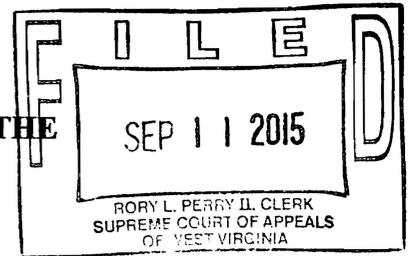


ARGUMENT DOCKET

**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.

BRIEF OF RESPONDENT JARRELL L. CLIFTON

Mark McMillian (WV Bar No. 9912)
Mark McMillian- Attorney at Law, L.C.
Boulevard Tower – Suite 900
1018 Kanawha Boulevard, East
Charleston, WV 25301
Tele: 304.720.9099
Email: mark@markmcmillian.com

Also on Brief: Erin K. Snyder
(WV Bar No. 12596)

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I. STATEMENT OF THE CASE

For purposes of brevity and judicial economy, Respondent adopts that which was submitted by the Office of Disciplinary Counsel, adding that the Respondent J.L. Clifton, through counsel, also filed a formal objection to the Hearing Panel Subcommittee's ("HPS") Report filed on June 23, 2015. The Petitioner further differs with the Office of Disciplinary Counsel's (ODC) conclusion that the HPS properly found that the evidence established that the Respondent violated Rule 1.7(b), 8.1(a), and 8.4(d) of the Rules of Professional Conduct. Brief of the Lawyer Disciplinary Board p. 3.

This Court has before it the recommended Findings of Fact and Conclusions of Law submitted by the HPS in its report and, accordingly, a full recitation of the same is unnecessary here.

This case principally concerns allegations that the Respondent used his position as an assistant prosecuting attorney to obtain nude images and oral sex from a woman under day report supervision. He is also charged with similar conduct with two women with whom he had prior consensual relations, and dishonesty in connection with the investigation of those matters. The Respondent admits misconduct in the exchange of graphic images and certain related conduct as violations of the West Virginia Rules of Professional Conduct, but denies compelling sexual accommodations. The Respondent asserts that many of the individual allegations fall outside the time restrictions prescribed by the West Virginia Rules of Lawyer Disciplinary Procedure and are accordingly not appropriate for consideration. The recommended decision of the Hearing Panel Subcommittee is two years suspension with further conditions. While Respondent concedes disciplinary action in some form is appropriate, it should be based upon conduct

he actually committed, and certainly less than recommended by the Office of Disciplinary Counsel. Appropriate sanctions would be a lesser variant of that recommended by the Subcommittee.

II. SUMMARY OF ARGUMENT

The Respondent, J.L. Clifton, as a threshold matter asserts that many of the specified charges in this case predate the limitations prescribed in Rule 2.14 of the West Virginia Rules of Lawyer Disciplinary procedure. The Respondent further challenges the Report of the Hearing Panel Subcommittee in its substantive findings relating to the violations as contrary to the evidence of record and not based upon reliable, probative, and substantial evidence so as to support those findings to a clear and convincing standard. He further opposes the proposed sanction of the Office of Disciplinary Council and asks this Court to reform the sanctions imposed to a level consistent with the evidence and circumstances of this case.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

IV. ARGUMENT

A. STANDARD OF PROOF

In lawyer disciplinary matters, this Court uses a *de novo* standard to the review of the adjudicatory record made before the Lawyer Disciplinary Board. Syl. pt. 3, Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994). This Court gives respectful consideration to the Board's recommendations, while ultimately exercising its own independent judgment. Id. at 381. The Court grants deference to the Disciplinary Board's findings of fact, except where the records reflect that such findings are not supported by reliable, probative, and substantial evidence. Lawyer Disciplinary Bd. v. Dues, 624 S.E.2d 125, 218 W.Va. 104 (2005); citing Syl. pt. 3, Committee on Legal Ethics of the West Virginia State Bar v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984). According to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure, "In order to recommend the imposition of discipline on any lawyer, the allegations of the formal charge must be proved by clear and convincing evidence." Lawyer Disciplinary Bd. v. Alshire, 230 W.Va. 70, 736 S.E.2d 70, 73 (2012), citing Syllabus Point 2, Lawyer Disciplinary Bd. v. Cunningham, 195 W.Va. 27, 464 S.E.2d 181 (1995).

