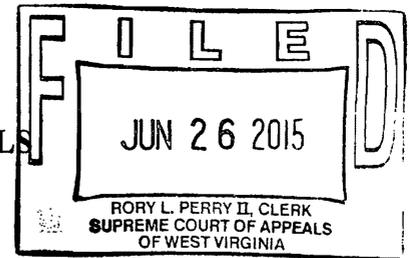


**BEFORE THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA**



**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

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**REPORT OF THE HEARING PANEL SUBCOMMITTEE**

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**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 both 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, which was granted, and the Hearing was set for August 12 and 13, 2014.

Respondent's previous counsel filed a "Motion to Withdraw", and Respondent personally filed a "Motion to Dismiss Statement of Charges on Grounds of *Res Judicata*" and a "Motion to Continue". Said motions were heard on July 28, 2014. Based on general representations made to the Hearing Panel, and with the consent of their client, Respondent's attorneys were granted leave to withdraw. To afford Respondent reasonable time to retain new counsel, the Motion to

Continue was granted. A ruling on the Motion to Dismiss was held in abeyance. The Hearing in this matter was then 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." At a status conference on August 12, 2014, Attorney Mark L. McMillian officially appeared for the first time, as counsel for Respondent. Counsel for Respondent was given until August 26, 2014, to file any additional arguments on the Motion to Dismiss and until October 10, 2014 to complete discovery. Disciplinary Counsel was given until August 28, 2014, to file any additional reply to the Motion to Dismiss. Both parties filed additional documents herein.

The Hearing Panel Subcommittee subsequently met in executive session to consider: (1) Respondent's Motion to Dismiss Statement of Charges on Grounds of Res Judicata; (2) Memoranda in Support of and in Opposition to 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 Respondent's Motion regarding Rule 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." Since Disciplinary Counsel wished to file responses thereto, the motions were not heard at the October 29, 2014 prehearing. Disciplinary Counsel was directed to file responses by 2:00 p.m. on October 30, 2014; and Respondent's counsel was given 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 timely responses. Thereafter, on October 31, 2014, Respondent withdrew the notice under Rule 412(b)(2). Then, 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 Subcommittee 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 agreeing that the charge against Respondent relating to an alleged violation of sexual imposition on an incarcerated person, under West Virginia Code 61-8B-10, located in Paragraph 49 of the Statement of Charges, and regarding a violation of Rule 8.4(b) of the West Virginia Rules of Professional Conduct, would be withdrawn and no such evidence would be offered for the 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, Jarrell L. Clifton, II, who also appeared in person. Over the course of two days, the Hearing Panel Subcommittee heard testimony from T.N.S.<sup>1</sup>, 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

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

Jones, Dorothy Morgan, Maggie Feury and Respondent. In addition, ODC Exhibits 1-14, 17, 18, 20 bates numbers stamp 1048-1097, and 22-35 were admitted, with redactions to Exhibit 9, without objection. Also admitted without objection, were Respondent's Exhibits 1-2 and Joint Exhibit J1-J2 were admitted into evidence.

Based upon the evidence and the record, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board hereby makes the following Findings of Fact, Conclusions of Law and Recommended Sanctions regarding the final disposition of this matter.

## **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **A. General**

2. 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.
3. Respondent served as an Assistant Prosecuting Attorney for Pocahontas County, West Virginia from late 2007 to the late 2010. 11/11/14 Hrg. Trans. p. 38.
4. 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 Circuit Court of Pocahontas County, West Virginia. ODC Ex. 1, bates stamp 1-2; ODC Ex. 2, bates stamp 3-4; 11/11/14 Hrg. Trans. p. 39.

5. Respondent self-reported the matter to Disciplinary Counsel, on August 8, 2012, and 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.
6. By letter dated August 9, 2012, Disciplinary Counsel wrote to Respondent asking for a response to the allegations. Id.
7. 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.
8. Because Respondent invoked his Fifth Amendment Right, a stay of the disciplinary proceeding was ordered by the Investigative Panel of the Lawyer Disciplinary Board on September 15, 2012. ODC Ex. 6, bates stamp 17.
9. 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.
10. 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.
11. 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.
12. 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.

