

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

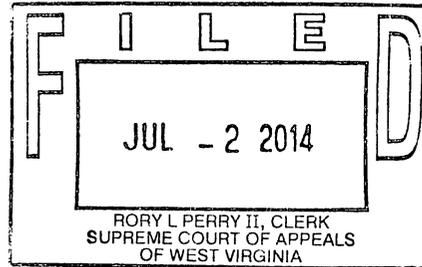
LAWYER DISCIPLINARY BOARD,

Complainant,

v.

JOHN F. HUSSELL, IV,

Respondent.



No. 13-0544

BRIEF OF THE LAWYER DISCIPLINARY BOARD

Jessica H. Donahue Rhodes [Bar No. 9453]
Lawyer Disciplinary Counsel
Office of Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304
(304) 558-7999
(304) 558-4015 – facsimile
jrhodes@wvdc.org

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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 John F. Hussell, IV (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 May 24, 2013. Respondent was served with the Statement of Charges on May 29, 2013. Disciplinary Counsel filed her mandatory discovery on or about June 18, 2013. Respondent filed his “Verified Answer to Statement of Charges” on or about June 28, 2013. Respondent requested and was granted an extension to July 25, 2013, to provide his mandatory discovery, and filed it on that same date.

Thereafter, on October 29, 2013, this matter proceeded to hearing in Charleston, West Virginia. The Hearing Panel Subcommittee was comprised of Paul T. Camilletti, Esquire, Chairperson, Steven K. Nord, Esquire, and Mrs. Priscilla M. Haden, layperson. Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. Benjamin L. Bailey, Esquire, and Michael B. Hissam, Esquire, appeared on behalf of Respondent, who also appeared. The Hearing Panel Subcommittee heard testimony from Carolyn LaFollette, James Calvert LaFollette, Latelle M. LaFollette, Dearmond Arbogast, Craig M. Kay, Esquire, and Respondent. In addition, ODC Exhibits 1-25 and Respondent’s Exhibits R2 and R3 were admitted into evidence.

On or about April 17, 2014, the Hearing Panel Subcommittee issued its decision in this matter and filed with the Supreme Court of Appeals of West Virginia its “Report of the Hearing Panel Subcommittee” (hereinafter “Report”). The Hearing Panel Subcommittee properly found that

the evidence established that Respondent violated Rules 1.7(a), 1.7(b), 8.1(a), 8.4(c) and 8.4(g) of the Rules of Professional Conduct.

The Hearing Panel Subcommittee issued the following recommendation as the appropriate sanction:

1. That Respondent's law license be suspended for ninety (90) days;
2. That Respondent not be required to petition for reinstatement pursuant to Rule 3.31 of the Rules of Lawyer Disciplinary Procedure;
3. That, upon reinstatement, Respondent's practice be supervised for a period of one (1) year by an attorney agreed upon between the Office of Disciplinary Counsel and Respondent;
5. That during Respondent's period of suspension, that Respondent shall be required to undergo an independent psychiatric evaluation to determine whether he is fit to engage in the practice of law and is further required to comply with any stated treatment protocol; and
6. That Respondent be ordered to reimburse the Lawyer Disciplinary Board the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

B. FINDINGS OF FACT

John F. Hussell, IV (hereinafter "Respondent") is a lawyer practicing in Charleston, which is located in Kanawha County, West Virginia. ODC Ex. 21, p. 141. Respondent, having passed the Bar exam, was admitted to The West Virginia State Bar on October 3, 1994. ODC Ex. 21, p. 144. 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.

Complainant James Calvert LaFollette filed an ethics complaint against Respondent on June 27, 2011. ODC Ex. 1, p. 1-8. Calvert LaFollette stated that Respondent was hired to assist his family¹ with estate planning in late summer or early autumn of 2009. ODC Ex. 1, p. 1. Calvert LaFollette said that, beginning in August of 2009, Respondent and his wife began spending a great deal of time together. Id. He said when he questioned Carolyn LaFollette about the relationship, she stated that Respondent and his wife were having marital problems and Respondent had no one else to talk with about his problems. ODC Ex. 1, p. 2. On or about September 12, 2009, Calvert LaFollette and his family hired Respondent to handle their estate planning. ODC Ex. 1, p. 4-5. Calvert LaFollette said he and his wife were having marital problems, and he spoke with Respondent about keeping the information he provided and details of his estate planning separate from that of his wife. ODC Ex. 1, p. 2. He said Respondent assured him that would not be a problem and that he could continue to represent both of them with estate planning. Id.