B. ISSUE RELATING TO RULE 2.14 OF THE WEST VIRGINIA RULES OF LAWYER DISCIPLINARY PROCEDURE

Respondent asserted a statute of limitations argument in this case before the HPS and moved that certain of the charges be dismissed. A number of the allegations contained in the *Statement of Charges* of October 31, 2013, refer to conduct that occurred

greater than two (2) years prior to any complaint filed with the Office of Disciplinary Counsel ("ODC").

Rule 2.14 of the Rules of Lawyer Disciplinary Procedure provides as follows:

Any 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.*

(Emphasis supplied)

The ODC does not allege or assert that any of the conduct complained of in the *Statement of Charges* was concealed from them or that it had not been discovered relatively contemporaneously to the subject conduct. In Lawyer Disciplinary Board v. Barton, 690 S.E. 2d 119 (W.Va. 2010), the disciplined attorney questioned the timeliness of the complaint. In that case, the Court found that in fact a complaint was received by ODC in April 2006 and that the attorney depleted trust account funds in September 2005 and misappropriated and converted funds in July 2004, appropriately bringing the matter within the appropriate jurisdiction of the Board. *Id.* While the "Complainant" need not be the victim of the misconduct, the policy underpinning Rule 2.14 is clearly to dispense with complaints summarily in the same fashion as claims barred by a *statute of limitation* or the *doctrine of laches*. The statement of the ODC is clear, "The board cannot investigate complaints about conduct occurring more than two years ago, unless only discovered the conduct more recently." The West Virginia State Bar, Lawyer Disciplinary FAQ, <http://www.wvbar.org/public-information/lawyer-disciplinary-board-faq/>. Rule 2.14 certainly cannot be avoided simply by positioning ODC itself as the Complainant. Were that to become an accepted practice, a complaining party could notify

the Board of a matter outside of the time limitations that was fashioned by the Board as its own complaint, subverting the Rule completely.

Respondent's action of self-reporting on August 7, 2012 disclosed his indictment which later served as the basis for charges relating to T.N.S. Paragraph 16 of the *Statement of Charges*, states "during the months of May, June or July 2010 the Respondent had contact with Ms. Schoolcraft on several occasions. Investigative Panel Statement of Charges p. 3. The following paragraphs contain allegations that the Respondent had inappropriate sexual relations including compulsory sex with the Respondent. *Id.* at p. 3-5. As to the allegations concerning K.M. and L.B.C, the filing date of the ODC's *Statement of Charges* was October 31, 2013. Regarding, K.M, the allegations contained in Paragraph 25-37, involves alleged conduct beginning in 2008 and concluding in 2010. *Id.* at p. 6-8. The Investigative Panel alleges conduct concerning L.B.C. in Paragraph 38- 49, all of which occurred during the year 2009. *Id.* at p. 8-10 Given that those charges fall outside of the two-year period prescribed by Rule 2.14 of the West Virginia Rules of Disciplinary Procedure, each should have been dismissed below and should not have been considered here.

C. ALLEGATIONS CONCERNING T.N.S.

Respondent admitted to the exchange of nude or partially nude photographs with T.N.S., but Respondent denies the acts of sex alleged by her. Respondent further denied making any threats to her within any context. T.N.S.'s testimony served as the foundation for the Disciplinary charges against the Respondent. Due to inconsistencies in her testimony and the testimony of several credible witnesses, as addressed in greater detail

below, the record lacks the clear and convincing evidence necessary to impose sanctions for engaging in unlawful sexual assault, abuse, or that he used his position or public office so as to compel T.N.S. to engage in sexual acts or otherwise.

T.N.S.'s testimony regarding the nature of her interactions with the Respondent is inconsistent and unreliable. T.N.S. variously recounted instances of engaging in oral sex with Mr. Clifton from once to several more times. T.N.S. was unable to remember the number of times she met with the Respondent and what happened during those meetings. 11/10/14 Hrg. Trans. p 16-21. T.N.S. testified that the Respondent demanded that she send more photographs and made veiled threats about her being returned to jail. 11/10/14 Hrg. Trans. p. 87-89.

