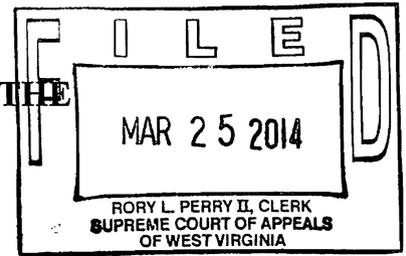


**BEFORE THE SUPREME COURT OF APPEALS OF THE  
STATE OF WEST VIRGINIA**



**LAWYER DISCIPLINARY BOARD,**

**Complainant,**

**v.**

**No. 13-00065**

**CHARLES C. AMOS,**

**Respondent.**

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**BRIEF OF THE LAWYER DISCIPLINARY BOARD**

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Rachael L. Fletcher Cipoletti [Bar No. 8806]  
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## I. STATEMENT OF THE CASE

### A. NATURE OF PROCEEDINGS AND RECOMMENDATION OF THE HEARING PANEL SUBCOMMITTEE

This is a disciplinary proceeding against Respondent Charles C. Amos (hereinafter “Respondent”), arising as the result of a Statement of Charges issued against him and filed with the Supreme Court of Appeals of West Virginia on or about January 17, 2013. Respondent’s counsel was served with the Statement of Charges on January 18, 2013, and filed a timely response thereto on or about February 14, 2013. Disciplinary Counsel filed its mandatory discovery on or about February 7, 2013. Respondent’s counsel filed his mandatory discovery on or about April 3, 2013.

Thereafter, this matter proceeded to hearing in Charleston, Kanawha County, West Virginia, on May 6, 2013. The HPS was comprised of John W. Cooper, Esquire, Chairperson; Debra A. Kilgore, Esquire; and William R. Barr, Layperson. Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. Respondent appeared with counsel, Paul E. Biser, Esquire. The HPS heard testimony from Christy Wright; Natalie Murphy; the Honorable Darrell Pratt; Thomas Plymale, Esquire; and Respondent. Ms. S.C., the victim in this proceeding, failed to appear at the hearing despite having been notified by ODC of the date, time and place prior to the hearing.

ODC advised the HPS that it had spoken to Ms. S.C., who at the time of the hearing, was a Kentucky resident, and she indicated she did not need a subpoena for her appearance.

She repeatedly expressed her willingness to appear as a witness for the hearing without a subpoena. At no time, did Ms. S.C. seem resistant to appearing at the disciplinary hearing. Regardless, on April 19, 2014, ODC sent Ms. S.C. a letter advising of the date, time and location of the hearing and included a West Virginia issued subpoena for appearance with an acceptance of service affidavit.<sup>1</sup> On May 2, 2013, a staff person at ODC spoke to the witness' mother who indicated that Ms. S.C. was at work, but planned to attend the hearing. However, Ms. S.C. did not appear at the May 6, 2013 disciplinary hearing. At the conclusion of the evidence presented, ODC made a motion requesting to have additional time to locate Ms. S.C., a witness for the ODC, who had indicated that she was willing to testify, but subsequently failed to appear at the hearing. After deliberation, the Panel ordered that within seven (7) days, Office of Disciplinary Counsel may file a Motion to Reopen Record, but ODC was ordered to demonstrate good cause to reopen the record to permit the testimony of Ms. S.C. Respondent's objection was noted for the record.

On May 9, 2013, ODC's investigator located Ms. S.C. at her place of employment in Louisa, Kentucky. On or about May 13, 2013, ODC filed a motion to reopen the record and take the testimony of Ms. S.C. and advised that Ms. S.C. failed to appear at the hearing in this matter because she was at work on the date and time of the hearing and feared losing her employment. The pleading further stated that while she was apprehensive, she would be

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<sup>1</sup>It is customary when a witness is located out of state *and* has not expressed reluctance or demonstrated resistance to forego the expense of filing a miscellaneous action in another state to have a subpoena issued in the sister state for appearance at the disciplinary matter in West Virginia. In recent memory, this practice has been utilized without incident until this case.

willing to testify if arrangements were made with her Kentucky employer so as to not lose her employment. Finally, the motion noted that at the time of the motion, she was a shift manager for a Kentucky restaurant and works 40 hours per week and had an additional job that she works 4 nights per week at a local restaurant/bar.

