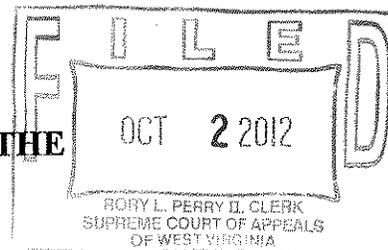


**BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**



OFFICE OF DISCIPLINARY COUNSEL,

Complainant,

v.

No. 35549

JOSHUA M. ROBINSON,

Respondent.

REPLY BRIEF OF THE OFFICE OF DISCIPLINARY COUNSEL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

REPLY TO RESPONDENT’S BRIEF 1

 a. The Hearing Panel’s determination that Randall Clifford, MA’s testimony had minimal mitigation value 1

 b. The Hearing Panel’s determination that Respondent’s testimony lacked credibility 2

 c. The Hearing Panel’s determination that Respondent not be granted his request for retroactive application of his date of disbarment to his date of emergency suspension 5

CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

Committee on Legal Ethics v. Six,
181 W.Va. 52, 380 S.E.2d 219 (1989) 7

West Virginia Statutes and Rules:

R. Lawyer Disciplinary Procedure 3.15 9

R. Lawyer Disciplinary Procedure 3.18 7

R. Professional Conduct Rule 8.4(b) 7

R. Professional Conduct Rule 8.4(c) 7

Other:

ABA Model Standards for Imposing Lawyer Sanctions, § 9.32I 2

REPLY TO RESPONDENT'S BRIEF

a. **The Hearing Panel's determination that Randall Clifford, MA's testimony had minimal mitigation value.**

Although it is understandable that Respondent is dissatisfied, the Hearing Panel Subcommittee properly weighed the evidence presented by Respondent's expert witness Randall Clifford, MA. and determined that evidence to have little weight. Mr. Clifford testified that the focus of his counseling with Respondent was on anger management and cognitive restructuring. He further diagnosed Respondent with intermittent explosive disorder and adjustment disorder. [Transcript at 28-29].

Mr. Clifford testified that over the course of the professional relationship he had spent approximately 10 hours with Respondent. [Transcript at 51 and Exhibit R6]. However, there were long gaps between Respondent's sessions with Mr. Clifford and Respondent had not been seen Mr. Clifford since December of 2010. Additionally, Mr. Clifford's diagnosis was based solely on Respondent's self-serving disclosures. Moreover, despite the fact that Mr. Clifford agreed that it was important for a client to be truthful in his disclosures to his counselor, it is undisputed that Respondent was not truthful about his criminal history with Mr. Clifford when he failed to disclose his prior criminal convictions for aggravated assault in the 4th degree in October of 1995 and his February of 2010 convictions for wanton endangerment. [Transcript at 47-48]. Additionally, Mr. Clifford's notes reflect that Respondent advised him that he had a history of heavy alcohol consumption/abuse; however, Respondent advised the psychiatrist performing a Court ordered evaluation that he

drank alcohol in the past, but it was never a problem. [Exhibit 11, Bates No. 763] Additionally, ten days after he told Mr. Clifford he had an alcohol problem, Respondent testified under oath to the Kanawha County Circuit Court that he did not have an alcohol problem. [Exhibit 14, Bates No. 701 and Exhibit 11, Bates No. 619] Given the brevity and lack of continuity of the counseling sessions with Mr. Clifford and the demonstrated lack of candor in Respondent's disclosures to Mr. Clifford, this testimony and its effect was correctly assessed very little value in determining mitigation by the Hearing Panel Subcommittee and it failed to satisfy the requirements as expressed by the *Model Standards for Imposing Lawyer Sanctions*, Stnd. 9.32(I) (reprinted in *ABA/BNA Lawyer's Manual for Professional Conduct* 01:839)(emphasis added)].

b. The Hearing Panel's determination that Respondent's testimony lacked credibility.

Again, while it is understandable that Respondent is displeased with the Hearing Panel's accurate assessment that his testimony lacked credibility, the evidence was overwhelming that throughout the proceedings Respondent was far less than candid. Respondent's rendition of the felonious assault on his client, Mr. David L. Gump, is simply not supported by the facts and evidence. Respondent testified that Mr. David L. Gump was distressed because Respondent advised him that he would no longer represent his interests. Respondent testified that after a series of phone calls with Mr. David L. Gump that Mr. Gump appeared at his law office, which was located in his home, and began pounding on the front door. Respondent further testified under oath that when he came downstairs, Mr.