T.N.S. testified as follows:

A: Yes, Well, I mean when you're directly threatened or you take it as a threat. I mean when somebody says to you "I don't want to see you go back to jail," or, you know, things like that, I mean, you know, I took that as a threat that I'd end up back in jail. In some portion or way, I'd end up back in jail.

Q: Okay. And the way you feared that might happen - - because, obviously, Mr. Clifton couldn't put you in jail, right?

A: Well, I don't know. Anybody can pull anything and do anything. I don't know. I mean I was fearing, I mean.

11/10/14 Hrg. Trans. p. 87-88

Maggie Fuery, a friend in whom T.N.S. confided, learned that T.N.S. intended to bring allegations against the Respondent. 11/11/14 Hrg. Trans. p. 229. Ms. Fuery testified that she tried to dissuade T.N.S. from bringing charges against the Respondent for forcing oral sex because she knew the allegations to be false. 11/11/14 Hrg. Trans. p. 228-230. Ms. Fuery stated T.N.S. responded by offering to purchase Ms. Fuery an automobile in exchange for her cooperation. 11/11/14 Hrg. Trans. p. 225-230, 234.

T.N.S. herself acknowledged that while a former boyfriend, J.U. was a purported witness to a sexual abuse at the hands of another county employee, J.U. falsely stated that he had witnessed the episode, when he had not; and that T.N.S. had failed to disclose that, but rather used it at times in confronting him with it when it advantaged her.

11/10/14 Hrg. Trans. p. 54-60. T.N.S. acknowledged that J.U. had in fact received an automobile as a reward for his participation in that case. 11/10/14 Hrg. Trans. p. 56.

Several credible witnesses testified below as to the inconsistency of T.N.S.'s statements. T.N.S. testified that she expressed concerns to Elisa Taylor, who in turn instructed her to go to Sheriff Jonese. 11/10/14 Hrg. Trans. p. 95-99. However, rather than reporting any sexual impropriety of the Respondent, she only disclosed that there had been photographs exchanged. Id. Although T.N.S. had earlier stated that she had complained of the sexual abuse to Fred Taylor, a probation officer, she changed her story in her testimony and acknowledged that she had in fact not done that. 11/10/14 Hrg. Trans. p. 99-100.

Elisa Taylor, who was involved in the supervision of T.N.S. during her probation and day report, opined that T.N.S. came to her as a drug addicted young lady who behaved as such "... one day there lying, the next day they telling the truth, possible. It was hard to tell. It depended upon what the situations was, what day it is, how she was that day." 11/10/14 Hrg Trans. p. 327. Lt. Simon opined during his testimony, "My feeling about [T.N.S.] is she took advantage of the situation. I mean does that make her an evil person? No. I mean she should've just told the truth in this matter and you know, like I said we may not have been here today." 11/10/14 Hrg. Trans. p. 368.

Lt. Robert Simon testified regarding his investigation of the criminal case against Mr. Clifton, "... I believe she lied about the rape, about the sexual engagements with Mr. Clifton being rape." 11/10/14 Hrg. Trans. p. 352. He also testified to his investigation relating to Ms. Fuery, "T.N.S. was trying to get Ms. Fuery to change her - - to go along with the story of this sexual assault, being the rape that, obviously, I think everyone realizes now that it was a consensual relationship." 11/10/14 Hrg. Trans. p.351-352. FBI Special Agent Fred Aldrige testified "I have a massive problem with T.S. in that - - If that's where you're going with this - - in that, you know, she elected to lie and be deceptive as far as it pertains to sex with J.L. Clifton." 11/10/14 Hrg. Trans. p. 365.

Pocahontas Sheriff David Jonese, testified concerning his opinion of the character of T.N.S. for truthfulness "...I've found that she is very good at manipulating. She plays the role very good, but she is untrustworthy. I don't think she knows the truth." 11/11/14 Hrg. Trans. p. 195. With respect to her reputation in the community, he testified "That you could not believe her even, I don't believe under oath. That she perpetually lies and manipulates." Hrg. Trans. p. 199.

Special Agent Aldridge further testified from his investigation report "[T.N.S.] told [M. H.- an F.B.I. employee with whom T.N.S. was friendly] she had a sexual relationship with Sheriff Jonese." 11/10/14 Hrg. Trans. p. 418. But, when T.N.S. was asked during her testimony "You've actually accused Sheriff Jonese of having sex with you, haven't you?" She replied, "No." 11/10/14 Hrg. Trans. p. 418. Jonese further confirmed that nothing of the sort ever occurred. "That would be totally untrue." 11/11/14 Hrg. Trans. p. 199.