Respondent filed a timely objection to the same on May 22, 2013, and argued that good cause had not been demonstrated. Amongst other issues, Respondent noted that despite being provided ample time, Ms. S.C. never advised that she was unable to attend the hearing or that she needed a subpoena for a work related absence.

The HPS denied ODC's request to reopen the record by Order entered June 12, 2013. By letter dated June 19, 2013, ODC noted its objection to the June 12, 2013 Order.

The parties thereafter submitted to the HPS a pleading entitled, "Joint Stipulated Findings of Fact, Conclusions of Law and Recommended Sanctions." After due consideration, the HPS adopted as its own many of said stipulations and recommendations of the parties but modified and supplemented them to more fully articulate its own findings, conclusions and recommendations.

On or about January 23, 2014, the HPS issued its recommended decision in this matter and filed the same with the Supreme Court of Appeals of West Virginia (hereinafter "Report"). The HPS properly found that the evidence established that Respondent violated Rules 1.7(b); 4.2; and 8.4(d) of the Rules of Professional Conduct.

The HPS issued the following recommendation:

1. That Respondent be publicly reprimanded;
2. That Respondent pay costs of the proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure;
3. That Respondent continue with the counseling with his mental health care provider for a period of at least one (1) year to provide proof of the same to the Office of Disciplinary Counsel; and
4. That Respondent be prohibited from engaging in abuse and neglect proceedings in any capacity other than as a guardian ad litem for a period of at least one year.

**B. HEARING PANEL SUBCOMMITTEE'S FINDINGS OF FACT**

**COUNT I**  
**I.D. No. 11-03-316**  
**Complaint of the Office of Disciplinary Counsel**

Charles C. Amos (hereinafter "Respondent") is a lawyer practicing in Huntington, which is located in Cabell County, West Virginia. Respondent was admitted to The West Virginia State Bar on October 12, 1982, by successful passage of the West Virginia Bar Examination. As such, Respondent is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.

The Office of Disciplinary Counsel opened a complaint after receiving a self report from Respondent's counsel.

At the time of the events in this proceeding, Respondent had been a part-time assistant prosecutor in Wayne County for most of his career. Initially, he was involved in abuse and

neglect proceedings as a private practitioner until he was employed as an assistant prosecutor in the mid-1980's. His primary responsibilities in the prosecuting attorney's office were handling abuse and neglect cases. In that capacity, he was involved in an abuse and neglect matter involving Ms. S.C., in a proceeding involving the custody of her children. Ms. S.C. was represented by attorney Derek W. Marsteller, Esquire.

While the abuse and neglect case was pending, in or about June 2011, Respondent visited a local bar in Huntington, West Virginia, where he had drinks with friends. Ms. S.C. was at the same bar. At Respondent's invitation, Ms. S.C. joined Respondent and his friends at their table. Both Respondent and Ms. S.C. had drinks and then the four left and went to another bar. Respondent and Ms. S.C. traveled in Respondent's car and the other two drove in a separate vehicle.

During the course of the evening, Respondent and Ms. S.C. discussed her abuse and neglect proceeding and the progress she was making in her efforts to regain custody of her children. Respondent drove Ms. S.C. home that evening and requested to see Ms. S.C.'s apartment and children's bedrooms. Respondent had no further in person contact with Ms. S.C. after this occasion. This contact was out of court contact and was done outside the presence of Mr. Marsteller and without his consent or knowledge. Respondent exchanged text messages with Ms. S.C., which related to the abuse and neglect proceedings and contained suggestions for Ms. S.C. to improve her situation with regard to her case.

