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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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

LAWYER DISCIPLINARY BOARD,

Complainant,

v. **No. 12-0174**

RICHARD T. BUSCH,

Respondent.

BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. STATEMENT OF THE CASE

A. NATURE OF PROCEEDINGS

Formal charges were filed against Respondent Richard T. Busch with the Clerk of the Supreme Court of Appeals on or about February 13, 2012, and served upon Respondent's counsel via certified mail by the Clerk on or about February 22, 2012. Respondent filed his Answer to the Statement of Charges on or about March 2, 2012. Disciplinary Counsel filed its mandatory discovery on or about March 12, 2011, with supplemental discovery filed on June 21, 2012, July 10, 2012, and July 24, 2012. Respondent filed his mandatory discovery on or about July 6, 2012, with supplemental discovery filed on July 11, 2012.

On or about March 12, 2012, the Office of Disciplinary Counsel filed a Motion for Leave to Issue a Subpoena *Duces Tecum* for All Investigative Materials of Attorney Lees. On or about April 6, 2012, Respondent filed Respondent's Response in Opposition to ODC's Motion for Leave to Issue a Subpoena *Duces Tecum.* A hearing regarding the Motion was held on or about April 25, 2012, which granted the Office of Disciplinary Counsel's Motion.

On or about May 21, 2012, a Joint Motion to Continue the June 5, 2012 Hearing was filed. On or about May 29, 2012, a hearing regarding the Motion was held and the Motion was granted. Thereafter, this matter proceeded to hearing in Charleston, Kanawha County, West Virginia, on July 12, 2012, and July 27, 2012. The Hearing Panel Subcommittee was comprised of Paul T. Camilletti, Esquire, Chairperson, Richard M. Yurko, Jr. Esquire, and Robert L. Riley, layperson. Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. Respondent appeared

with counsel, J. Michael Benninger, Esquire. On July 12, 2012, the Hearing Panel Subcommittee heard testimony from Stephen G. Jory, Esquire; Deputy Alan G. Vanscoy; Rocco Mazzei, Esquire; Michael M. Taylor, Trooper A.S. Loudin; the Honorable Jaymie Wilfong; and Christopher W. Cooper, Esquire. On July 27, 2012, testimony was heard from Andrew D. Mendelson, Esquire; Charles D. Renton; and Respondent.

In addition, ODC Exhibits 1-31; Respondent's Exhibits 1-13; and Joint Exhibit 1– the Joint Stipulations of Facts and Conclusions of Law– were admitted into evidence at the July 12, 2012 hearing and ODC Exhibit 32 was admitted at the July 27, 2012 hearing.

On or about August 21, 2013, the Hearing Panel Subcommittee issued its recommendation in this matter and on that date, filed with the Supreme Court its "Report and Recommendation of the Hearing Panel." The Hearing Panel Subcommittee properly found that the evidence established that Respondent violated Rules 3.3; 3.4; 3.8; 8.4(c); and 8.4(d) of the Rules of Professional Conduct with regard to Count I and Count II.

On or about August 29, 2013, Respondent filed "Respondent's Rule 3.11 Objection" to the "Report and Recommendation of the Hearing Panel." By Order entered September 4, 2013, this Honorable Court ordered the parties to submit written briefs of their positions and set the same for oral argument on the Rule 19 argument docket.

B. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Richard T. Busch (hereinafter "Respondent"), is a lawyer practicing in Elkins, Randolph County, West Virginia. Respondent was admitted to The West Virginia State Bar on April 23, 2002, and, as such, is subject to the disciplinary jurisdiction of the Supreme

Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. Beginning in January of 2009 and continuing through the time of the misconduct, Respondent was the duly elected Prosecuting Attorney of Randolph County, West Virginia.

On or about December 5, 2011, one day prior to when the Randolph County Commission was scheduled to meet to discuss a report prepared by Attorney Jim Lees pertaining to a Commission-ordered investigation into Respondent's office, Respondent resigned his position as the Prosecuting Attorney of Randolph County, West Virginia.

Count I
Complaint of the Office of Disciplinary Counsel
11-03-018

J. Ronald Blake, Jr., and his wife Judy Mae Blake were the co-directors of the Community Response Foundation, a non-profit organization specializing in representative payee services for Social Security recipients. *Stipulated.* J. Ronald Blake, Jr. died November 29, 2009, and after his death Judy Mae Blake continued in the role of director of the Community Response Foundation. *Stipulated.* On or about December 4, 2009, a warrant was issued for the arrest of Judy Mae Blake for committing a violation of W.Va. Code § 61-3-20a. Embezzlement by Fiduciary. *Stipulated.* On or about December 7, 2009, a warrant was issued for the search of all records and computers pertaining to Blake and the Community Response Foundation. *Stipulated.* On or about December 7, 2009, Deputy A.G. Vanscoy executed a property receipt for seizure of: 1. HP Desktop Computer Serial # GC674AA; 1. Dell Laptop Computer Serial # unable to locate w/power cord; 1. Sony VAIO

Laptop Computer #281994383005505 w/ power cord; 1. Dell Laptop Computer #34632833653; and 13 Misc. Papers from Blake. *Stipulated.* Blake was arraigned on or about December 7, 2009. *Stipulated.*

By correspondence dated January 13, 2010, Respondent made the following specific request to Deputy A.G. Vanscoy: "Therefore, please accept this letter as a request to make a copy of any and all accounting files which are on the Community Response Foundation computers. Once you have successfully duplicated those accounts, will you please provide the disk(s) to our office so that the same can be forward [sic] to Appalachian Benefits Assistance, Inc." See Respondent's Exhibit 9. *Stipulated.* The January 13, 2010 letter was not produced by Respondent until a few days before the evidentiary hearing in this matter. Day 2 Transcript at 334.