13. Disciplinary Counsel obtained a copy of the files concerning the criminal 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.

**B. Allegations Concerning T.N.S.**

14. 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.
15. 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.
16. 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 provided 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. (while T.N.S. was on probation and Day Report)
17. 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.

18. T.N.S. is unsure of the exact date or amount of times she went to Respondent's office at the prosecuting attorney's office, in the Pocahontas County Courthouse, but said she went approximately three or four times. 11/10/14 Hrg. Trans. p. 16. T.N.S. is unable to remember what happened at each meeting in Respondent's prosecutor's office, but Respondent asked to take naked pictures of T.N.S., which he did, and he had T.N.S. perform oral sex on him. 11/10/14 Hrg. Trans. p. 17-21. She testified that he threatened that she would go back to jail if she didn't comply. 11/10/14 Hrg. Trans. p. 19-22.
19. After those initial meetings, T.N.S. was able to avoid meeting with Respondent by sending him numerous photos 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.
20. 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.
21. 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.
22. 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.
23. On or about April 17, 2012, Respondent, no longer an assistant prosecuting attorney at that time, contacted T.N.S. through Facebook. Id. Hrg. Trans. P. 37. 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 indicated that he wanted to meet with T.N.S. Id.

24. Two day 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 conversation 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<sup>2</sup>. 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.
25. 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

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

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 to groups 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 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.

### **C. Allegations Concerning K.M.**

26. 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 Hr. Trans. P. 154-155. During that time the two had a consensual sexual relationship. On one occasion, and without K.M.'s knowledge, Respondent videotaped the two of them having sex at his business after hours. 11/10/14 Hrg. Trans. 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.

27. 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.
28. 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.
29. On or about March 29, 2009, K.M. signed a "Criminal Bail Agreement: Cash or Recognizance." ODC Ex. 13, bates stamp 197-198.
30. 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.
31. 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. However, 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. According 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, Johnathan 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.

32. 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.
33. 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.
34. 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.

35. 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.
36. 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.
37. 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.
38. On or about June 28, 2010, an Agreed Order of Dismissal with Prejudice was entered in K.M.'s civil case against Alleghany 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.

#### **D. Allegations Concerning L.C.**

39. In the past, L.C. was formerly known 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.
40. 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. Admitting to her embarrassment, L.C. testified 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. .

41. 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.
42. 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.
43. 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.
44. 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.
45. 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.

46. 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.
47. On or about September 16, 2009, the case against L.C. was dismissed. ODC Ex. 28, bates stamp 1344.
48. 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.
49. 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. Hrg. Trans. 271-273..

#### **E. VIOLATIONS OF RULES OF PROFESSIONAL CONDUCT**

50. Because Respondent was 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 provide him with

sexually explicit photographs and videos, Respondent violated Rules 1.7(b), 8.4(c) and 8.4(d)<sup>3</sup> 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;

51. Because Respondent attempted among other things to require KM. to 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.
52. Because Respondent required L.C. perform to oral sex on him when she approached him as an Assistant Prosecutor inquiring about a criminal matter, while she was both a defendant in a criminal matter, and 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.

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<sup>3</sup> 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 conduct. The substance of the new Rules would not result in a different disposition in this case.

53. Because Respondent provided false information to the Office of Disciplinary Counsel wherein he denied the conduct alleged in the indictment of August 7, 2012, 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; Because the information Respondent provided false information to the F.B.I. and the West Virginia State Police about his relationship with T.N.S., in violation of 18 U.S.C. 1001(a)<sup>4</sup> and West Virginia Code 15-2-16<sup>5</sup>, which adversely reflected on his honesty, 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;<sup>6</sup>

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<sup>4</sup> 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.”

<sup>5</sup> 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.

<sup>6</sup> Respondent 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 this Report this was patently untrue. Respondent still possessed the videotape in question and even brought it with him to the parties November 10, 2014 hearing.