Respondent thereafter removed himself from the case without ever having appeared in any court proceedings related to Ms. S.C. after the out of court contact. Respondent

reported his conduct to Prosecuting Attorney, Thomas Plymale, Esquire, and the Honorable Circuit Court Judge Darrell Pratt, who presided over the case.

Mr. Plymale stated that on or about June 29, 2011, he contacted Respondent and advised that he needed to resign his position with the prosecutor's office and self report to the Office of Disciplinary Counsel. Respondent resigned his position as Assistant Prosecutor after seventeen (17) years and started to see a counselor.

Respondent readily admitted his actions in this matter were an abuse of his position as the Assistant Prosecuting Attorney. During his testimony, he was contrite and readily acknowledged his violations. The record is clear that he had not engaged in similar conduct in any other matter in his career. Moreover, from the testimony of Judge Pratt and Prosecuting Attorney Plymale, it appears that Respondent was not only competent in handling abuse and neglect cases, he was devoted to the administration of justice in such matters and went beyond the minimal fulfillment of his duties. *See HPS Report.*

### **C. CONCLUSIONS OF LAW**

Because Respondent, an Assistant Prosecuting Attorney, engaged in inappropriate conduct with a woman who was represented by counsel in an abuse and neglect matter to which he was the assigned Assistant Prosecutor and repeatedly communicated with this represented party outside the presence of counsel and without the permission of her counsel about the case, Respondent has violated Rule 1.7(b); Rule 4.2 and Rule 8.4(d) and of the Rules of Professional Conduct, which states as follows:

**Rule 1.7. Conflict of interest: General rules.**

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

**Rule 4.2. Communication with person represented by counsel.**

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

**Rule 8.4. Misconduct.**

It is professional misconduct for a lawyer to:

(d) engage in conduct that is prejudicial to the administration of justice;

## 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 HPS of the Lawyer Disciplinary Board recommended that Respondent be publicly reprimanded; that Respondent pay costs of the proceedings pursuant to Rule 3.15 of the Rules of Lawyer

Disciplinary Procedure; that Respondent continue with the counseling with his mental health care provider for a period of at least one (1) year to provide proof of the same to the Office of Disciplinary Counsel; and that Respondent be prohibited from engaging in abuse and neglect proceedings in any capacity other than as a guardian *ad litem* for a period of at least one (1) year.

### **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to Rule 19 of the Revised Rules of Appellate Procedure, this Honorable Court's March 7, 2014 Order set this matter for oral argument for May 7, 2014.

### **IV. ARGUMENT**

#### **A. STANDARD OF PROOF**

The Supreme Court is the final arbiter of formal legal ethic charges and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law. Syl. Pt. 3, Committee on Legal Ethics v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984); Syl. Pt. 7, Committee on Legal Ethics v. Karl, 192 W.Va. 23, 449 S.E.2d 277 (1994). The charges against an attorney must be proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. See, Syl. Pt. 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995). The evidence presented in this case exceeds the standard of clear and convincing, and in fact, the facts and the violations of the Rules of Professional Conduct were stipulated to by the parties.

In lawyer disciplinary matters, a *de novo* standard of review applies to questions of law, questions of application of the law to the facts, and questions of appropriate sanction to be imposed. Roark v. Lawyer Disciplinary Board, 207 W. Va. 181, 495 S.E.2d 552 (1997); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994). The Supreme Court gives respectful consideration to the Lawyer Disciplinary Board's recommendations as to questions of law and the appropriate sanction, while ultimately exercising its own independent judgment. McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381.

At the Supreme Court level, "[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board." Cunningham, 464 S.E.2d at 189; McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381. Substantial deference is to be given to the Lawyer Disciplinary Board's findings of fact unless the findings are not supported by reliable, probative, and substantial evidence on the whole record. McCorkle, Id.; Lawyer Disciplinary Board v. Cunningham, 195 W. Va. 27, 464 S.E.2d 181 (1995).