T.N.S. also testified to the following: "Fred Taylor was my probation officer in Lewisburg and he's the first one that I told about what happened to me and he's the one that reach [sic] out to the FBI to contact me to talk to them." 11/10/14 Hrg. Trans. p. 418. When confronted with reports indicating she had not reported the Respondent to Mr. Taylor, she testified "Well, I was late for work and I was on my way to work and I never slept the night before"... "I mean it wasn't like, you know, I could sit down and tell him everything, you know, for hours. I didn't have time. I had to get to work. And that's the only thing I was having nightmares about at the time. I mean that's what I told him. I didn't need to tell him about J.L.[Respondent] at that time." Ibid, 101-102.

The ODC asserts that "[T.N.S.] testified that he [Respondent] threatened that she would go back to jail if she didn't comply" (with performing oral sex on the Respondent.) Brief of ODC P.6. While that assertion itself differs from the testimony cited, a reading of ODC Exhibit 21 (Statement of T.N.S taken by Lt. Simon) discloses a self-serving interpretation of facially innocuous remarks that, as noted above, even Lt. Simon found to be not believable.

The following was also a part of the testimony of T.N.S.

Q: [T]hese few times that you've described involving pictures or anything, that was actually a small part of the overall discussions that you had with him; is that right?

A: Yeah. I've had other discussions with him, yeah.

Q: Okay. He himself was involved in some of the same community activities that you're in --

A: Yes.

Q: -- the coalition and those kind of things?

A: Yes.

Q: And he was a proponent of yours, right?

A: Yeah.

Q: You all were working for a common goal?

A: Right.

Q: And he encouraged you and expressed his appreciation and admiration of what you were doing toward those projects, didn't he?

A: Yeah. He told me it was a good thing.

11/10/14 Hrg. Trans pp. 140-141

In summary, the Respondent, to his considerable, sincere shame and regret, admits that he exchanged graphic images with T.N.S.. He denies sexual contact of the sort alleged. To find her version of events truthful would require brushing aside all of the hearing evidence other than her own, which is itself self-contradicting.

D. ALLEGATIONS CONCERNING K.M.

As to the allegations concerning K.M., there is not clear and convincing evidence to support the allegation that Respondent misused the legal system and his position to initiate the sexual relationship with K.M. She and the Respondent had a sexual relationship dating back to the Fall of 1995, over a decade before the Respondent completed law school. At a later time, in 2008, Respondent was approached by K.M. to handle a dispute wherein she sought to collect for unpaid meals from Allegheny Echos. 11/10/14 Hrg. Trans. p. 157-158, 209, 246. During the pendency of that legal action, K.M testified that the Respondent began making overtures to rekindle their sexual relationship and at times used matters relating to that case as the reason for them to meet. 11/10/14

Hrg. Trans. p. 211. K.M. further testified that her adult son J.W., had been charged with brandishing a weapon and she sought his counsel or advice respecting that matter while the Respondent was an Assistant Prosecuting Attorney. 11/10/14 Hrg. Trans. p. 212-221. K.M. further testified that she was “terrified” concerning the potential fate of her son in connection with the criminal case and acquiesced to the Respondent’s overtures by “kissing” his penis but refusing to do more. 11/10/14 Hrg. Trans. p. 165-166.

K.M.’s assertion that she believed her son, J.W., was facing potential penalties of years in prison is neither consistent with other statements made in her testimony. Because of the evidence of underlying motives and irrationality described above, this Court should not take K.M.’s allegations as credible. K.M. testified that she had engaged in criminal justice studies, which she later modified to criminal corrections studies. 11/10/14 Hrg. Trans. p. 212. Further, she testified that she attended an initial court appearance with her son, J.W., and identified a Magistrate Court form used in those proceedings and acknowledged that the Court had indicated that the offense charged was a misdemeanor. 11/10/14 Hrg. Trans. p. 213- 219. Her continued relationship with the Respondent is also inconsistent with feelings of intimidation because of the sex tape; she continued to seek his help and even rented his home, where she lived while he attended law school. The sexual relationship between the Respondent and K.M. preceded any legal connection between the two.