On or about April 7, 2010, a hearing was held before the Honorable Judge Jaymie Wilfong pertaining to a request from the Court-appointed conservator for the Community Response Foundation to receive an archival copy of the records of the seized computers so it could fulfil its duties as conservator. *Stipulated.* By Order entered April 8, 2010, Judge Wilfong ordered "that such computers be turned over, FORTHWITH, to the State Police Crime Lab and that a complete archival record for each computer be made and forwarded to Appalachian Benefits on an EXPEDITED basis."*Stipulated.* Respondent did not appeal this Order or at any time lodge an objection to jurisdiction by the Circuit Court Judge. Transcript Day 1 at 498. On or about April 27, 2010, Deputy A.G. Vanscoy wrote Respondent and detailed what would be required to have the State Police Digital Forensics Lab in

Morgantown, West Virginia make a "complete archival record" of the computers as ordered by the Court. *Stipulated.*

During the status conference held July 21, 2010, scheduled by the Court, commencing at 10:07 a.m., this issue of Respondent's failure to comply with Judge Wilfong's April 8, 2010 Order arose, and Respondent made certain statements regarding the matter, as set forth in the transcript of the hearing found and made a part of the record as ODC Exhibit 23, Bates No. 00793-00796. The statement made by Respondent, "[a]nd, what he is doing is he is duplicating the hard drive while keeping it in the chain of custody so we can get that hard drive out and get it to Mr. Jory and also to the benefit services group, the Appalachian Benefits, has taken over the accounts." This statement made to the Court was false. *Stipulated.* In addition, Respondent, during the July 21, 2010 hearing, also stated, " In addition, there are also - - - I've also been told by Deputy Vanscoy, there have been more checks come in that we need to investigate on the criminal end of it. So, at this point, I tried to contact Sergeant Casto yesterday and I'm awaiting his response with regards to the status of if he's copied the hard drive or not. Essentially, that's where we are, Your Honor." ODC Exhibit 23, Bates No. 00793-00794. *Stipulated.*

On or about July 22, 2010, a staff person under Respondent's control and supervision inquired as to the location of the computers and was advised that the computer equipment was still in the evidence locker at the Randolph County Sheriff's Office. Additional communication occurred between Charles D. Renton, the investigator in Respondent's office, and Sgt. Casto via e-mail messages on July 21 and July 22, 2010, concerning the computer

hard drives and the duplication of same. ODC Exhibit 30, Bates No. 02163-02164. *Stipulated.*

After reviewing the transcript of the hearing on July 21, 2010, Sgt. Casto produced an affidavit that the communication on July 21, 2010, with Mr. Renton was the first communication he had with Respondent's office about the subject evidence. Sgt. Casto stated that prior to this communication the subject evidence was not submitted to the West Virginia State Police Digital Forensics Unit. Sgt. Casto said he became aware of Respondent's claim when Trooper Loudin contacted him to advise that Judge Wilfong stated in Court that she was contemplating holding him in contempt of court for his delays. ODC Exhibit 30 Bates No. 02161-02162. On July 26, 2010, Respondent submitted a proposed Order to Judge Wilfong for the July 21, 2010 hearing, and a copy of same was provided to Mr. Jory. ODC Exhibit 5, Bates No. 00039-00040. *Stipulated.*

Despite being fully aware on this date where the evidence was, and more specifically, where it was not, i.e. the false nature of his prior statements to the Court, Respondent took no remedial action to correct his prior false statements to the Court and instead memorialized the same in a proposed Order for the Court's signature. Transcript Day 1 at 548-549.

In response to receiving the Order from Respondent, Mr. Jory sent correspondence dated July 27, 2010, to Judge Wilfong, noting his requested modifications to the proposed Order for the July 21, 2010 hearing. Mr. Jory's letter stated, among other things, "Not being computer literate, I interpret 'duplicate the hard drive' to mean that another hard drive should

be produced. Nevertheless, it is the documents on the hard drive which Appalachian Benefits and I seek to obtain." ODC Exhibit 5, Bates No. 00041-00043. *Stipulated.*

On or about July 30, 2010, Respondent directed that Deputy A.G. Vanscoy transport the computer equipment to the State Police Forensics Lab in Morgantown, West Virginia. *Stipulated.*

By correspondence dated August 3, 2010, Respondent responded to Mr. Jory's correspondence of July 27, 2010, and advised the Court:

> The State's investigation may or may not include the said hard drives that are being provided to Appalachian Benefits Services, and therefore the State is of the opinion that the Defendant is not entitled to copies of said hard drives at this time. Please advise how the Court wishes the State to proceed, through correspondence or by order.

