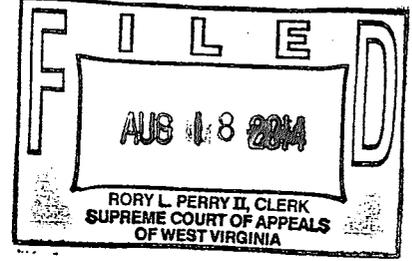


ARGUMENT  
DOCKET

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



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 13-0544

JOHN F. HUSSELL, IV,

Respondent.

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REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD

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## I. REPLY TO RESPONDENT'S BRIEF

This matter is before the Court pursuant to the "Report of the Hearing Panel Subcommittee" issued on April 17, 2014, wherein the Hearing Panel Subcommittee properly found that the evidence established that Respondent committed violations of Rules 1.7(a), 1.7(b), 8.1(a), 8.4(c) and 8.4(g) of the Rules of Professional Conduct. At this stage in the proceedings, this Court has held that "[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." Lawyer Disciplinary Board v. Cunningham, 195 W.Va. 27, 34, 464 S.E.2d 181, 189 (1995); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 290, 452 S.E.2d 377, 381 (1994).

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Committee on Legal Ethics v. Keenan, 189 W.Va. 37, 40, 427 S.E.2d 471, 473 (1993) (*per curiam*); quoting Syl. Pt. 3, in part, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984). It cannot be said that Respondent's conduct in this case conforms to the expectations of the profession as stated in the Rules of Professional Conduct. The evidence clearly establishes that Respondent acted in a manner which was intentional and knowing and deviated from the standard of care that a reasonable lawyer, let alone one with Respondent's considerable experience, would exercise in that situation.

**A. TERMINATION OF ATTORNEY CLIENT RELATIONSHIP WAS NEGATED BY THE CLIENTS' SIGNATURES ON JANUARY 14, 2010.**

A contract was signed by Calvert LaFollette and Carolyn LaFollette for Respondent to continue in his representation of them. ODC Ex. 1, bates stamp 1-6. Respondent was aware that he had a conversation with Calvert LaFollette on January 10, 2010, to terminate the attorney client relationship. Calvert LaFollette testified that he even spoke with Respondent about hiring a new

attorney to handle the estate planning. Hrg. Trans. p. 101. Respondent had sent a January 6, 2010 letter to Calvert LaFollette and Carolyn LaFollette about continuing to represent them separately. Further, Respondent received a letter signed by Calvert LaFollette and Carolyn LaFollette on January 14, 2010, which indicated that they agreed for Respondent to continue to represent them. The contradiction between the conversation on January 10, 2010, and the signature of January 14, 2010, must be found in favor of the clients. In any event, Respondent made no move to correct any confusion once he received the letter with the signatures.

Carolyn LaFollette testified during the hearing that she believed in signing on January 14, 2010, that Respondent was going to continue to represent Calvert LaFollette and that he would represent her in the future if she needed Respondent. Hrg. Trans. p. 20. Calvert LaFollette testified that he had informed Respondent about the problems he was having with Carolyn LaFollette and Respondent indicated that he could still represent them. Hrg. Trans. p. 96. Calvert LaFollette also stated that he signed on January 14, 2010, because he was unsure as to whether Respondent would continue to do work prior to Calvert LaFollette finding new counsel. Hrg. Trans. p. 100-101. Calvert LaFollette admitted to having a discussion with Respondent prior to signing on January 14, 2010, about finding another attorney. Hrg. Trans. p. 100.

Further, Respondent testified that he wrote on the January 6, 2010 letter when he received it to place the letter in the billing file. Hrg. Trans. p. 245-246. The January 6, 2010 letter signed by Calvert LaFollette and Carolyn LaFollette stated that they “consent[ed] to having [Respondent] represent each of us separately.” There was no request for Respondent to transfer their client file to another attorney until June of 2010.

Respondent asserts in his brief that the attorney client relationship between Respondent and James Calvert LaFollette and Carolyn LaFollette was terminated on January 10, 2010. This assertion is based upon the conversation that James Calvert LaFollette had with Respondent on January 10, 2010. However, Respondent seems to ignore the fact that both James Calvert LaFollette and Carolyn LaFollette signed a January 6, 2010 letter on January 14, 2010, which clearly indicated from the language contained therein that they were agreeing to have Respondent to continue to represent them. If the Respondent was terminated on January 10, 2010, then what does the signature on January 14, 2010 mean. As pointed out in Disciplinary Counsel's brief, this Court has found that "[a]s soon as a 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 dealings 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).