The record before the HPS discloses clear motives for K.M. to conceal the consensual nature of their relationship. K.M. admitted that when she and the Respondent had their initial sexual encounter, the Respondent was dating her niece. 11/10/14 Hrg. Trans. p. 185. This fact obviously first became known to the niece when

the two were interviewed in connection with the investigation of criminal charges concerning of the alleged sexual assault of T.N.S. 11/10/14 Hrg. Trans. p. 180-183. The criminal investigation made the niece aware of that relationship, and rather than admitting she had betrayed her niece, K.M. apparently chose to divert attention from that by alleging that she was “pressured” into having sex with him, an act she claims she was unaware was filmed. 11/10/14 Hrg. Trans. p. 180-185. The Respondent testified the two agreed to make a sex tape of that encounter and even watched it together later. 11/11/14 Hrg. Trans. p. 107-108.

It was not disputed that the tape was made at a time prior to the Respondent’s attending law school when the two both worked at a restaurant operated by him. Another employee of the same establishment testified that the camera was a fixture of the restaurant and the monitors were clearly visible and known to everyone to be there. 11/11/14 Hrg. Trans. p. 209. K.M. admitted that there was a later consensual sex when she believed the Respondent had destroyed the videotape. 11/10/14 Hrg. Trans. p. 237. She claimed he later used the tape to try to compel sex from her, coupled with the matter legal matter involving her son. 11/10/14 Hrg. Trans. p. 240. As noted above, there was no reason for her to be concerned about the charge involving her son. She cannot sensibly explain that she twice asked for legal assistance in civil matters from the Respondent during these times. While she claims she was dissatisfied with those services, the records do not support that. While neither conceded a related motive, K.M. and T.N.S. acknowledge they knew one another. 11/10/14 Hrg. Trans. p. 224-226, 104-105.

E. ALLEGATIONS CONCERNING L.B.C.

Given the following, the Hearing Panel Subcommittee came to an improper finding that the Respondent used his position to extract sexual conduct from L.B.C. or that sexual acts occurred in his office. It is undisputed that the Respondent had a sexual relationship with L.B.C. extending back to the year 1995. 11/10/14 Hrg. Trans. p 154-155. In 2009, while the Respondent was an Assistant Prosecuting Attorney, L.C.B. experienced acrimony between her and her boyfriend resulting in various charges being brought one against the other. While the specifications in the *Statement of Charges* allude to various offenses wherein L.B.C. was a Defendant in misdemeanor charges later resolved by pretrial diversion or otherwise, it is clear that L.B.C. was not a Defendant during a time that she alleges sexual relations took place with the Respondent. L.B.C.'s testimony was that she had oral sex with the Respondent at his office at a time that she was there to complain about being the victim of a theft. 11/10/14 Hrg. Trans p. 263, 297. The Court records established that at that time she had no charges pending against her. While she testified that she had an incomplete recollection of other time frames, she recalls that she was charged at one point with destruction of property for allegedly breaking her boyfriend's windshield. 11/10/14 Hrg. Trans. p. 269. In her testimony, she denied that her sexual relationship with the Respondent had any connection to that case because she understood that she "wasn't in any serious trouble". Hrg. Trans. p.271-272. Panel Member Akers inquired of L.B.C. during her testimony as to her recollection of the time frame that she alleges that the "two or three times" that she performed oral sex on Mr. Clifton in the courthouse.

MR. AKERS: Okay. Alright. Okay. And did those instances all occur only after you had the property damage matter that you approached him for? Did those happen all after that?

THE WITNESS: I honestly don't know. Honest to God, I don't remember. All I know is it was in 2009 because that was after I had - - I moved out from R.B.'s in February and I met my now husband in December, so all I know is that time frame. I honest to God don't remember the dates.

11/10/14 Hrg. Trans. p. 293-294

MR. AKERS: Okay. That particular document bates stamp 1480 dated August of 2009. Do you believe that you had performed oral sex on Mr. Clifton prior to that date or on some occasions before and after that date? Do you know as you sit here today?

THE WITNESS: I honestly don't know.