On or about January 6, 2010, Respondent prepared a letter which stated he could represent both parties and keep each client's information separate and confidential. ODC Ex. 1, p. 6-7. On or about January 14, 2010, both Calvert LaFollette and Carolyn LaFollette signed the January 6, 2010 letter. Id. Calvert LaFollette stated that he and his wife had separated around this time. ODC Ex. 1, p. 2. Calvert LaFollette stated that Respondent bought a phone in order to make telephone calls to Carolyn LaFollette with the purpose of keeping the telephone calls hidden from both Calvert LaFollette and Mrs. Hussell. Id. Calvert LaFollette stated that he and his wife had agreed on the value of a cabin which was marital property, but Respondent gave Carolyn LaFollette advice about the value of the property and, based on this advice, Calvert LaFollette had to pay an increased

¹ This included his father, Latelle McKay LaFollette, III; his sister, Dearmond Arbogast; his brother, Latelle McKay LaFollette, IV; Complainant and his then wife, Carolyn LaFollette.

amount thereon. Id. Calvert LaFollette stated that sometime between January and May of 2010, Respondent and Carolyn LaFollette began a sexual relationship. ODC Ex. 1, p. 2-3. Calvert LaFollette provided an affidavit signed by Carolyn LaFollette wherein she admitted to the affair and stated she told her husband about the same in May of 2010. ODC Ex. 1, p. 8. She also stated that she discussed the value of the property with Respondent, and Respondent was one of the neighbors who stated the value was too low. Id. Carolyn LaFollette went on to say that she discussed the formula for alimony with Respondent, and he gave her feedback. Id. Calvert LaFollette said he and other family members, with the exception of Carolyn LaFollette, terminated their professional relationship with Respondent on or about June 17, 2010. ODC Ex. 1, p. 3.

In his initial response to the ethics complaint, Respondent stated that he represented Calvert LaFollette and Carolyn LaFollette from September 12, 2009, to January 10, 2010. ODC Ex. 4, p. 15. Respondent stated that he only performed two and a half (2.5) hours of work on their behalf, which consisted of a diagram of a tax plan and consulting with them about the selection of individuals to be named to serve in a fiduciary capacity in the documents. Id. Respondent said he never received any financial information from either party. Id. Respondent stated that he met with Calvert LaFollette in Greenbrier County on January 10, 2010, to discuss the termination of the attorney-client relationship. ODC Ex. 4, p. 16. Respondent stated that on that date, Calvert LaFollette told him he had contacted Elizabeth D. Keightley, a trust officer at Branch Banking & Trust Company, concerning the selection of another estate planning attorney. Id. Respondent stated he never performed any legal work for Calvert LaFollette after that date. Id.

Respondent denied giving Carolyn LaFollette any legal advice concerning her divorce after the termination of the representation on January 10, 2010. ODC Ex. 4, p. 16-17. He said the only

“feedback” he gave to Carolyn LaFollette concerning her divorce was to speak with her legal counsel. Id. At her sworn statement on December 12, 2012, Carolyn LaFollette stated that Respondent did purchase a phone to keep their conversations hidden from both spouses. ODC Ex. 18, p. 90. Further, Respondent advised her to get another appraisal on some marital property. ODC Ex. 18, p. 96. The sexual relationship between Respondent and Carolyn LaFollette started in or around March of 2010. ODC Ex. 18, p. 110. Respondent had told Carolyn LaFollette that he would take care of her if she was divorced. ODC Ex. 18, p. 119. In or around June or July of 2010, Carolyn LaFollette ended her sexual relationship with Respondent. ODC Ex. 18, p. 114. According to Carolyn LaFollette, Calvert LaFollette fired Respondent after Calvert LaFollette found out about the sexual relationship between Respondent and Carolyn LaFollette. ODC Ex. 18, p. 99. Further, Calvert LaFollette was upset when he discovered Carolyn LaFollette’s and Respondent’s sexual relationship because Respondent was Calvert LaFollette’s friend and attorney. ODC Ex. 18, p. 99-100.