ODC Exhibit 5, Bates No. 00044. *Stipulated.*

By Order entered August 24, 2010, the Court ordered that "all documents in the seized hard drives be printed and that copies thereof be duplicated and provided to Appalachian Benefits Assistance, Inc., and to Defendant on or before August 9, 2010." *Stipulated.*

On or about August 24, 2010, Deputy A.G. Vanscoy returned the original computer equipment to the Randolph County Sheriff's Office. *Stipulated.* Appalachian Benefits Assistance Corporation, in its capacity as conservator for Community Response Foundation, received a cloned copy. *Stipulated.* However, at that time, despite the prior Court orders, no archival copy was provided to Attorney Stephen G. Jory, counsel for Blake. *Stipulated.*

By letter dated September 9, 2010, Attorney Jory wrote to Respondent and inquired about the documents that were the subject of the two prior court hearings. Attorney Jory

requested the same be provided Community Response Foundation and him within the next week. *Stipulated.*

By letter dated September 23, 2010, Respondent wrote to Attorney Jory and in pertinent part stated "[p]erhaps more curious, however, is why you feel that you are entitled to such information. First, Ms. Blake has not yet been indicted. The potential relevance of these hard drives is, and shall remain undetermined until an indictment is returned." *Stipulated.* Respondent copied Judge Wilfong on this September 23, 2010 correspondence to Attorney Jory. *Stipulated.*

By letter dated September 28, 2010, Attorney Jory responded to Respondent's letter and in relevant part "[l]est you forget, I am entitled to a copy of the hard drives because a court order exists stating that they shall be delivered to me. If you believe the order to be erroneous, you have an obligation to have it changed. Otherwise, you could find yourself in contempt of a court order. The ultimate issue is not, as you suggest, one of relevance." *Stipulated.*

Attorney Jory copied Judge Wilfong on his September 28, 2010 correspondence noting that he felt he must do so as Respondent copied the Court on the prior letter that made several inferences that Attorney Jory had engaged in inappropriate conduct. *Stipulated.*

On or about October 12, 2010, Judge Wilfong sent a letter to Respondent and Attorney Jory which made clear that Respondent was directed at the July 21, 2010 hearing to provide Attorney Jory with the subject evidence referenced in the earlier September 2010 letters. *Stipulated.*

Further, Judge Wilfong referenced Respondent's statements in the July 21, 2010 hearing about the delays in receiving the subject evidence from Sgt. Casto and indicated that she learned from Deputy Vanscoy that the hard drives were not in Sgt. Casto's possession at the time of the July 21, 2010 hearing. The Court further stated that Deputy Vanscoy advised her that he personally transported the hard drives to Sgt. Casto on or about July 30, 2010. The Court further noted that Respondent had been made aware of the location of the hard drives on several occasions. Judge Wilfong noted that despite the same knowledge concerning the location of the hard drives, Respondent never contacted the Court to correct his representations to the Court at the July 21, 2010 hearing. Finally, Judge Wilfong invited the parties to advise her if she had inaccurately assessed that the statements made by Respondent were false and misleading. *Stipulated.*

Judge Wilfong testified at the hearing that she knew she could have at this point set the matter for judicial review, but sent the October 12, 2010 letter because she wanted to pursue a course that gave "Mr. Busch an opportunity" to take corrective action. Day 1 Transcript at 513. Respondent did not respond to Judge Wilfong's October 12, 2010 letter. *Stipulated.*

On or about October 25, 2010, the Grand Jury of Randolph County issued an Eleven Count Indictment against Blake. *Stipulated.*

By letter dated November 9, 2010, Respondent advised Attorney Jory that he had "directed Deputy A.G. Vanscoy to release the original hard drives that were obtained as evidence in the above-referenced case." *Stipulated.*

The letter stated that in relevant part that "[f]urther investigation has led me to determine that the files contained on the hard drives are neither relevant nor germane to the charge against your client returned by the Randolph County Grand Jury." Respondent Exhibit 10. Respondent admitted in both the December 22, 2010 hearing and the disciplinary hearing that despite the language in the letter that at no time did he review the contents on the hard drives. Transcript Day 1 at 532 and Day 2 at 369.

Blake was arraigned on or about November 10, 2010. Trial was set for January 11, 2011. *Stipulated.*

On or about November 15, 2010, Attorney Jory filed a motion seeking the return of the subject property and indicated that despite Respondent's November 9, 2010 letter, the Sheriff's Office refused to return the property to his client without a signed Court Order. *Stipulated.* The Court entered an Order granting Attorney Jory's motion on or about November 16, 2010. *Stipulated.* On or about December 9, 2010, Attorney Jory filed a motion to dismiss the case based upon Respondent's prosecutorial misconduct citing, in relevant part, Respondent's failure to comply with the Court's Orders and his lies to the Court and Attorney Jory about the same. *Stipulated.*

The motions were heard on or about December 22, 2010. The Court found that Respondent clearly violated the Order by "deliberately refusing to turn over documents as required;" made false statements to the Court in the July 21, 2010 hearing; attempted to shift the blame to others who were not responsible; failed to correct the false statements made to the Court in the July 21, 2010 hearing even after the Court gave him an opportunity to correct

the same by the issuance of her October 12, 2010 letter; and found that despite Respondent's assertions to Attorney Jory in his November 9, 2010 letter that the computer records were not germane, Respondent subsequently acknowledged in the December 22, 2010 hearing that Respondent never reviewed the records. The transcript of the December 22, 2010 hearing sets forth the entire dialogue between the Court, Mr. Jory and Respondent and, is marked as Respondent Exhibit 8.