11/10/14 Hrg. Trans. p. 296

To summarize, the testimony of L.B.C. is that she had a historical sexual relationship with Mr. Clifton preceding his service as an Assistant Prosecuting Attorney. She denies that the sexual relationship influenced her treatment as a complaining victim or Defendant by him or his office. 11/10/14 Hrg. Trans. p. 288. She denies being able to recall the precise number of encounters or when those occurred thus any association with a particular legal event. 11/10/14 Hrg. Trans. p.281, 293-294. She was complimentary of his abilities as an attorney and assigns no unfair favorable or unfavorable treatment of her by him in his official capacity. L.B.C. also concedes that during the applicable time period she was taking "several different kinds of medication" including pain medication, diet pills, Ativan, and others. 11/10/14 Hrg. Trans. p. 281-286. L.B.C. acknowledged that she historically denied to others that sex with the Respondent occurred. 11/10/14 Hrg. Trans. p. 287). The Respondent, testifying as a witness called by the ODC, denies having sex with L.B.C. in his office.

We ask the Court to consider testimony of Brandy Moore. Ms. Moore's testimony was excluded based on the objection of the ODC as she did not appear on the witness list¹. Her testimony was offered as an avowal or proffer and we ask the Court consider it here as evidence concerning the reliability of the testimony provided by L.B.C.. Ms. Moore testified that she is of the opinion that L.B.C. is regarded as untruthful, that she has historically lied about matters of sexual relationships, and in this case that L.B.C. approached Ms. Moore. and asked her to give false testimony supporting her story. 11/10/14 Trans. p. 31-32.

F. DISHONESTY IN THE INVESTIGATION

Regarding the finding that the Respondent was dishonest when questioned by police concerning his relationship with T.N.S., this is in sharp contradiction to the evidence. Lt. Simon initially testified that he believed Mr. Clifton admitted more than a professional relationship with her only after he was told she had been wired during an encounter. During the HPS proceedings however, a search of his original notes failed to include that. More importantly, Special Agent Aldridge, upon reviewing his notes found that indeed he made that concession without that prompting.

Q: Okay. So he didn't deny that they had friendly contact or even exchanged pictures?

A: No.
11/10/14 Hrg. Trans. p. 412

¹ Respondent had reserved in his disclosure of witnesses the right to call persons identified in documents supplied by the ODC, which included Ms. Moore. That disclosure was deemed insufficient by the HPS and excluded per the objection of ODC.

We then turn to the charge that Respondent was dishonest with respect to his retention of the sex tape and thus, in violation of the Rules of Professional Conduct. Respondent acknowledged that he kept the tape among old personal and business materials since that time, and retrieved it once he was aware of K.M.'s allegations out of concern of being accused of destruction of evidence, had he done otherwise. No evidence offered suggests that Mr. Clifton had shown the video recording to others or reproduced it in any other way.

Referring to Respondent's argument relating to Rule 2.14 W.V.R.D.P., this exemplifies the policy underlying the Rule. Disciplinary Board claims that Respondent was dishonest regarding the retention of a videotape of sexual acts between him and L.B.C. This fails to recognize that the acts were recorded almost nine years prior to formal charges regarding the incident. Respondent had diminished recollection regarding the incident and he presented the recording, once he realized that it had not been destroyed.

G. SANCTIONS

As stated above, HPS has improperly concluded that the Respondent used his position or public office as to compel others to engage in sexual acts with him. By Respondent's own testimony, he admits to engaging in the exchange of nude or partially nude photographs and sexual banter. In Lawyer Disciplinary Board v. Chittum, 689 S.E.2d 811 (W.Va. 2010), this Court analyzed analogous circumstances involving telephone calls with an implied possibility of a romantic relationship. This Court in that case found that such communications were misconduct under Rule 8.4(a) WVRPC, because they were an attempt to establish a sexual relationship with a client, who was an

incarcerated person in a vulnerable position. While the facts in Chittum are not precisely the same as the instant case, Rule 8.4(d) prohibits such conduct "that is prejudicial to the Administration of Justice[.]" In Chittum, the violations were sanctioned by a reprimand, period of supervision, additional continuing education and further sanctions relating to a separate violation.