At his sworn statement on January 9, 2013, Respondent stated that he met with Calvert LaFollette and Carolyn LaFollette on or about September 11, 2009. ODC Ex. 21, p. 148. On or about September 12, 2009, Respondent sent an engagement letter to Calvert LaFollette and Carolyn LaFollette about representing the LaFollettes in estate planning services. ODC Ex. 21, p. 148-149. On or about September 12, 2009, Calvert LaFollette and Carolyn LaFollette signed the engagement letter. ODC Ex. 21, p. 149. Respondent did not receive any financial information from Calvert LaFollette and Carolyn LaFollette. ODC Ex. 21, p. 153. Respondent denied that he told Carolyn LaFollette that he would take care of Carolyn LaFollette if she received a divorce. ODC Ex. 21, p. 163.

On or about January 10, 2010, Respondent spoke with Calvert LaFollette about Calvert LaFollette getting a divorce, that Calvert LaFollette did not want Respondent to represent him, and that Elizabeth Keightley had given Calvert LaFollette another attorney's name to represent Calvert LaFollette. ODC Ex. 21, p. 169-170. Respondent denied contacting Calvert LaFollette after receiving the January 6, 2010 letter that was signed by both Calvert LaFollette and Carolyn LaFollette on January 14, 2010. ODC Ex. 21, p. 174-175. Respondent never wrote a disengagement letter. ODC Ex. 21, p. 172-173, 176. Respondent advised Carolyn LaFollette to follow her attorney's advice regarding getting another appraisal on marital property. ODC Ex. 21, p.180-181. Around March of 2010, Respondent met Carolyn LaFollette in Florida and had sexual relations while there. ODC Ex. 21, p. 186-187. And Respondent had sexual relations with Carolyn LaFollette in or around May or June of 2010 during the concerts on the levee in Charleston, West Virginia. ODC Ex. 21, p. 185.

On or about May 26, 2010, Calvert LaFollette met with a new attorney, Craig Kay, Esquire, to take over the LaFollette family's estate planning. ODC Ex. 25, p. 221 (Exhibit filed under seal), Hrg. Trans. p. 215. During that meeting, Calvert LaFollette informed Mr. Kay that he had found out about Respondent and Carolyn LaFollette's sexual relations the week before. *Id.* On or about June 1, 2010, Mr. Kay made the first contact with Respondent to obtain the LaFollettes' client files. ODC Ex. 25, p. 261 (Exhibit filed under seal). On or about June 17, 2010, Respondent provided the complete client files for the LaFollettes except for Carolyn LaFollette. ODC Ex. 25, p. 222-223 (Exhibit filed under seal).

C. CONCLUSIONS OF LAW

The Hearing Panel Subcommittee made several conclusions of law as to violations of the Rules of Professional Conduct. The conclusions of law were based upon the record presented and are supported by the clear and convincing standard.

The Hearing Panel found that Respondent misrepresented the termination of his representation of Calvert LaFollette for January 10, 2010, in violation of Rules 8.1(a) and 8.4(c) of the Rules of Professional Conduct. Respondent asserted that Calvert LaFollette approached him on January 10, 2010, to terminate the relationship. Respondent had sent a January 10, 2010 letter to Calvert LaFollette and Carolyn LaFollette about representing both parties and keeping each client's information separate and confidential. The evidence showed that Calvert LaFollette signed the January 10, 2010 letter on or about January 14, 2010, which allowed Respondent to continue to represent Calvert LaFollette and Carolyn LaFollette. It is clear that Calvert LaFollette indicated after January 10, 2010, that Respondent was representing Calvert LaFollette. Respondent did not make any attempt to contact Calvert LaFollette about the January 14, 2010 signing to clear up the issue. This clearly demonstrates that Respondent continued to represent Calvert LaFollette. In the months after January, Respondent began a sexual relationship with Carolyn LaFollette in violation of Rule 8.4 (g). This was clearly before the termination of representation of client Carolyn LaFollette. It is unclear as to when Respondent stopped his representation of Carolyn LaFollette as he only forwarded the client files of Calvert LaFollette and his family to the new attorney in June of 2010. Carolyn LaFollette was specifically excluded from the client files that were provided to the new attorney.