The Court entered an Order on or about January 10, 2011, finding Respondent's conduct in the Blake case to "clearly demonstrate a pervasive pattern of prosecutorial misconduct" and dismissed the case against Blake with prejudice. *Stipulated.* By letter dated January 10, 2011, Circuit Court Judge Jaymie G. Wilfong, pursuant to her duties as a judge, reported to ODC allegations of misconduct by Respondent in a criminal matter. *Stipulated.*

Pursuant to Rule 2.4 and Rule 2.5 of the Rules of Lawyer Disciplinary Procedure, the Office of Disciplinary Counsel initiated an investigation into Judge Wilfong's allegations. *Stipulated.* By letter dated January 13, 2011, Disciplinary Counsel sent the complaint to Respondent requesting a verified response to the allegations within 20 days of receipt of the complaint. *Stipulated.* By letter dated February 2, 2011, Respondent requested a 10 day extension to file his response to the complaint. *Stipulated.* By letter dated February 3, 2011, the same was granted by Disciplinary Counsel. *Stipulated.* On or about March 1, 2011, the Office of Disciplinary Counsel received Respondent's answer to the complaint. *Stipulated.* Respondent admitted in his March 2, 2011 verified response that by failing to provide a copy of the computer files to defense counsel that he violated Rule 3.8(d) (timely disclosure of

exculpatory evidence) of the Rules of Professional Conduct. ODC Exhibit 8 at Bates No. 00119.

Respondent stipulated prior to the hearing that his misconduct violated Rule 3.3(a)(1) and Rule 3.3(a)(4) of the Rules of Professional Conduct.

The Hearing Panel Subcommittee further found that Respondent unlawfully obstructed Attorney Jory's access to the hard drives by knowingly disobeying the Court's Order from the July 21, 2010 hearing and therefore violated Rule 3.4(a) and Rule 3.4(c) of the Rules of Professional Conduct. Attorney Jory testified at the evidentiary hearing that he and the Prosecutor's Office had a deal for pre-indictment information. Attorney Jory testified that he believed the information on the computers that was created from his client's own records was relevant to his client's defense. Day 1 Transcript at 49. Attorney Jory further testified that after months of trying to get the computer hard drives from Respondent that he was both entitled to as evidence having exculpatory value and pursuant to the Court's Order from the July 21, 2010 hearing, when he received Respondent's November 9, 2010 letter, wherein Respondent was returning the original hard drives because they were "not germane,' he "exploded." Day 1 Transcript at 61.

Attorney Jory agreed that it was his impression and belief as opposing counsel that Respondent unlawfully obstructed his access to the evidence, specifically the computer hard drives. Day 1 Transcript at 72. Attorney Jory further agreed that it was his impression and belief as opposing counsel that Respondent violated the Orders arising from the April 7, 2010 hearing and the July 21, 2010 hearing. Day 1 Transcript at 75.

Respondent, as the elected Prosecuting Attorney, also had an attendant duty to make timely disclosures that "tend to negate" the guilt of the accused or mitigates the offense. Respondent was aware that the computer hard drives could possess exculpatory evidence and he was under a court ordered obligation to tender the same to defense counsel. Respondent admitted the same in his March 2, 2011 verified response. Respondent's refusal to comply with the Court Order and his special duty as the Prosecuting Attorney violates Rule 3.8(d) of the Rules of Professional Conduct.

Not only did Respondent clearly make false representations of fact to the Circuit Court and opposing counsel in the hearing, Respondent made false statements of fact in his November 9, 2010 letter. Respondent admitted during the December 2010 hearing that he had not reviewed any of the contents of the hard drive; however, Respondent falsely stated to Attorney Jory in the November 9, 2010 letter that "[f]urther investigation has led me to determine that the files contained on the hard drives are neither relevant nor germane to the charges against your client." Respondent's false statement to opposing counsel and the Court, and his mischaracterization of potentially exculpatory evidence is also a violation of Rule 8.4(c) and Rule 8.4(d) of the Rules of Professional Conduct.

Count II
Complaint of the Honorable Circuit Court Judge Jaymie G. Wilfong
I.D. No. 11-03-271

Autumn Ray Faulkner was indicted by the Randolph County Grand Jury during the February 2011 Term of Court on three Counts of Sexual Abuse by a Parent, Guardian, Custodian or Person in Position of Trust and three Counts of Sexual Abuse in the Third Degree. *Stipulated.*

Faulkner's case was presented to the Randolph County Grand Jury on two prior occasions. The first presentment yielded a refusal by the Grand Jury to indict Faulkner, and the second was dismissed by the Court after an indictment was issued based on a finding of "Grand Jury Contamination." *Stipulated.* Faulkner was arraigned on or about March 9, 2011, and her trial was set for June of 2011. *Stipulated.*

On or about April 15, 2011, Faulkner's counsel of record, Attorney Rocco Mazzei filed a Motion to Dismiss Indictment or in the Alternative to Suppress Evidence on Additional Grounds. *Stipulated.* In relevant part, Attorney Mazzei claimed that the Prosecuting Attorney's Office refused to provide him with a video of the minor child/victim. The Motion came on for hearing before Judge Wilfong on or about June 1, 2011. *Stipulated.*