**B. ANALYSIS OF SANCTION UNDER RULE 3.16 OF THE RULES OF LAWYER DISCIPLINARY PROCEDURE**

Syl. Point 4 of Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998) holds: Rule 3.16 of the Rules of Lawyer Disciplinary Procedure provides that when imposing a sanction after a finding of lawyer misconduct, the Court shall consider: (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. A review of the record and stipulations in this matter indicates that Respondent admits that he has transgressed all four factors set forth in Jordan.

**1. Whether Respondent has violated a duty owed to a client, to the public, to the legal system or to the legal profession.**

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 and, in fact, Respondent admits he violated duties owed to the public, the legal system, and the legal profession.

**2. Respondent acted intentionally, knowingly or negligently.**

Respondent acted intentionally and knowingly in this case.

**3. The amount of actual or potential caused by the lawyer's misconduct.**

The amount of injury was great and the potential for injury in this matter was tremendous. “Potential injury” is defined in the ABA Standards for Imposing Lawyer

Sanctions as “the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer’s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct.” [Id.] “Injury” is defined as “harm to a client, the public, the legal system, or the profession which results from a lawyer’s misconduct.” [Id.] However, it is noted that the potential injury was limited by Respondent’s self reporting and removal of himself as the Assistant Prosecutor assigned to the case.

**4. 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 Scott Court 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. absence of a prior disciplinary record; 2. cooperative attitude towards Disciplinary Counsel; 3. Respondent had a good reputation at the time of the offenses. Respondent volunteered extensive amounts of time for a local adult special care center, including acting as a board member and he was a two term president of the board; 4. Respondent made a timely good faith effort to rectify the consequences of his misconduct by reporting his conduct to both the judge and prosecuting attorney. He also removed himself from the case prior to any further hearing in the abuse and neglect case involving Ms. S. C.; 5. Respondent sought counseling after the incident; 6. Respondent resigned his job as

assistant prosecutor after seventeen (17) years; and 7. Respondent expressed remorse for his conduct.

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. Respondent was in a position of authority as the Assistant Prosecutor at the time of the offense and the same is subject to heightened scrutiny; 2. Ms. S.C. was a Respondent mother in an abuse and neglect case to which Respondent was the assigned prosecutor and her vulnerability was great; 3. Respondent engaged in multiple offenses of misconduct involving Ms. S.C. as he continued to communicate with her after the first social encounter; and 4. Respondent has substantial experience in the practice of law.

#### **V. RECOMMENDED SANCTION**

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syllabus Pt. 3, in part, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), cited in Committee on Legal Ethics v. Morton, 410 S.E.2d 279, 281 (1991). In addition, discipline must serve as both instruction on the standards for ethical conduct and as a deterrent against

similar misconduct to other attorneys. In Syllabus Point 3 of Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987), the Court stated:

In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.

Moreover, a principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999). "A sanction is to not only punish the attorney, but should also be designed to reassure the public confidence in the integrity of the legal profession and deter other lawyers from similar conduct." Syl. pt 2, Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993); Syl. pt 3, Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Syl. pt. 5, Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Syl pt. 3, Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); and Syl pt. 3, Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000).

After the HPS denied ODC's motion to reopen the record, the parties stipulated to violations of Rule 1.7(b) [Conflict of Interest]; Rule 4.2 [Communications with a Represented Party]; and Rule 8.4(d) [Prejudice to the Administration of Justice] of the Rules of Professional Conduct and recommended to the HPS that amongst other requirements that

Respondent should be suspended for a period of seventy-five (75) days, with automatic reinstatement to the practice of law. Because Respondent was in a public position as an Assistant Prosecutor at the time of the misconduct, the parties cited to the ABA Standards for Imposing Lawyer Sanctions Standard 5.22 that states that “[s]uspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or the integrity of the legal process.” However, in reaching its recommendation as to sanctions, the HPS stated that although it was “hesitant to recommend a greater or lesser sanction than that to which the parties agreed... because the mitigating factors outweigh the aggravating factors in this case, the HPS [felt] compelled to do so in this instance given the overall performance and commitment of Respondent in his career as an assistant prosecuting attorney in abuse and neglect matters.”