During the separation of Calvert LaFollette and Carolyn LaFollette, Respondent provided legal advice to Carolyn LaFollette that harmed Calvert LaFollette. The evidence produced at the hearing showed that Respondent spoke to Carolyn LaFollette separately about marital property and alimony matters which was a direct conflict to his representation of Calvert LaFollette in violation of Rule 1.7(a). This advice, while it may have helped Carolyn LaFollette, was not in the best interest of Calvert LaFollette. The Hearing Panel also found another conflict under Rule 1.7(b) by Respondent when he had sexual relations with his client, Carolyn LaFollette, who was also the wife of his client, Calvert LaFollette. This created a conflict between Respondent's interests and the interests of his own clients.

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). Respondent violated Rules 1.7(a), 1.7(b), 8.1(a), 8.4(c), and 8.4(g) by having sexual relations with his client, by having sexual relations with his client's wife, by providing legal advice to one client that harmed the other client, and by providing false information on the date of the termination of the representation. In order to effectuate the goals of the disciplinary process, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board recommended that Respondent's law license be suspended for ninety (90) days; that Respondent not be required to petition for reinstatement; that upon reinstatement, Respondent undergo supervised practice for one (1) year; that Respondent undergo an independent

psychiatric evaluation to determine his fitness to practice law and to comply with any treatment protocol; and that Respondent pay the costs of the disciplinary proceeding.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Office of Disciplinary Counsel does not object to oral argument in this matter. The issues raised by Respondent and the findings made by the Hearing Panel Subcommittee do not address any new issues of law that would require Disciplinary Counsel to request oral argument pursuant to Rule 20 of the Rules of Appellate Procedure.

IV. ARGUMENT

A. STANDARD OF PROOF

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 clearly exceeds the standard of clear and convincing.

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. 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).

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 evidence in this case met and exceeded the clear and convincing standard as required by the Rules of Lawyer Disciplinary Procedure. The findings of fact are well documented in the record and the conclusions of law are supported by the evidence that was presented at the disciplinary hearing in this matter.

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 extensive record in this matter indicates that Respondent has transgressed all four factors set forth in Jordan.

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).

1. 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 to their clients. 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 evidence in this case establishes by clear and convincing proof that Respondent violated his duties owed to his client, the public, the legal system, and the legal profession.

Respondent testified that he represented Calvert LaFollette and Carolyn LaFollette from September 12, 2009, until January 10, 2010. Respondent asserted that Calvert LaFollette approached him on January 10, 2010, wherein Calvert LaFollette indicated that he no longer wanted Respondent to handle his case. Respondent stated that Calvert LaFollette made no indication that he wanted Respondent to continue representing him after that date. Hrg. Trans. p. 239. Respondent sent a letter dated January 10, 2010 to the LaFollettes to seek permission to continue representation of both Calvert LaFollette and Carolyn LaFollette even though they were separated. Respondent seems to

forgot that Calvert LaFollette and Carolyn LaFollette both signed the January 10, 2010 letter on January 14, 2010 which shows their agreement for Respondent to continue to represent them. ODC Ex. 1, p. 6-7. This is obviously an indication from Calvert LaFollette, along with Carolyn LaFollette, that they wanted Respondent to continue in his representation of them. Upon receipt of the LaFollette's signatures dated January 14, 2010, Respondent indicated on the letter that it was for "Calvert LaFollette billing" and placed it into the LaFollettes' billing file. Hrg. Trans. p. 246. Respondent made no attempt to contact Calvert LaFollette after this to discuss the contradiction. There was no disengagement letter sent by Respondent to either of the LaFollettes.. Hrg. Trans. p. 250. Respondent also did not provide the client files to the LaFollettes after January 10, 2010. Respondent only forwarded the client files, which did not include Carolyn LaFollette, to a new attorney in early June of 2010, almost six (6) months after he alleged that he was terminated.

Carolyn LaFollette testified that her signing on January 14, 2010, meant that Respondent "was going to continue to represent Calvert. I really didn't think of – the fact that he was going to represent me unless I needed him for something later." Hrg. Trans. p. 20. Carolyn LaFollette also testified that she had sexual relations with Respondent prior to her signing the May 13, 2010 "Postnuptial Agreement." Hrg. Trans. p. 28-29, ODC Ex. 25, p. 225-242. That is certainly before early June of 2010 when Craig Kay, Esquire, sought LaFollette's client files from Respondent. Carolyn LaFollette testified that she was concerned about starting a sexual relationship with Respondent "[b]ecause at the time technically he was our attorney. . ." Hrg. Trans. p. 30. Respondent's own testimony was that he had sexual relations with Carolyn LaFollette starting March or April of 2010 until May of 2010. Hrg. Trans. p. 253-254. It is clear from the evidence that Respondent was the attorney for Carolyn LaFollette and Calvert LaFollette during that time. Respondent may deny that he began his sexual relationship with Carolyn LaFollette after his representation was terminated but the same is not supported by the evidence.