When questioned by the Court about this issue, Respondent advised the Court that he had never been in possession of the video, that he had been in contact with the West Virginia State Trooper assigned to the case on multiple occasions and Respondent believed that the West Virginia State Trooper had lost the evidence, but that the trooper was trying to locate

the same, as more fully set forth in the transcript of the June 1, 2011 hearing marked as ODC Exhibit 26, Bates 01392-01422. *Stipulated.*

Trooper First Class Loudin was not in attendance at the June 1, 2011 Motion hearing. *Stipulated.* Subsequent to the June 1, 2011 hearing, Judge Wilfong was made aware that the statements made to her by Respondent may not have been accurate and out of an abundance of caution she noticed the same for "Judicial Review" for June 7, 2011. *Stipulated.* Respondent and Trooper First Class Loudin both were directed by Judge Wilfong to attend the June 7, 2011 hearing. *Stipulated.* Trooper First Class Loudin testified that the disc in question had never been "lost;" that there was a copy of the same in his investigative file; and that Respondent never contacted him about the video. *Stipulated.*

Respondent then denied blaming Trooper First Class Loudin for losing the disc and indicated that the responsibility for the same was his, not Trooper First Class Loudin. Judge Wilfong then read from the prepared transcript of the June 1st hearing wherein Respondent clearly placed the blame of the missing disc on Trooper First Class Loudin and inquired of Respondent what other inference could be drawn from Respondent's June 1st statements to the Court, as more fully set forth in the transcript in the June 7, 2011 hearing, marked as ODC Exhibit 27, Bates 01423-01440. *Stipulated.*

Judge Wilfong found that Respondent made a material misrepresentation to the Court and held Respondent in contempt of Court. *Stipulated.* Judge Wilfong explained at the July 12, 2012 hearing that she held Respondent in direct contempt of court for his actions that took place in front of the Court at the June 1, 2011 hearing. Day 1 Transcript at 548-549.

By letter dated June 8, 2011, because the Court had exposed his false statements about Trooper Loudin's culpability, Respondent now asserted that the reason the prosecutor's office did not have the subject disc was that the same had been given to Rocco Mazzei and produced a handwritten receipt to support his new contention. Respondent Exhibit 5.

By letter dated June 10, 2011, Attorney Mazzei disputes that he received a copy of the disc from Assistant Prosecuting Attorney Cooper at the April 23, 2009 preliminary hearing. Attorney Mazzei stated that "he had filed three (3) separate prior discovery requests requesting this information and received no response from Mr. Busch." Attorney Mazzei reiterated his position that based on Respondent's course of misconduct, pursuant to the Rusen case, that the Faulker case should be dismissed with prejudice. Respondent Exhibit 6.

Testimony surrounding the issue of the disclosure to and receipt by defense counsel of a recorded copy of the victim's interview is irrelevant to the issue of the false statements made by Respondent to the Court during the June 1, 2011 hearing. Judge Wilfong correctly assessed the value when she stated ".... "the trooper lost it" theory isn't going to work, so let's go with the "defense attorney already has it" which may or may not have happened. ....The issue is that he threw an innocent trooper under the bus without any regard when the trooper wasn't present.... So now this is more spin, you know, this isn't an issue– this isn't an issue because the disc was already handed over." Day 1 Transcript at 552-553.

Prior to holding the sanctions hearing or reporting the same to ODC, Judge Wilfong testified that on June 13, 2011, she received a text message from Respondent early in the

morning asking to meet with her. Day 1 Transcript at 555. Judge Wilfong met with Respondent in her chambers and she offered to help him and offered to sit down with Trooper Loudin's supervisor, the captain of the Elkins Detachment of the West Virginia State Police, to allow Respondent to explain that he fully understood what he did was wrong in this case. Day 1 Transcript at 555-557. Judge Wilfong stated that despite how frustrated she was with Respondent's behaviorshe felt that she had to offer help because Respondent, a critical member of the bar, came to her asking for her help. Day 1 Transcript at 557. By letter dated June 13, 2011, Respondent advised Trooper Loudin that Judge Wilfong misunderstood Respondent to be blaming Trooper Loudin for losing evidence. ODC Exhibit 15, Bates No. 00198.

By letter dated June 14, 2011, Judge Wilfong, pursuant to her duties as a judge, reported to ODC allegations of misconduct by Respondent in a criminal matter. *Stipulated.* Judge Wilfong testified that after reviewing Respondent's letter of June 13, 2011 and by letter dated June 23, 2011, Judge Wilfong rescinded the offer to help Respondent. ODC Exhibit 15, Bates No. 00199. Day 1 Transcript at 564.

Judge Wilfong testified further that when she read "[m]y statements the judge seized on were incorrect. They were a mistatement of fact and I should have stopped her in her tracks when she took my comments as an attempt to blame you for my not having the disc." She realized that "[s]o now it is not Trooper Loudins' fault, and it's certainly not Rich Busch's fault, it's my fault because I've misunderstood the whole thing..." Day 1 Transcript at 564.

Judge Wilfong was not copied on Respondent's June 13, 2011 letter to Trooper Loudin. Exhibit 15, Bates No. 00198. Judge Wilfong further stated "I felt at that point that Mr. Busch had no interest in being honest, that he had no interest in correcting it, that it was more of a spin..... And, I thought at that point, there really wasn't anything I could do to help him. Either he was so far into the lie that he wasn't going to back out of it or he was spinning it to his own benefit. I don't know." Day 1 Transcript at 565.