### **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; (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). Each of the four factors is analyzed below.

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

All lawyers have 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. 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 Prosecuting Attorney for Pocahontas County, West Virginia, 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 had previously been falsely accused of stealing handcuffs which resulted in her Day Report status being revoked and she was sent to jail for five (5) months as a result of 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 since these incidents, 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 called Maggie Feury who testified that she believes 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. told Ms. Feury that she and Respondent had sex. 11/11/14 Hrg. Trans. p. 225. Ms. Feury stated that she saw that T.N.S. was sweaty and had red friction marks on her inner thighs. 11/11/14 Hrg. Trans. p. 225-226.

Respondent created a specific conflict of interest by having sex with T.N.S. while she was on Day Report and probation. Further, he demand that T.N.S. send him sexually explicit photographs and videos. It is a conflict for Respondent, an assistant prosecuting attorney, to require T.N.S. to provide sex, photographs, and videos while she was in on Day Report and on probation, under control of the Court, and he was in a position of power.

It was also a conflict for Respondent 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 the implications to her son's criminal case if she did not return to prosecutor's office. 11/10/14

Hrg. Trans. p. 170. K.M. testified that she was terrified at the thought of going 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. testified 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., she testified that she kept Respondent as her attorney in the civil case against Alleghany Echoes because she was in fear about what should happen to 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 testified that she ultimately settled 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.

While he was acting as an assistant prosecuting attorney Respondent asked L.C. for and received oral sex from her while she was a victim in one of his office’s cases. 11/10/14 Hrg. Trans. p. 294-296. L.C. testified that she had also gone to Respondent’s office at the courthouse, while he was an assist prosecuting attorney, because she was a victim of theft, and while there, she ended up providing oral sex to Respondent. 11/10/14 Hrg. Trans. p. 263. During this period of time, she also had criminal charges pending against her. L.C. testified that she believed that having oral sex with Respondent could help her. 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. She 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 was not the assistant prosecutor. 11/10/14 Hrg. Trans. p. 301.

The witnesses described multiple incidents of sexual misconduct by Respondent which were in direct conflict with his responsibilities as an assistant prosecuting attorney 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. Further, those nude photos and nude videos were received by Respondent while 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 “wide range of sex talk and fantasy talk.” 11/11/14 Hrg. Trans. p. 46-47. Respondent also admitted to taking the cell phone of T.N.S. 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. Respondent, while an assistant prosecutor, had the position of power over the women who testified in this case in a way that interfered with the administration of justice. 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. 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 them occurred during their prior consensual relationship. 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 5 and 6.

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 does 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 intentionally and knowingly with respect to the women who testified that he told them to perform sexual acts upon him. 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

conflict of interest he created. He also failed to consider the damaging effect of his sexual misconduct upon the criminal justice system and the legal profession.

**C. The amount of real injury is great.**

This conduct by Respondent clearly demonstrates a 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 holding 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.”

**D. Presence of aggravating factors.**

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 the 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 and his position as assistant prosecuting attorney for his own sexual gratification.

**E. Presence of mitigating factors.**

Respondent's mitigating factors are an absence of a prior disciplinary record and his relative inexperience in the practice of law. While Respondent, during his testimony, may have raised an issue in mitigation by admitting that he was dealing with an inappropriate 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 for the same. Therefore, there is not sufficient evidence 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 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 there has been any recovery demonstrated by a meaningful and sustained period of successful rehabilitation, or that the recovery stopped 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). Thus, the mitigating factors in the matter are the absence of any disciplinary record

and his relative inexperience in the practice of law (although he was serving as assistant prosecuting attorney).

#### IV. SANCTIONABLE CONDUCT

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 position as assistant prosecuting attorney in exchange for requiring sexual gratification. 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, in the courthouse, 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). 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 the 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 prejudiced 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, referenced by Respondent, 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 is the fact that 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 and sexual favors, photographs and videos were required of 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 court of their investigation. Additionally, false information was knowingly proved 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 the Respondent’s license to practice law.