Carolyn LaFollette acknowledged that she and Calvert LaFollette were unable to come to an agreement about who would be guardian of their children if something should happen to them and that this prevented Respondent from continuing the estate planning process. Hrg. Trans. p. 36-37. However, she also stated that Respondent indicated that they could work on that later. Hrg. Trans. p. 36-37. Attorneys do not stop representing clients because the clients did not agree on a specific issue. In this case, it was understood that the clients would continue to work on the issue and get back to Respondent. Further, Carolyn LaFollette indicated that when she discussed the value of the cabin, Respondent “agreed it was worth more.” Hrg. Trans. p. 21. Carolyn LaFollette then obtained another appraisal which found a higher value for the property. Hrg. Trans. p. 22. Carolyn LaFollette and Calvert LaFollette were still clients of Respondent and Respondent was giving this separate advice to Carolyn LaFollette which ultimately harmed his other client, Calvert LaFollette.

Calvert LaFollette testified that Respondent knew he and Carolyn LaFollette were going through a divorce but Respondent “suggested that he could represent both of us.” Hrg. Trans. p. 96. Calvert LaFollette believed Respondent to still be his attorney on January 14, 2010, even though Respondent “probably wasn’t going to do that much work since [Calvert LaFollette] told [Respondent] [Calvert LaFollette] was going to try to find another one.” Hrg. Trans. p. 101. Calvert LaFollette stated that Respondent’s “representation was a group representation” of the whole family. Hrg. Trans. p. 106. Respondent had access to financial information about Calvert LaFollette through his “group” representation. Hrg. Trans. p. 107. Calvert LaFollette never received any correspondence from Respondent after signing the January 10, 2010 letter on January 14, 2010. Hrg. Trans. p. 122-123. Respondent was still the attorney for Calvert LaFollette and Carolyn LaFollette based upon their January 14, 2010 signatures and his placement of the letter into the client file.

2. Respondent acted intentionally and knowingly.

There is no evidence to suggest that Respondent did not act intentionally or knowingly. Respondent intentionally contacted Carolyn LaFollette for personal conversations that lead to the sexual relationship. Respondent even bought a cell phone for Carolyn LaFollette so they could have private conversations with each other. Hrg. Trans. p. 250. These conversations all occurred while Respondent was representing both Calvert LaFollette and Carolyn LaFollette. Furthermore, Respondent acted in an intentional manner when he attempted to cover up his improper relationship with Carolyn LaFollette by stating that the attorney client relationship between him and the LaFollettes ended on January 10, 2010. It is clear that both Calvert LaFollette and Carolyn LaFollette considered Respondent to be their attorney by their signature dated January 14, 2010. Respondent's attempt to maintain that his representation ended on January 10, 2010, is not supported by credible evidence and by his actions of placing the letter with the January 14, 2010 signatures into their client file.

3. The amount of real injury is great.

Respondent should have been aware that initiating sexual relations with his client, Carolyn LaFollette, who was also his client Calvert LaFollette's wife, created a conflict of interest. Further, Respondent did not recognize the consequence of his actions when he had the sexual relations with his client Carolyn LaFollette, who was also the wife of his client, Calvert LaFollette. Respondent's objectivity in the case was clearly flawed. This type of misconduct clearly reflects adversely upon the reputation of the Bar and lawyers in general. Calvert LaFollette testified that he did not think this was something his attorney could do. Hrg. Trans. p. 116-117. In fact, Calvert LaFollette stated that this affected his perception of attorneys because he does not have a lot of trust for them now. Hrg. Trans. p. 120-121. Calvert LaFollette was also harmed by the higher value that Carolyn LaFollette received on the cabin.

4. There are several aggravating and mitigating factors present.

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) quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.21 (1992). In this matter, the aggravating factors are Respondent’s refusal to acknowledge the wrongful nature of his misconduct, his false statements during this proceeding, and his substantial experience in the practice of law.