Judge Wilfong conducted a sanctions hearing at which time Respondent and his counsel appeared to address the Court on or about June 30, 2011. Judge Wilfong imposed no sanction and instead deferred the issue of sanction to the Office of Disciplinary Counsel, as more fully set forth in the June 30, 2011 hearing transcript marked as ODC Exhibit 28, Bates No. 01441-01481. *Stipulated.* Judge Wilfong also dismissed the case against Faulkner without prejudice. *Stipulated.* Judge Wilfong then appointed Attorney Stephen G. Jory as Special Prosecutor to pursue any further actions against Faulkner. *Stipulated.*

On or about June 22, 2011, the Office of Disciplinary Counsel sent Respondent a letter directing him to file a response to the complaint within twenty days. *Stipulated.* By and through counsel, Respondent filed a verified response to the same on or about July 12, 2011. *Stipulated.*

Respondent resigned his position as Prosecuting Attorney of Randolph County, West Virginia on December 5, 2011. Respondent avers that he has not practiced law since that date.

Respondent stipulated prior to the hearing that his misconduct as it pertains to this Count is also in violation of Rule 3.3(a)(1) and Rule 3.3(a)(4) of the Rules of Professional Conduct.

The Hearing Panel further found that Respondent's failures and misconduct unlawfully obstructed Attorney Mazzei's access to the recording of the alleged victim's statements and therefore violated Rule 3.4(a) and Rule 3.4(c) of the Rules of Professional Conduct. The Hearing Panel further found that Respondent, as the elected Prosecuting Attorney, also had an attendant duty to make timely disclosures that "tend to negate" the guilt of the accused or mitigate the offense. Respondent is aware that prior recorded statements by an alleged victim is critical to the defense and it could possess exculpatory evidence and he was under a court ordered obligation to tender the same to defense counsel. Respondent's refusal to comply with this special duty as the Prosecuting Attorney violates Rule 3.8(d) of the Rules of Professional Conduct.

The Hearing Panel concluded that the evidence clearly established that Respondent's false statements: concerning the whereabouts of the disc; assigning responsibility for the same; and explaining his attempts to communicate with Trooper Loudin at the June 1, 2011, hearing constitute a violation of Rule 8.4(c) and Rule 8.4(d) of the Rules of Professional Conduct.

II. SUMMARY OF ARGUMENT

The Supreme Court 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). In order to effectuate the goals of the disciplinary process, the Hearing Panel Subcommittee recommended that 1.That Respondent's law license be suspended for 3 years; 2. That prior to petitioning for reinstatement that Respondent be evaluated by a licensed mental health provider and follow any protocol, if any, as directed by the mental health provider; 3.That prior to petitioning for reinstatement that Respondent be ordered to undergo an additional (12) hours CLE with focus in ethics; 4. Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure; 5. That prior to petitioning for reinstatement that Respondent reimburse these costs to the Lawyer Disciplinary Board; and 6. That if Respondent is successfully reinstated in the future, that upon reinstatement he be placed on two (2) years of probation with supervised practice by an active attorney in his geographic area in good standing with the West Virginia State Bar.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 19 of the Revised Rules of Appellate Procedure, this Honorable Court's September 4, 2013 Order set this matter for oral argument for January 22, 2014.

IV. ARGUMENT

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).

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

Lawyers owe duties of candor, loyalty, diligence and honesty. Members of the public should be able to rely on lawyers to protect their property, liberty, and their lives. Lawyers are officers of the court, and as such, must operate within the bounds of the law and abide by the rules of procedure which govern the administration of justice in our state. Furthermore, a lawyer's duties also include maintaining the integrity of the profession. The Supreme Court has noted that "[o]ur profession is founded, in part, upon the integrity of the individual attorney in his dealings with the public in general and his clients in particular." Office of Lawyer Disciplinary Counsel v. Tantlinger, 200 W. Va. 542, 490 S.E.2d 361 (1997) (*per curiam*). The evidence in this case establishes by clear and convincing proof that

Respondent violated duties owed to his client, the State of West Virginia, to the public, the people of Randolph County, the legal system, and the legal profession.

B. Respondent acted intentionally and knowingly.

There is no evidence to contradict that Respondent's misconduct was intentional and knowing. Respondent did not dispute his impairment; but rather, insisted that that he was not impaired in any meaningful way. Respondent intentionally sought to be elected to the position of Prosecuting Attorney. The evidence presented demonstrated that Respondent had the requisite tools and competence to be a skilled Prosecuting Attorney for Randolph County, West Virginia.

C. The amount of real injury is great.

Respondent is the chief law enforcement officer of Randolph County, West Virginia, and he repeatedly lied to the Circuit Court Judge about the actions of law enforcement officers in the community. This pattern of misconduct not only causes actual harm to the legal system (undermining the community's perception of the justice system) but also engenders a perception of lawlessness and lack of safety within the community at large. Moreover, Respondent's false statements about the actions of the law enforcement officers could have cost the law enforcement officers their jobs, their pensions and their credibility in the law enforcement community.