In the judicial disciplinary action In Re: Wilfong, 765 S.E.2d 283 (W. Va. 2014), this Court assessed sanctions including a suspension to the close of the judge's term amounting to 17 months and other sanctions where the disciplined judge engaged in an inappropriate sexual relationship with a married person whom appeared personally or through subordinates in the judge's courtroom regularly and also involved multiple other attorneys and court employees in facilitating or covering up the illicit relationship. The far-reaching extent of that judge's conduct is in sharp contrast to that of the Respondent. "Although both were married to other people we normally would be loath to interfere in such personal matters. In this case, however, the private aspects of the affair are secondary to the problems it has created." Wilfong, citing In Re: Gerard, 631 N.W. 2d 271, 277 (IA. 2001).

This Court declined to accept an agreed upon 90 day suspension of an attorney and dismissed the *Statement of Charges* in Lawyer Disciplinary Board v. Hussel, ___ W.Va. S.E. 2d ___, Docket No.: 13-0544 (W.Va. 2014). In that case, an attorney had an acknowledged sexual relationship with a woman after having represented her and her husband jointly. The Court based its decision on a finding that the attorney/client relationship with the woman had effectively ended at the time of the sexual relationship. In Lawyer Disciplinary Board v. Artimez, 540 S.E. 2d 156 (W.Va. 2000), the Court

declined to sanction Artimez for the sexual relationship with a client's wife, but found a violation of Rule 8.4(d). Because Artimez reached an agreed settlement with the aggrieved husband that included a monetary payment accompanied by a covenant not to pursue an action through the Office of Disciplinary Counsel, the sanction imposed was a public reprimand and cost of the disciplinary proceedings. In Lawyer Disciplinary Board v. Amos, 760 S.E. 2d 424 (W.Va. 2014), Amos, an assistant prosecuting attorney, met with a woman, who was a party to an abuse and neglect case. Although the woman was represented by counsel, Amos took the woman to bars and strip clubs, visited her home, acknowledged that he kissed her on the cheek, rubbed her thigh and made remarks suggesting to her that he expected sexual favors in exchange for help in the pending abuse and neglect case. Amos acknowledged that he had kissed her twice on the cheek and maintained text-message contact with one another over a period of weeks. Though he denied touching her or asking for sexual favors, he admitted discussing the case with her. The Court sanctioned Amos with a suspension of 75 days with automatic reinstatement, limitations on his practice in abuse and neglect cases for one year, counseling with a mental health provider, and costs of the proceeding.

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 a effective deterrent to other members of the bar and that the same time restore public confidence in the ethical standards of the legal profession. Amos, citing Syl. Pt. 3, Committee on Legal Ethics v. Walker, 358 S.E. 2d 234 (W.Va. 1987). Mitigating factors in a Lawyer Disciplinary proceedings are any considerations or factors that may justify a reduction in the degree of

discipline imposed. Syl. Pt.3, Amos, citing Syl. Pt. 2, Lawyer Disciplinary Board v. Scott, 579 S.E. 2d 550 (W.Va. 2003). Mitigating factors which may be considered in determining the appropriate sanctions to be imposed against the lawyer for violating the Rules of Professional Conduct include: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or rectify consequences of the misconduct; (5) full and free disclosure to the Disciplinary Board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses., Syl. Pt.4, Amos, citing Syl. Pt. 3, Lawyer Disciplinary Board v. Scott, 579 S.E. 2d 550 (W.Va. 2003).

The Respondent has no prior disciplinary record of any sort and has had no other complaints filed against him to date. Respondent has been fully compliant and honest from the onset of the investigations culminating in the instant complaint. Respondent self-reported the issue that spawned the current action.

Respondent had been licensed to practice for less than three years at the time of the allegations. Within his total of seven years of practice to date, Respondent has gained the respect of his fellow officers and the legal community, as well as his clients, citizens and the leaders of the community where he lives and serves. Additionally, the Respondent has received multiple letters of support from members of the Bar and Courts in the Eleventh Circuit, including letters from Chief Judge James J. Rowe and Judge J.C. Pomponio. While refused by the HSP as hearsay, those were included in the record as an

avowal. Respondent here asserts that they are appropriate and should be considered by this Court for purposes of mitigation. Both Circuit judges, sitting at times relating to this action, speak to the quality of the Respondent's service in his practice. Moreover, Judge James J. Rowe indicates that "It would pose a hardship on the judiciary if her were not able to serve."