The Scott Court also adopted mitigating factors in a lawyer disciplinary proceeding and 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). The following mitigating factors are present: absence of a prior disciplinary record and reputation. Respondent has been licensed to practice law in West Virginia since October 3, 1994, and has no prior discipline from either the Investigative Panel of the Lawyer Disciplinary Board or the West Virginia Supreme Court of Appeals.

C. 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).

Pursuant to Rule 4.32 of ABA Model Standards for Imposing Lawyer Sanctions, “[s]uspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.” It is clear from the evidence that Respondent knew of the conflict of interest in representing both Calvert LaFollette and Carolyn LaFollette and in having a sexual relationship with a client who was also a client's spouse. However, Respondent never disclosed to either Calvert LaFollette or Carolyn LaFollette the nature of the conflict.

Respondent intentionally had sexual relations with his client who was also a client's wife. Respondent's attempt to state that he was no longer the attorney for both Calvert LaFollette and Carolyn LaFollette is not supported by the evidence. The evidence produced during the hearing include the January 14, 2010 signatures on the January 10, 2010 letter which is after Respondent's alleged termination date. A new attorney was not hired to handle the estate of the LaFollettes, which did not include Carolyn LaFollette, until May of 2010. This was well after Respondent started the sexual relationship with Carolyn LaFollette.

This Court has previously decided Lawyer Disciplinary Board v. Artimez, 208 W.Va. 288, 540 S.E.2d 156 (2000), which is a case wherein an attorney had sex with a client's wife. That case

involved an attorney starting a sexual relationship with a client's wife after the client had separated from his wife. This Court did not find a violation of Rule 1.7 in the Artimez case because the client and wife had separated when the attorney began the sexual relationship with the client's wife. While Respondent started a relationship with Carolyn LaFollette after she separated from Calvert LaFollette, Carolyn LaFollette was still a client to Respondent and Respondent was still representing Calvert LaFollette in estate matters. Carolyn LaFollette sought counsel from Respondent about her ongoing separation. Respondent indicated that some of the marital property appeared to be appraised at a lower rate and he told Carolyn LaFollette to get a different appraisal. The different appraisal had a higher appraisal value which resulted in Respondent's other client, Calvert LaFollette, having to pay more for the marital property. Respondent was in a position to help one client to the detriment of his other client. That obviously is a conflict and that is why the Hearing Panel found the violations of Rule 1.7. Calvert LaFollette was also upset when he discovered the sexual relationship between Respondent and Carolyn LaFollette because he considered Respondent to be his attorney. Respondent was suppose to be working in the best interest of Calvert LaFollette, but instead was using the separation to encourage the sexual relationship with Carolyn LaFollette which was detrimental to Calvert LaFollette. In Artimez, there was no attorney client relationship between the attorney and the client's wife. In this case, Respondent was representing Carolyn LaFollette as well as Calvert LaFollette as evidenced by the January 14, 2010 signing of the January 10, 2010 letter. A new attorney, Craig Kay, Esquire, was not hired until June of 2010. Mr. Kay never represented Carolyn LaFollette.

“As soon as the client has expressed a desire to employ an attorney, and there has been a corresponding consent on the part of the attorney to act for him in a professional capacity, the relation of attorney and client has been established; and all dealing thereafter between them relating to the subject of the employment will be governed by the rules applicable to such relation.” Syllabus

Point 1, Keenan v. Scott, 64 W.Va. 137, 61 S.E. 806 (1908). Respondent began his representation of Calvert LaFollette and Carolyn LaFollette around September 12, 2009, to work on estate matters. Part of the estate matter included wills which would indicate who would be the guardian of their children if something were to happen to the both of them. The LaFollettes could not come to an agreement about the guardian for their children, and Respondent did not meet with the LaFollettes after that. However, Respondent's representation of the LaFollettes did not end when they could not agree on the guardian. In fact, when Respondent discovered that the LaFollettes were separating and divorcing, Respondent sent a January 10, 2010 letter to them to obtain a waiver to represent both of them. This letter was sent after the LaFollettes could not agree on the guardian. Respondent did not believe his representation ended after that issue because he sent the January 10, 2010 letter to deal with any possible conflict. Respondent wanted to continue to represent the LaFollettes and the LaFollettes agreed to allow Respondent to represent them by signing the letter on January 14, 2010. Respondent's assertion that Calvert LaFollette fired him on January 10, 2010 is not supported by the evidence. The January 14, 2010 signatures is a direct contradiction and Respondent did not contact the LaFollettes after receiving the letter back with the signatures. Respondent placed the letter in the file for any billing issues, which shows that Respondent was still considered himself to be representing the LaFollettes. It is likely that Respondent was awaiting the resolution of the LaFollette's marriage to determine how to proceed with estate planning. Such was the point of the January 10, 2010 letter from Respondent to them. It was not until early June of 2010 that Respondent was contacted by another attorney for the client files and an actual severance of the attorney client relationship began.