Trooper Loudin, who specializes in investigating crimes against children, when asked whether Respondent's conduct in the Faulker case impacted his ability to work with the prosecutor's office testified that "once you're placed in a position where somebody has basically ruined their trust with you and tried to throw blame on something that wasn't even

your fault or you weren't even there to be able to defend yourself, obviously you're apprehensive on even wanting to work in that county. I cover several different counties and really it made me feel like I could go into other counties and work and actually accomplish something rather than– and have a little bit of trust with those prosecutors. So I don't want to say it forced me to neglect Randolph County, but it was a lot easier to go into other counties and feel like I accomplished something, rather than just being– feeling like I'm doing something for nothing.." Transcript at 390.

Additionally, Attorney Jory also testified that the harm to his client, Mrs. Blake, was tremendous as "her life was destroyed" and despite the Court's ruling to dismiss the case based on Respondent's prosecutorial misconduct, "you can't return those things to Ms. Blake." Transcript at 77-78.

It is disconcerting that Respondent fails to understand the harm to the county that he was elected to serve as the prosecuting attorney. Respondent as the prosecuting attorney was in the position to work in collaboration with law enforcement to protect the citizens of Randolph County, West Virginia and dispense justice in a fair, even-handed manner. However, Respondent's pattern of misconduct created an atmosphere of distrust and fear in the community. Perhaps Judge Wilfong stated it best when she testified that "I think it is absolutely critical that the prosecutor be able to represent facts, scenarios, proffers, procedure properly and accurately and truthfully, and at that point I think that his credibility was destroyed. I think that his– the trust that the public needed to have in him was destroyed. I feel confident that the trust that the Bar needed to have in him to deal with cases together was

destroyed. There was just a general feeling of nobody trusted Mr. Busch because he lied." Transcript at 569.

D. There is evidence of mitigating and aggravating factors.

Mitigating 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. The Supreme Court of Appeals has stated that mitigating factors "are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Lawyer Disciplinary Board v. Scott, 213 W.Va. 216, 579 S.E.2d 550, 557 (2003). There are mitigating factors present in this case: (1) upon the sage advice of learned counsel, prior to the commencement of impeachment proceedings, Respondent voluntarily resigned his elected position as Prosecuting Attorney; (2) no prior disciplinary record; and (3) by and through counsel, Respondent displayed a cooperative attitude toward the disciplinary proceedings.

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. 216, 579 S.E. 2d 550, 557 (2003). There are aggravating factors present in this case: (1) pattern of misconduct; (2) multiple offenses; (3) refusal to acknowledge wrongful nature of the conduct; (4) experience in the practice of law; (5) aside from the execution of her mandatory judicial duty to report the same to ODC, there was no additional penalty imposed

by the Circuit Court Judge in either the Blake or Faulkner cases for his misconduct; (6) lack of any interim rehabilitation by Respondent in his execution of his duties as the prosecuting attorney after the Blake case; and (7) Respondent was the elected prosecuting attorney, in a position of public trust, at the time of the misconduct.

V. SANCTION

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.

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). For the public to have confidence in our disciplinary and legal systems, lawyers such as Respondent must be removed from the practice of law. A severe sanction is also necessary to deter other lawyers from engaging in similar conduct.

A principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344,

518 S.E.2d 101 (1999). This type of conduct has a dramatic impact on the public's confidence in the integrity of the Bar and a severe sanction is warranted. *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.[1]

The Smoot Court reminds us that the "[p]ublic expects lawyers to exhibit the highest standards [of] integrity and honesty. Lawyers have a duty not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice. Lawyers are officers of the court and must operate within the bounds of the law and act in a manner to maintain the integrity of the Bar. Lawyer Disciplinary Board v. Smoot, 228 W.Va. 1, 716 S.E2d 491(2010) cert denied, 132 S.Ct. 94, 181 L.Ed. 2d 23 (U.S.2011) *quoting* Lawyer Disciplinary Bd. v. Stanton, 225 W.Va. 671, 678, 695 S.E.2d 901, 908 (2010). Moreover, the Smoot Court noted that "[a] lawyer's duties to the public, the legal system, and the profession are further reflected in the Rules of Professional Conduct, which establish a duty of candor to a tribunal (Rule 3.3)." Smoot at 506.

V. CONCLUSION

It is this Honorable Court's inescapable and unenviable duty to protect the public and preserve the integrity of its Courts and our system of justice. Based on the totality of Respondent's misconduct, the aggravating factors in this case, the relevant case law and the guidelines from the ABA Model Standards for Imposing Lawyer Sanctions, for the public

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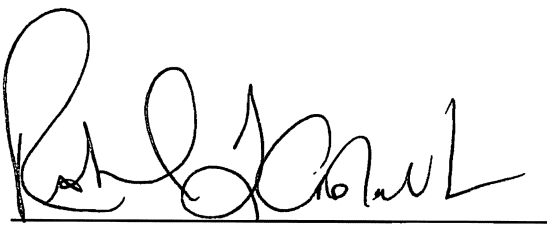
[1] Unpublished decisions cited in this brief have been provided to Respondent with a copy of the brief of the Lawyer Disciplinary Board.

to have confidence in our disciplinary and legal systems, lawyers who engage in the type of conduct exhibited by Respondent must be severely sanctioned. A license to practice law is a revocable privilege and when such privilege is abused, the privilege should be revoked. Such sanction is also necessary to deter other lawyers from engaging in similar conduct and to restore the faith of the victims in this case and of the general public in the integrity of the legal profession. Accordingly, the undersigned requests that this Honorable Court adopt the recommendations of the Hearing Panel Subcommittee in this case.