The attorney-client relationship was addressed in the recent disciplinary case Lawyer Disciplinary Bd. v. Nace, 232 W.Va. 661, 753 S.E.2d 618 (2013). In Nace, the attorney argued that there was not an attorney client relationship. However, this Court found that the two necessary actions required by Keenan were evident in Nace. Specifically, the client demonstrated that he wanted to employ the attorney by sending a letter along with an affidavit for the attorney to sign and return. Id. The attorney did sign the affidavit and returned it to the client. Id. In this case, Calvert LaFollette and Carolyn LaFollette signed a letter on January 14, 2010, indicating that they wanted Respondent to continue to represent them. Respondent not only sent a letter to continue to represent

the clients separately but he also placed the letter into the client file when he received it. It is clear that there was an attorney client relationship between the LaFollettes and Respondent.

This Court has also discussed the attorney client relationship in State ex rel. Bluestone Coal Corp. v. Mazzone, 226 W.Va. 148, 697 S.E.2d 740 (2010).

“Whether an attorney-client relationship has been established is a matter of contract, and such contract may be evidenced either by written agreement or by implication. See State ex rel. DeFrances v. Bedell, 191 W.Va. 513, 517, 446 S.E.2d 906, 910 (1994) (per curiam) (“The relationship of attorney and client is a matter of contract, expressed or implied.”). Where the attorney-client relationship has arisen by implication, we explicitly have ‘recognized that the attorney-client relationship can exist without an agreement for compensation[, and] an attorney-client relationship may be implied from the conduct of the parties.’” Committee on Legal Ethics of the West Virginia Bar v. Simmons, 184 W.Va. 183, 186, 399 S.E.2d 894, 897 (1990) (per curiam) (citations omitted).”

State ex rel. Bluestone Coal Corp. v. Mazzone, 226 W.Va. 148, 159-160, 697 S.E.2d 740, 751-752 (2010). As in this case, it is clear that there was implication through an agreement of the clients by their signature, Calvert LaFollette and Carolyn LaFollette, for Respondent to continue to represent them on January 14, 2010.

The Simmons case was a disciplinary case about an attorney who was involved in business transactions with a client. Committee on Legal Ethics of the West Virginia Bar v. Simmons, 184 W.Va. 183, 186, 399 S.E.2d 894, 897 (1990). The attorney in that case attempted to argue that the couple he had borrowed money from were not his clients. Id. That case noted that the clients had employed the attorney and both believed that they had an ongoing attorney-client relationship. Id. Most importantly, this Court noted that “there is nothing in the record which indicates that [the attorney] ever advised either of them that their attorney-client relationship no longer existed or that he was not acting in his capacity as their attorney.” Id. While the case does not require a written termination letter, it does require that the attorney make efforts to advise the clients that there is no

longer an attorney-client relationship. After the receipt of the letter with the January 14, 2010 signature of Calvert LaFollette and Carolyn LaFollette, Respondent was required to inquire about the status of the attorney client relationship or to advise about the termination of the attorney client relationship. Respondent did nothing except to take the letter signed by the clients on January 14, 2010, and place it into the client file. Respondent made no inquiry into the status of the relationship.

It is a delicate situation when an attorney begins a sexual relationship with a client when there has not been a sexual relationship prior to the forming of the attorney client relationship. Under the applicable Rules of Professional Conduct, there has to be a clear termination of the attorney client relationship for an attorney to begin any sexual relationship with a client. The problem in this case is that there was not a clear termination of the attorney client relationship. This happened in part because Respondent failed to address the receipt of the signed letter by the clients consenting to Respondent's continued representation.

## **II. 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).

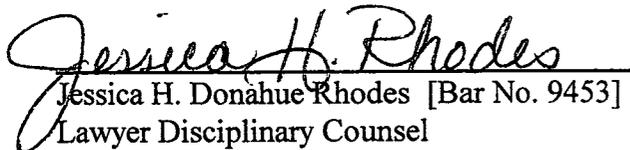
For the reasons set forth above, the Hearing Panel Subcommittee recommended the following sanctions:

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;
4. 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

5. 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 and consented to by Respondent.

*Respectfully submitted,*  
The Office of Disciplinary Counsel  
By counsel

  
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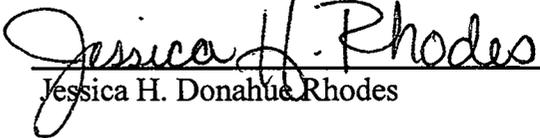
**CERTIFICATE OF SERVICE**

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This is to certify that I, Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 18<sup>th</sup> day of August, 2014, served a true copy of the foregoing "**Reply 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