David L. Gump had broken the bottom panes of glass in his front door by reaching in to try to unlock the door and then forcing the door open came into his foyer with a piece of concrete in his hand. Respondent stated that after struggling with Mr. David L. Gump in his foyer, Mr. David L. Gump dropped the concrete and Respondent struck him with the wooden baseball bat multiple times. Respondent stated that the struggle then progressed onto the front porch and that Respondent continued to strike Mr. David L. Gump with the baseball bat. Respondent further stated that after Mr. David L. Gump attempted to flee from the assault levied upon him that Respondent then chased him down the street with the baseball bat and cornered him in an area that Mr. David L. Gump could not escape Respondent. After Respondent saw the police approaching, he then took his baseball bat and smashed the window out of Mr. David L. Gump's car. Respondent then provided a statement to the Charleston Police Department that he was the victim of an attempted burglary and battery. [Hearing Transcript at 148-167].

However, the evidence clearly contradicts Respondent's version of events of what happened leading up to and on that fateful December 2, 2010 day. Respondent testified that he terminated the attorney client relationship with Mr. David L. Gump on the phone prior to the violent assault. However, when he called 911 he clearly identified himself as Mr. David L. Gump's attorney. [Exhibit R7 and Transcript at 313-314]. Moreover, Respondent testified that he had already terminated the attorney client relationship, yet on December 3, 2010, the day following the December 2, 2010 incident he sought informal advice from the Office of

Disciplinary Counsel as to whether, as a result of the altercation, if he had grounds to withdraw as counsel. [Transcript at 278-279]. All of these facts are inconsistent with Respondent's contention that the cause for Mr. David L. Gump's visit to his law office was to angrily protest Respondent's decision to terminate the relationship.

Additionally, despite Respondent's testimony that Mr. David L. Gump broke into his home and attacked him, the investigation reports by the police department show no physical evidence that Mr. David L. Gump was ever in Respondent's home. [Transcript at 545]. Despite Respondent's testimony that he violently beat Mr. David L. Gump with a baseball bat in the foyer of his home, the police were unable to document even a single drop of blood on the inside of Respondent's home. [Transcript at 426-427]. Despite Respondent's testimony that Mr. David L. Gump broke the bottom panes of glass in the door attempting to gain entry into his home, the crime scene photographs indicate that the top diamond of the glass was broken, which is consistent with an eye witness's accounting of the events that Respondent broke the glass out when he swung the baseball bat at Mr. David L. Gump while standing on his front porch. [Transcript at 281 and Exhibit 11, Bates No. 509].

The eye witness, who was a 10 year old minor, gave an accounting of the events to the police and she stated that she heard Respondent cussing on his front porch at Mr. David L. Gump. Then, she stated that Respondent attempted to hit Mr. David L. Gump with a baseball bat and missed, then tried again and missed and hit the top of the window of his front door breaking the glass. She then stated she saw Respondent chase Mr. David L. Gump

off his front porch into the street and after Mr. David L. Gump had fallen down, she saw Respondent hit Mr. Gump with the baseball bat. She further stated that Respondent then again chased Mr. David L. Gump further down the street and beat him in the head with a baseball bat “over and over and over” again. [Exhibit 11, Bates No. 509]. Despite the fact that the eye witness accounting is consistent with the evidence, Respondent’s explanation to this 10 year old minor’s statement is that she was lying. [Transcript at 284]. Respondent further explained that her uncle, who was also an eye witness and who gave a statement that mirrored her testimony, is also lying. [Transcript at 284]. Again, the Hearing Panel Subcommittee properly concluded that Respondent’s rendition of this event is not accurate and is not trustworthy and therefore no mitigation value was assessed.

The Hearing Panel Subcommittee respectfully listened to hours of testimony and reviewed voluminous documents that clearly established that Respondent’s credibility was lacking and the HPS was well within its right as the finder of fact to assess the same.

c. The Hearing Panel’s determination that Respondent not be granted his request for retroactive application of his date of disbarment to his date of emergency suspension.

The petition seeking Respondent’s disbarment was filed on April 29, 2010. Respondent filed a request for a mitigation hearing with the Chairperson of the Lawyer Disciplinary Board on or about May 16, 2010. Disciplinary Counsel filed an Objection to Respondent’s request for a mitigation hearing on or about June 3, 2010. The Chairperson of

the Lawyer Disciplinary Board granted Respondent's request for a mitigation hearing thereafter.