This Court indefinitely suspended an attorney for having sexual conversations with a client's wife while the client was incarcerated. *See Lawyer Disciplinary Board v. Perry*, No. 10-4006 (11/22/11) (Unreported). The conflict in representing a client while having the sexual conversations

with the client's wife was found to be a violation of Rule 1.7(b). Attorneys have been suspended attorneys for having sexual relations with their clients and for having sex with a client's spouse in other jurisdictions. See In re Witherspoon, 203 N.J. 343, 3 A.3d 496 (N.J. 2010) (an attorney suspended for one (1) year for offering discounted legal fees to clients in exchange for sexual favors of various kinds); In re Disciplinary Proceedings Against Inglimo, 305 Wis.2d 71, 740 N.W.2d 125 (Wis. 2007) (an attorney suspended for three (3) years for having sex with client's spouse while client participated in the sexual encounter and using drugs with client); Application for Disciplinary Action against Chinquist, 714 N.W.2d 469 (North Dakota 2006) (an attorney was suspended for thirty (30) days for a conflict in having a sexual relationship with a client in a child support and visitation matter along with other violations involving failure to safekeep client money, charging unreasonable fees, and failing to advise a client to seek independent counsel when accepting payment from an individual other than client); and Disciplinary Proceedings Against Inglimo, 305 Wis.2d 71, 740 N.W.2d 125 (Wis. 2007) (an attorney suspended for eighteen (18) months for conflict in having sexual relations with client's wife along with violations involving the use of marijuana with clients and delivery marijuana to clients).

Respondent held a special position in handling the estate matters for the LaFollettes which gave Respondent power in the situation. Respondent became aware of the separation of Calvert LaFollette and Carolyn LaFollette, and wanted to continue the representation by asking them to sign a waiver to allow him to continue to represent both of them. Within months, Respondent began a sexual relation with his client Carolyn LaFollette, who was also married to Respondent's other client Calvert LaFollette. This is not where Respondent's misconduct ended. Respondent asserted that he stopped representing the LaFollettes on January 10, 2010, when that assertion was not true, in violation of Rule 8.1(a) and 8.4(c). Further, Respondent provided advice to Carolyn LaFollette about the separation and divorce which resulted in harm to Respondent's client Calvert LaFollette.

Respondent's attorney position for both Carolyn LaFollette and Calvert LaFollette was in conflict. Calvert LaFollette had his immediate family, including himself, being represented by Respondent to handle all of their estate planning which allowed Respondent to be aware of very personal information. Instead of properly handling the estate matters and focusing the issues that might arise there, Respondent spent his time initiating a sexual relationship with client Carolyn LaFollette. Respondent then provided advice to Carolyn LaFollette that had a negative affect on the position of his client Calvert LaFollette in the divorce proceeding.

For the public to have confidence in our disciplinary and legal systems, lawyers who engage in the type of misconduct exhibited by Respondent must be removed from the practice of law for some period of time. A license to practice law is a revokable 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 lawyers and the legal profession.

V. CONCLUSION

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. It is the position of Disciplinary Counsel that for his conduct of having sexual relations with his client Ms. LaFollette who was also his client Mr. LaFollette's wife demand that Respondent's license should be suspended for ninety (90) days.

Sanctions are not imposed only to punish the attorney, but also are designed to reassure the public's confidence in the integrity of the legal profession and to deter other lawyers from similar conduct. Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993); Committee

on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000)W.Va. 645, 542 S.E.2d 466 (2000).

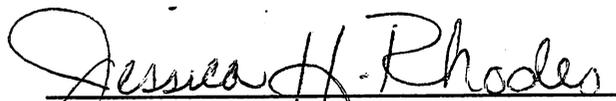
A principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999).