The HPS recommended the following sanctions:

1. That Respondent be publicly reprimanded;
2. That Respondent pay costs of the proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure;
3. That Respondent continue with the counseling with his mental health care provider for a period of at least one (1) year to provide proof of the same to the Office of Disciplinary Counsel; and

4. That Respondent be prohibited from engaging in abuse and neglect proceedings in any capacity other than as a guardian *ad litem* for a period of at least one (1) year.

Based upon the record presented, as counsel for the Board, ODC requests this Honorable Court adopt the recommendation of the HPS. Respondent was never arrested or charged with any criminal charges and there was no pattern of misconduct involving any other victims. Respondent denied that he propositioned her for sexual activity or any *quid pro quo* for lenience in her abuse and neglect matter. [Transcript at 167]. Respondent mitigated the damage to Ms. S.C. by reporting his misconduct to his superior, Prosecuting Attorney Plymale and Circuit Court Judge Pratt. Respondent also denied instructing Ms. S.C. not to cooperate with any investigation into his misconduct [Transcript at 167-168].

Respondent also self-reported to ODC and sought counseling immediately. The Honorable Circuit Court Judge Pratt, who was Respondent's former supervisor when he occupied the position of Prosecuting Attorney, agreed that he was surprised when Respondent reported the misconduct to him and considered it to be an aberration in Respondent's behavior. [Transcript at 74-75]. Respondent has no prior formal disciplinary action by the Board or this Court. The Circuit Court also removed Respondent from the appointment lists for all abuse and neglect cases in his Circuit. [Transcript at 89]. In addition to the additional penalty of losing his long-time position as assistant prosecutor, the wealth of mitigating factors in this case outweigh the aggravating factors and this recommendation is not wholly inconsistent with the Court's sanctions in Lawyer Disciplinary

Board v. Artimez, 208 W.Va. 288, 540 S.E.2d 156 (2000) [lawyer violated Rule 8.4(d) of the Rules of Professional Conduct by contracting with his client to obtain a release from all possible claims for professional misconduct and violated Rule 1.7(b) by having a sexual relationship with his client's wife and was publicly reprimanded] and Lawyer Disciplinary Board v. Chittum, 225 W.Va. 83, 689 S.E.2d 811 (2010) [lawyer violated seven rules, one of which involved an attempt to begin a sexual relationship with an incarcerated client in violation of Rule 8.4(a) and 8.4(d)].

As such, while Respondent's conduct was egregious and should not be tolerated by this Honorable Court, based on the evidence presented, the Board requests the Court adopt the recommended sanctions by the Hearing Panel Subcommittee.

*Respectfully submitted,*  
The Lawyer Disciplinary Board  
By Counsel



Rachael L. Fletcher Cipoletti [Bar No. 8806]  
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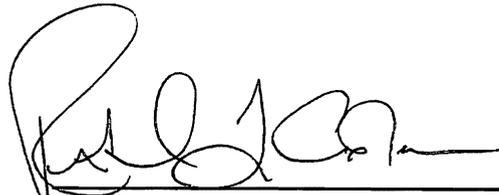
**CERTIFICATE OF SERVICE**

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This is to certify that I, Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 25<sup>th</sup> day of March, 2014, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" upon Respondent's counsel Paul D. Biser, Esquire, by mailing the same via United States Mail, both certified and regular, with sufficient postage, to the following address:

Paul E. Biser, Esquire  
511 8<sup>th</sup> Street  
Huntington, West Virginia 25701



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Rachael L. Fletcher Cipoletti