criminal case was dismissed. 11/11/14 Hrg. Trans. p. 151. To assert that he did not know about the possibility of K.M. being involved in this disciplinary matter is without merit.

In Lawyer Disciplinary Board v. Smoot, 228 W.Va. 1, 716 S.E.2d 491 (2010), this Court found that the District Court was the Complainant in that matter due to it directing the clerk to provide a Judgment Order to the Office of Disciplinary Counsel. Id. In that case, the misconduct occurred in November of 2001, but the Statement of Charges was not filed against him until February of 2009. Id. The case went on to note that the disciplinary “proceedings were initiated by virtue of the Judgment Order of the United States District Court for the Southern District of West Virginia.” Id. at 9, 499. And it was “[b]ecause the United States district court brought the alleged misconduct to the attention of the ODC, that tribunal is the ‘complainant’ for purposes of Rule 2.14.” Id. It could be argued that Respondent is the Complainant because he was the one who brought the “alleged misconduct to the attention of the ODC.” However, Respondent only provided a copy of the indictment and refused to provide any response to the investigation based upon his Fifth Amendment right. Disciplinary Counsel had to seek information about Respondent’s misconduct from the police report. Further, Respondent was advised about K.M. as a 404(b) witness in his criminal case.

B. TESTIMONY OF THE WITNESSES PROVIDED CLEAR AND CONVINCING EVIDENCE OF MISCONDUCT

All of the victims in this case, T.N.S., K.M., and L.C., provided testimony against Respondent. All three of the victims described the misconduct by Respondent. The Hearing Panel found that the information testified to by the victims was true. Respondent argues that there was

additional testimony by other witnesses, including Maggie Fuery. Ms. Fuery testified that T.N.S. told her that she had sex with Respondent. 11/11/14 Hrg. Trans. p. 225-226. This supports T.N.S.'s contention that she and Respondent had sexual intercourse in his office at the prosecutor's office when she was on day report. 11/11/14 Hrg. Trans. p. 223. Further, in reviewing ODC Ex. 20, which is a recording of T.N.S. and Respondent, Respondent appeared to be comfortable in asking T.N.S. to show him her genitals and asking T.N.S. to hold his penis. That transcript also appears to indicate that Respondent pulled out his penis during that meeting. It is apparent that there was a familiarity between Respondent and T.N.S. in this situation. Respondent was not afraid to ask T.N.S. to show her genitals or to hold his penis, or even afraid to pull his penis out. Respondent admitted in his answer that T.N.S. exposed herself in his prosecutor's office. Respondent's Affirmative Defenses, filed February 28, 2014. Respondent had a familiarity with T.N.S. going beyond the exchange of explicit photographs.

Further, Alissa Taylor testified that T.N.S. told her that "she was doing sexual favors for [Respondent] to get rid of her felony." 11/10/14 Hrg. Trans. p. 322-323. T.N.S. came to day report as someone addicted to drugs, and Ms. Taylor's testimony about T.N.S.'s lying was in relation to her being addicted to drugs. 11/10/14 Hrg. Trans. p. 327. However, Ms. Taylor also testified that during T.N.S.'s second time on day report, T.N.S. was found to be "perceived as a cut above the typical person that might find themselves in day report." 11/10/14 Hrg. Trans. p. 330. T.N.S. strived to change her life and is now being attacked by Respondent, who has willingly admitted to receiving nude photographs from T.N.S., as well as having sexually explicit conversations with her.

Respondent makes note of ODC Ex. 21 and quotes from that transcript. That transcript is not part of the evidence in this case due to Respondent's own motion to exclude that transcript. 11/11/14

Hrg. Trans. p. 273-274. Respondent's reference to the specific language in ODC Ex. 21 is improper based upon Respondent's own motion and should not be considered by this Honorable Court in determining this case.

K.M. testified as to her past with Respondent, which included a sex tape. However, K.M. indicated that when she approached Respondent in his prosecutor's office to discuss her son's criminal case, Respondent began to discuss sexual matters. In context of the transcript between T.N.S. and Respondent, it is clear that Respondent had no problem speaking to women about sexual matters when they were in his office. Respondent was also married during this time frame, but that did not stop him from engaging in this misconduct.

The sexual misconduct of Respondent against L.C. was the result of her being involved in the court system as a victim and/or defendant when he obtained oral sex from her. Respondent had power over L.C., and she even believed that providing oral sex to Respondent would help her. 11/10/14 Hrg. Trans. p. 271-272. L.C. certainly testified that she approached Respondent about being a victim in a criminal case and he had sexual contact with her. 11/10/14 Hrg. Trans. p. 263-265. This was not an occasion of Respondent running into L.C. outside of his office, and a sexual relationship continuing at that point. This occurred when L.C. went to Respondent's office because he was the assistant prosecutor and Respondent used his position improperly by obtaining oral sex from her.