At this juncture, the matter was assigned a hearing panel subcommittee and the rules governing other disciplinary proceedings that proceed to hearing applied. Disciplinary Counsel filed its mandatory discovery on or about July 28, 2010, with supplements filed September 14, 2010, and February 25, 2011. Respondent failed to provide his mandatory discovery, which was due on or before August 29, 2010. Disciplinary Counsel then filed a Motion to Exclude Testimony of Witnesses and/or Documentary Evidence or Testimony of Mitigating Factors on October 25, 2010. Respondent filed a response to the Motion on October 28, 2010. The Hearing Panel Subcommittee denied Disciplinary Counsel's Motion to Dismiss on November 2, 2010. Respondent filed his mandatory discovery on or about November 1, 2010, with supplements on filed on or about November 12, 2010, November 19, 2010, February 14, 2011, and March 4, 2011.

It is noted that the original hearing date in the 3.18 petition was set for January 28, 2011. However, based upon motions filed by Respondent and Disciplinary Counsel in late December 2010 and in January 2011, in order to protect Respondent's constitutional rights in the criminal case, the disciplinary case was continued until March 28, 2011.

The relevant facts as it pertains to why Respondent's request for retroactivity should be denied include: 1. Respondent was arrested multiple times on multiple charges and incarcerated at the time of the emergency petition and the need to suspend his license and

protect his clients was immediate; 2. despite pleading guilty to a felony that involved savagely beating his client with a baseball bat, Respondent requested and received the mitigation hearing in this case and should not now be afforded the benefits of accepting responsibility at the time of the petition; 3. there have been no delays by Disciplinary Counsel; and 4. perhaps, most importantly, Respondent has been either incarcerated or on home confinement for 21 of the 30 months to which he now seeks retroactive credit.

CONCLUSION

Respondent has pled guilty to a crime demonstrating professional unfitness within the meaning of Rule 3.18 of the Rules of Lawyer Disciplinary Procedure.¹ Respondent has violated Rule 8.4(b) and Rule 8.4(c) of the Rules of Professional Conduct which state in pertinent part:

Rule 8.4(b) 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.

Rule 8.4(c) Misconduct

It is professional misconduct for a lawyer to:

- (c). Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

1

“Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics' burden of proving an ethical violation arising from such conviction.” Syl. Pt. 2, Committee on Legal Ethics v. Six, 181 W.Va. 52, 380 S.E.2d 219 (1989).

Respondent has violated the Rules of Professional Conduct and the aggravating factors far outweigh any effect of mitigating factors. Respondent has a history of violent behavior documented back to 1995 and continuing until the incident that occurred in 2010 while he was incarcerated. There is no evidence to suggest that Respondent possesses the requisite fitness or character to hold a license to practice law in the State of West Virginia. There is no evidence to suggest that Respondent should receive anything other than the ultimate sanction afforded by the Supreme Court of Appeals of West Virginia in lawyer disciplinary matters: annulment of his law license.

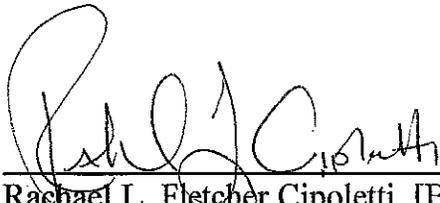
Therefore, for the reasons set forth above, the Disciplinary Counsel urges this Honorable Court to reject Respondent's request for retroactivity and adopt the following recommended sanctions:

1. That Respondent's law license be annulled;
2. That prior to petitioning for reinstatement of his law license that Respondent undergo a comprehensive psychological examination by an independent licensed psychiatrist to determine if Respondent is fit to practice law;
3. That Respondent fully comply with any and all treatment protocol expressed by this licensed psychiatrist;
4. That prior to petitioning for reinstatement of his law license that Respondent complete an extensive course recommended by the aforementioned licensed psychiatrist in Anger Management;

4. That prior to petitioning for reinstatement, Respondent pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure; and
5. That, upon reinstatement, Respondent's practice be supervised for a period of two (2) years.

Respectfully submitted,

The Office of Disciplinary Counsel,
By counsel.



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CERTIFICATE OF SERVICE

This is to certify that I, **Rachael L. Fletcher Cipoletti**, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 2nd day of October, 2012, served a true copy of the foregoing "**Brief of the Office of Disciplinary Counsel**" upon Sherri D. Goodman, Esquire, Counsel for Respondent Joshua M. Robinson, by mailing the same via United States Mail, with sufficient postage, to the following address:

Sherri D. Goodman, Esquire
Post Office Box 1149
Charleston, West Virginia 25324



Rachael L. Fletcher Cipoletti