Respectfully Submitted,
By Counsel.



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(304) 558-7999
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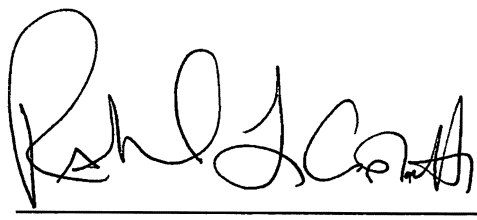
CERTIFICATE OF SERVICE

This is to certify that I, Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 7thth day of October, 2013, served a true copy of the foregoing **"BRIEF OF THE LAWYER DISCIPLINARY BOARD"** upon J. Michael Benninger, Esquire, counsel for Respondent, Richard T. Busch, by mailing the same, United States Mail with sufficient postage, to the following address:

J. Michael Benninger, Esquire
Post Office Box 623
Morgantown, West Virginia 26507



Rachael L. Fletcher Cipoletti

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STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 2nd of November, 2006, the following order was made and entered:

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OFFICE OF DISCIPLINARY COUNSEL

Lawyer Disciplinary Board, Petitioner

vs.) No. 32569 and 32755

Carolyn Sue Daniel, Respondent

On a former day, to-wit, September 18, 2006, came the Hearing Panel Subcommittee of the Lawyer Disciplinary Board, by David A. Jividen, its chairperson, Michael R. Whitt and Susan V. Fisher, pursuant to Rule 3.10 of the Rules of Lawyer Disciplinary Procedure, and presented to the Court its written recommended disposition in these matters, stipulated and agreed to by the parties, recommending that: (1) the respondent's law license be annulled; (2) that prior to petitioning for reinstatement of her law license, that the respondent be ordered to reimburse the following: (a) Debbie A. Benner-$ 709.00; (b) Juanita R. Carter-$ 209.00; (c) Arthur and Jamie Hamilton-$ 710.00; (d) Dawn R. Pickett-$250.00; (e) Karen A. Wright-$759.00; (f) V. Maxine McIntire-$209.00; (g) Deana A. Reeder-$709.00; (h) Mary M. Jacobs-$325.00; and (3) the 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.

Thereafter, on the 17th day of October, 2006, came the petitioner, the Lawyer Disciplinary Board, by Rachael L. Fletcher, its attorney, and stated no objection thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby adopt the stipulated written recommended disposition of the Hearing Panel Subcommittee of the

Lawyer Disciplinary Board. It is therefore ordered that: (1) the respondent's law license be annulled; (2) that prior to petitioning for reinstatement of her law license, that the respondent be ordered to reimburse the following: (a) Debbie A. Benner-$ 709.00; (b) Juanita R. Carter-$ 209.00; (c) Arthur and Jamie Hamilton-$ 710.00; (d) Dawn R. Pickett-$250.00; (e) Karen A. Wright-$759.00; (f) V. Maxine McIntire-$209.00; (g) Deana A. Reeder-$709.00; (h) Mary M. Jacobs-$325.00; and (3) the 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.

Service of an attested copy of this order shall constitute sufficient notice of its contents.

A True Copy

Attest: _____

Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 28th of February, 2007, the following order was made and entered:

Lawyer Disciplinary Board, Petitioner

vs.) No. 33070

John W. Askintowicz, a member of The
West Virginia State Bar, Respondent

On a former day, to-wit, January 25, 2007, came the Hearing Panel Subcommittee of the Lawyer Disciplinary Board, by David A. Jividen, its chairperson, pursuant to Rule 3.10 of the Rules of the Lawyer Disciplinary Procedure, and presented to the Court its written recommended disposition in this matter, recommending that: (1) the respondent's law license be annulled; (2) the respondent be ordered to legally satisfy the August 31, 2005 judgment obtained by William Gavin in its entirety; (3) the respondent be ordered to pay restitution to the following clients: Wendy Sorrell $1,500.00; Stacy L. Hawkins $2,500.00; Justin T. Mitchell $800.00; Robert J. O'Connor $1,000.00; Robert Mullenax $1,400.00; Aretha Valaszuez-Gomez $1,600.00; (4) the respondent be ordered to reimburse the Lawyer Disciplinary Board the costs of these proceedings pursuant to Rule 3.15 of the Rules of the Lawyer Disciplinary Procedure.

Upon consideration whereof, the Court is of opinion to and doth hereby concur with the stipulated written recommended disposition of the Hearing Panel Subcommittee of the Lawyer Disciplinary Board. It is therefore ordered that: (1) the respondent's law license be annulled; (2) the respondent be ordered to legally satisfy the August 31, 2005 judgment

obtained by William Gavin in its entirety; (3) the respondent be ordered to pay restitution to the following clients: Wendy Sorrell $1,500.00; Stacy L. Hawkins $2,500.00; Justin T. Mitchell $800.00; Robert J. O'Connor $1,000.00; Robert Mullenax $1,400.00; Aretha Valaszuez-Gomez $1,600.00; (4) the respondent be ordered to reimburse the Lawyer Disciplinary Board the costs of these proceedings pursuant to Rule 3.15 of the Rules of the Lawyer Disciplinary Procedure.

Service of an attested copy of this order shall constitute sufficient notice of its contents.

A True Copy

Attest: _____
Clerk, Supreme Court of Appeals