The trust placed in him is also demonstrated by his continued appointment to guardian *ad litem* assignments and other appointed work by the Courts. He was recently appointed to the Board of Trustees of the local hospital. He was also recently elected President of the Pocahontas County Bar Association. Among the many activities Mr. Clifton spends time in devotion to his community, as a volunteer, are pro bono legal services, Coordinator of the Community Food Pantry, President of the local Humane Society, and Trustee of his church, where he also, when called upon, stands in as substitute pastor in conducting worship services and bible study. 11/11/14 Hrg. Trans. p. 251-253.

With respect to other penalties and sanctions imposed, Respondent has not been sanctioned through another court or administrative body. In Lawyer Disciplinary Board v. Artimez, the Court took cognizance of the fact that the Respondent had already suffered external to the disciplinary proceedings when the disciplinary sanctions were imposed. Lawyer Disciplinary Board v. Artimez, 540 S.E.2d 156 (W.Va. 2000). In this case, the Respondent has suffered the emotional consequences, legal expense and unwarranted effect on his reputation through the criminal action wrongfully brought against him, now acknowledged by all concerned as being based on fictitious information brought by T.S..

Additionally, Respondent clearly expressed remorse in his testimony before the HPS.

11/11/14 Hrg. Trans. i.e. p.255-256.

Aggravating factors in a lawyer disciplinary proceeding are any consideration or factors that may justify an increase in the degree of discipline to be imposed. Syl. Pt. 5, *Amos*, citing Syl. Pt. 4, *Scott*, *supra*. With respect to the issue of aggravating factors we conclude that the gravamen of the Respondent's conduct is adequately represented in the violation discussed.

In *Chittum*, *supra*, at 821 the Court made the distinction between cases where a violation of ethical standards caused no "actual injury" in relation to his conduct. Because there was no resulting legal prejudice to any of the Complainants in this case, we ask this Court to likewise be guided, in part, by that principle.

As noted, *ante*, Mr. Clifton understands and appreciates the predicament with which he is faced and the sanctions attendant thereto. However, it is submitted on his behalf that the sanctions suggested by the ODC would be excessive under the facts of this case and carry with it the wrong message. As stated by Judge Rowe, it would additionally pose a further hardship to the already underserved community where the Respondent practices, primarily by appointment of the courts there. For reasons appearing above and may be advanced in argument of this case, a public reprimand with mandatory continued counseling or therapy, continuing education in approved ethics course and monitoring of his practice would serve the interests involved. Alternatively, should this Court deem it necessary, a reasonable suspension would be sufficient as opposed to more severe sanctions.

V. CONCLUSION

The Respondent respectfully prays that this Court, in consideration of the forgoing, decide this matter consistent with the evidence and authorities cited above and apply sanctions reasonable to this case such as those proposed above.

Respectfully submitted,
Jarrell L. Clifton, II,
By Counsel



Mark McMillian (W. Va. Bar No. 9912)
Mark McMillian- Attorney At Law, L.C.
Boulevard Tower- Suite 900
1018 Kanawha Boulevard, East
Charleston, WV 25301
Telephone: 304-720-9099
Email: mark@markmcmillian.com

CERTIFICATE OF SERVICE

Mark McMillian, undersigned counsel for the Respondent, hereby certifies that a true and exact copy of the accompanying *Brief of Respondent Jarrell L. Clifton* was served upon Jessica H. Donahue Rhodes, Esquire of the Office of Disciplinary Counsel, by regular U.S. Mail, postage paid, on this 11th day of September, 2015, addressed as follows:

Jessica H. Donahue Rhodes, Esquire
Office of Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorckle Ave, S.E.
Charleston, W.V. 25304

And upon the Hearing Panel Subcommittee at the following addresses:

Steven K. Nord, Esquire
Post Office Box 2868
Huntington, West Virginia 25728

James R. Akers, II, Esquire
Post Office Box 11206
Charleston, West Virginia 25339

Dr. K. Edward Grose
2305 Winchester Road
Charleston, West Virginia 25303



Mark McMillian (WV No. 9912)
Mark McMillian - Attorney at Law, L.C.
Boulevard Tower – Suite 900
1018 Kanawha Boulevard, East
Charleston, WV 25301
Tele: 304.720.9099
Email: mark@markmcmillian.com