The 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). As discussed, Respondent should be held to a higher standard because he was an assistant prosecuting attorney in his office in the courthouse where the conduct in question occurred. Moreover, there is clear and convincing evidence of a pattern and practice because there are multiple incidents, involving three victims who initially interacted with Respondent because of his position as 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.

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 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 amounts to 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 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 in the courthouse.

Conduct similar to that of the Respondent has been adversely sanctioned 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 plead 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 here, 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 and through the legal system. These three 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 the 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 victims in this case were not necessarily 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 victims vulnerable position to his advantage.

Another example of disbarment from the West Virginia Supreme Court occurred because an attorney 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 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 of the victims in this case because of his previous sexual relationships 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.

Respondent’s conduct herein is egregious and touches the very essence of the public’s perception of the legal profession. Respondent used his position of power and 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. For the public to have confidence in our public officials legal systems, the conduct engaged in by Respondent cannot go unpunished. A license to practice law is a

revocable privilege which carries certain duties and responsibilities. When such privilege is abused, the privilege may, justifiable, be revoked. It 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. Based on the evidence presented at the Hearing herein, the testimony of the witnesses, and the admissions made by the Respondent, it is the recommendation of this Lawyer Disciplinary Board Hearing Panel Subcommittee that the law license of the Respondent be suspended for a period of two years. 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.<sup>7</sup>

Ethical 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

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<sup>7</sup> By recommending suspension versus annulment, the Hearing Panel is in no way signaling that Respondent's conduct was anything less than very serious. The Panel weighed the fact that two of the victims, K.M. and L.C., had prior consensual relationships with the Respondent. There was testimony that the third victim, T.N.S., "took advantage of [her] situation" and lied to investigators in a "very serious way." Hrg. Trans. Pp. 368, 389. To some extent there was conflicting evidence as to whether all three victims engaged in a consensual relationship during the relevant disciplinary time period. Ultimately, however, the Hearing Panel concludes, 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.

Ethics v. Roark, 121 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). 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 be disciplined for their actions. 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 suspension of Respondent's license to practice law or a period of two years is an 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 Hearing Panel Subcommittee finds that the allegations against the Respondent have been established by clear and convincing evidence and recommends the following Sanctions:

- 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;
- 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 two year suspension, prior to petitioning for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, 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.

Accordingly, the Hearing Panel Subcommittee recommends that the Supreme Court of Appeals adopt these findings of fact, conclusions of law, and recommended sanctions as set forth above. Both the Office of Disciplinary Counsel and Respondent have the right consent or object pursuant to Rule 3.11 of the Rules of Lawyer Disciplinary Procedure.



Steven K. Nord, Esquire  
Chairperson  
Hearing Panel Subcommittee

Date: 6/23/2015

James R. Akers III

James R. Akers, III, Esquire *by skw, v/ Permittin*  
Hearing Panel Subcommittee

Date: 6/23/2015

Dr. K. Edward Grose

Dr. K. Edward Grose *by skw, v/ Permittin*  
Hearing Panel Subcommittee

Date: 6/23/2015

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**CERTIFICATE OF SERVICE**

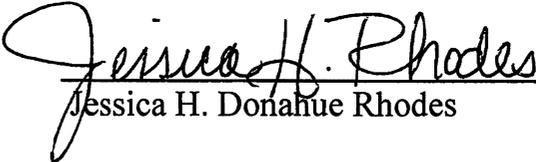
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This is to certify that I, Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 26<sup>th</sup> day of June, 2015, served a true copy of the foregoing "**REPORT OF THE HEARING PANEL SUBCOMMITTEE**" 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  
1018 Kanawha Boulevard East, Suite 900  
Charleston, West Virginia 25301

**Notice to Respondent:** for the purpose of filing a consent or objection hereto, pursuant to Rule 3.11 of the Rules of Lawyer Disciplinary Procedure, either party shall have thirty (30) days from today's date to file the same.

  
\_\_\_\_\_  
Jessica H. Donahue Rhodes