For the reasons set forth above, the Hearing Panel Subcommittee recommended the following sanctions:

1. That Respondent's law license be suspended for ninety (90) days;
2. That Respondent not be required to petition for reinstatement pursuant to Rule 3.31 of the Rules of Lawyer Disciplinary Procedure;
3. That, upon reinstatement, Respondent's practice be supervised for a period of one (1) year by an attorney agreed upon between the Office of Disciplinary Counsel and Respondent;
5. That during Respondent's period of suspension, that Respondent shall be required to undergo an independent psychiatric evaluation to determine whether he is fit to engage in the practice of law and is further required to comply with any stated treatment protocol; and
6. That Respondent be ordered to reimburse the Lawyer Disciplinary Board the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Accordingly, the Office of Disciplinary Counsel urges that this Honorable Court uphold the sanctions recommended by the Hearing Panel Subcommittee.

Respectfully submitted,
The Office of Disciplinary Counsel
By counsel



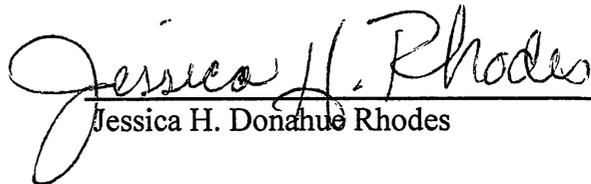
Jessica H. Donahue Rhodes [Bar No. 9453]

Lawyer Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304
(304) 558-7999
(304) 558-4015 *facsimile*

CERTIFICATE OF SERVICE

This is to certify that I, Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 2nd day of July, 2014, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" upon Benjamin L. Bailey, Esquire, and Michael B. Hissam, Esquire, counsel for Respondent John F. Hussell, IV, by mailing the same via United States Mail, both certified and regular, with sufficient postage, to the following address:

Benjamin L. Bailey, Esquire
Michael B. Hissam, Esquire
209 Capitol Street
Charleston, West Virginia 25301



Jessica H. Donahue Rhodes

DEC - 1 2011

OFFICE OF
DISCIPLINARY COUNSEL

STATE OF WEST VIRGINIA

At a regular term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on November 22, 2011, the following order was made and entered:

Lawyer Disciplinary Board, Petitioner

vs.) No. 10-4006

David D. Perry, a member of The West Virginia
State Bar, Respondent

On a former day, to-wit, September 23, 2011, came the Hearing Panel Subcommittee of the Lawyer Disciplinary Board, by Debra A. Kolgore, its chairperson, pursuant to Rule 3.10 of the Rules of Lawyer Disciplinary Procedure, and presented to the Court its written recommended disposition in this matter, recommending that: (1) respondent's law license be suspended indefinitely; (2) respondent be required to petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure; (3) respondent not be permitted to seek reinstatement to the practice of law for a period of three years; (4) upon reinstatement, respondent's practice be supervised for a period of two years by an attorney agreed upon between the Office of Disciplinary Counsel and respondent; (5) prior to petitioning for reinstatement, respondent be required to undergo an independent psychiatric evaluation to determine whether he is fit to engage in the practice of law and be required to comply with any stated treatment protocol; and (6) respondent be ordered to reimburse the Lawyer Disciplinary Board the costs of these proceedings.

Upon consideration whereof, the Court does concur with the recommendation and hereby approves the recommendation of the Hearing Panel Subcommittee. Justice Ketchum would accept respondent's petition for voluntary resignation in Supreme Court Docket No. 35534, instead of imposing the recommended disposition approved herein:

It is therefore ordered that: 1) the respondent be, and he hereby is, suspended from the practice of law in the State of West Virginia, indefinitely; (2) respondent shall be required to petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure; (3) respondent shall not be permitted to file a petition for reinstatement to the practice of law for at least three years after the date of this order suspending his license to practice law; (4) prior to petitioning for reinstatement, respondent must undergo an independent psychiatric evaluation to determine whether he is fit to engage in the practice of law, and must comply with any treatment protocol stated by the evaluator; (5) upon any such reinstatement of respondent's law license, respondent's practice of law shall be supervised for a two-year period by a supervising attorney agreed upon by both the Office of Disciplinary Counsel and respondent; and (6) respondent shall pay the costs incurred in this disciplinary proceeding.

Service of a copy of this order upon all parties herein shall constitute sufficient notice of the contents herein.

A True Copy

Attest: /s/ Rory L. Perry II, Clerk of Court