Respondent again makes reference to testimony that has not been admitted as evidence in this matter when he talks about Brandy Moore. Respondent did not list Ms. Moore as a witness in his witness list, nor was she listed as a witness by the Office of Disciplinary Counsel. The transcript from the hearing certainly shows that Respondent knew at least one week prior to the hearing that he was obtaining a subpoena for Ms. Moore to appear at the hearing and failed to update his witness

list even at that point. 11/11/14 Hrg. Trans. p. 9-14. Rule 3.4 of the Rules of Lawyer Disciplinary Procedure set forth that “the respondent shall provide the Office of Disciplinary Counsel with the complete identity, address and telephone number of any person with knowledge about the facts of any of the charges; provide a list of the proposed witnesses to be called at the hearing, including their addresses, telephone numbers, and a summary of their anticipated testimony . . .” Respondent’s witness list dated October 10, 2014, clearly does not list Brandy Moore as a witness in violation of Rule 3.4. Respondent attempts to argue that he reserved the right to call persons identified in the documents supplied by the Office of Disciplinary Counsel, but that does not comport with Rule 3.4. Her testimony was properly not considered by the Hearing Panel and this Honorable Court should also not consider her testimony as evidence.

C. RESPONDENT WAS DISHONEST IN HIS STATEMENTS TO THE POLICE AND F.B.I.

Lt. Simon was clear in his testimony that Respondent lied to him. 11/10/14 Hrg Trans. p. 362. Lt. Simon stated that Respondent “led us to believe that there was no relationship between him and T.N.S. until [Respondent] was confronted with this wire that we ran.” *Id.* Further, Special Agent Aldridge’s statement referenced by Respondent was taken out of context. Earlier in his testimony, Special Agent Aldridge stated that Respondent “denied any type of sexual relationship with T.N.S.” when asked. 11/10/14 Hrg. Trans. p. 406. It was after Respondent was told that the conversation he had with T.N.S. had been recorded, wherein Respondent admitted to exchanging nude photographs with T.N.S. It is clear that Respondent was dishonest in stating that he only had a professional acquaintance with T.N.S. to the State Police and the F.B.I. Clearly, the evidence in this case demonstrates that such a statement was not true.

As to Disciplinary Counsel pointing out that Respondent was dishonest in stating in his answer to the Statement of Charges that he no longer possessed the tape, this was done to show that even in an answer filed before this Honorable Court, Respondent was willing to conceal the truth. *See* Respondent's Affirmative Defenses, filed February 28, 2014. There was no need for Respondent to assert that he did not possess the videotape of him and K.M. in answering the Statement of Charges. Respondent testified during the hearing that he had the tape with him that day. 11/11/14 Hrg. Trans. p. 63. Further, Respondent even testified that he had told K.M. that he destroyed the videotape. 11/11/4 Hrg. Trans. p. 111-112. This demonstrates Respondent's dishonesty in answering charges before this Honorable Court.

D. MITIGATING FACTORS CANNOT INCLUDE LETTERS FROM MEMBERS OF THE BAR

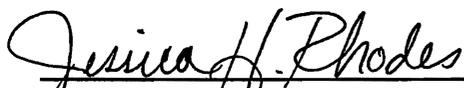
At the hearing, Respondent attempted to introduce multiple letters submitted on Respondent's behalf. Respondent had the ability to subpoena these individuals to appear at the hearing to provide testimony. However, Respondent did not list these individuals as witnesses and did not have them appear to testify at the hearing. There was no way for Disciplinary Counsel to cross examine these witnesses to determine whether they truly understood Respondent's misconduct, or if they had even read the charges against Respondent. The Hearing Panel was correct in excluding those documents. Further, Respondent's assertion that there may be a hardship upon the judiciary if Respondent was unable to serve as a lawyer in his community is not one of the thirteen (13) mitigating factors listed by this Court in Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E.2d 550 (2003). Such an assertion should not be considered as mitigating.

II. 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 25th day of September, 2015, served a true copy of the foregoing "**REPLY 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:

Mark L. McMillian, Esquire
1018 Kanawha Boulevard East, Suite 900
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And upon the Hearing Panel Subcommittee at the following addresses:

Steven K. Nord, Esquire
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