

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

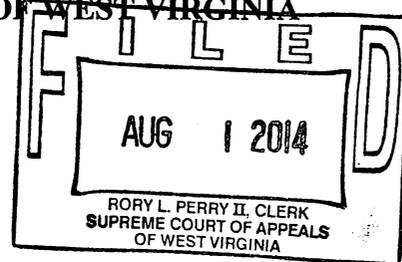
LAWYER DISCIPLINARY BOARD,

Complainant,

v.

JOHN F. HUSSELL, IV,

Respondent.



No. 13-0544

BRIEF OF RESPONDENT JOHN F. HUSSELL, IV

Benjamin L. Bailey (WVSB #200)
Michael B. Hissam (WVSB #11526)
Bailey & Glasser LLP
209 Capitol Street
Charleston, WV 25301
(304) 345-6555
(304) 342-1110 facsimile
bbailey@baileyglasser.com
mhissam@baileyglasser.com

Counsel for Respondent

TABLE OF CONTENTS

I. STATEMENT OF THE CASE	1
A. Nature of Proceedings and Recommendation of the Hearing Panel Subcommittee.....	1
B. Evidence Presented to the Panel and the Panel’s Findings of Fact.....	3
i. <i>Genesis of this Proceeding</i>	3
ii. <i>Respondent’s Limited Representation of Calvert and Carolyn LaFollette</i>	3
iii. <i>Calvert LaFollette Verbally Terminates the Attorney-Client Relationship</i>	5
iv. <i>Respondent’s Post-Termination Relationship with Carolyn LaFollette</i>	8
v. <i>Respondent’s Circumstances Since June 2010</i>	11
C. The Hearing Panel’s Conclusions of Law	11
II. SUMMARY OF ARGUMENT	13
III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	15
IV. ARGUMENT	15
A. Standard of Proof	15
B. The Proposed Sanctions are Appropriate under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure.....	16
1. <i>Whether lawyer violated a duty owed to a client, to the public, to the legal system, or to the profession</i>	18
2. <i>Whether the lawyer acted intentionally, knowingly, or negligently</i>	19
3. <i>Amount of actual or potential injury caused by the lawyer’s misconduct</i>	19
4. <i>Existence of any aggravating or mitigating factors</i>	20
C. The Recommended Sanctions.....	23
V. CONCLUSION	24
CERTIFICATE OF SERVICE	25

TABLE OF AUTHORITIES

Rules

Rule of Lawyer Disciplinary Procedure 3.15	2
Rule of Lawyer Disciplinary Procedure 3.16	19
Rule of Lawyer Disciplinary Procedure 3.31	2
Rule of Lawyer Disciplinary Procedure 3.7	16
Rule of Professional Conduct 1.16	17
Rule of Professional Conduct 1.7	15
Rule of Professional Conduct 1.7(a).....	2, 13, 18
Rule of Professional Conduct 1.7(b).....	2, 13, 18
Rule of Professional Conduct 8.1(a).....	2, 12, 14, 18
Rule of Professional Conduct 8.4(c).....	2, 12, 14, 18
Rule of Professional Conduct 8.4(g).....	2, 12, 15, 18

Cases

<i>Application for Disciplinary Action against Chinquist</i> , 714 N.W.2d 469 (N.D. 2006)	25
<i>Committee on Legal Ethics v. Blair</i> , 174 W.Va. 494, 327 S.E.2d 671 (1984)	16
<i>Committee on Legal Ethics v. McCorkle</i> , 192 W. Va. 286, 452 S.E.2d 377 (1994).....	16
<i>In re Disciplinary Proceedings against Inglimo</i> , 305 Wis.2d 71, 740 N.W.2d 125 (Wis. 2007)	25
<i>In re James</i> , 223 W. Va. 870, 679 S.E.2d 702 (2009)	21
<i>In re Witherspoon</i> , 203 N.J. 343, 3 A.3d 496 (N.J. 2010).....	25
<i>Lawyer Disciplinary Bd. v. Battistelli</i> , 206 W. Va. 197, 205, 523 S.E.2d 257, 265 (1999).....	17
<i>Lawyer Disciplinary Bd. v. Stanton</i> , No. 13-0138, 2014 W. Va. LEXIS 857 (W. Va. June 5, 2014).....	20
<i>Lawyer Disciplinary Bd. v. Chittum</i> , 225 W.Va. 83, 91-92, 689 S.E.2d 811, 819-20 (2010)	21, 26
<i>Lawyer Disciplinary Bd. v. McGraw</i> , 194 W. Va. 788, 461 S.E.2d 850 (1995)	16
<i>Lawyer Disciplinary Bd. v. Santa Barbara</i> , 231 W. Va. 740, 747, 749 S.E.2d 633, 640 (2013)	22, 26
<i>Lawyer Disciplinary Bd. v. Scott</i> , 213 W. Va. 209, 579 S.E.2d 550 (2003).....	23, 24
<i>Lawyer Disciplinary Bd. v. Sullivan</i> , 230 W. Va. 460, 740 S.E.2d 55 (2013)	26
<i>Office of Lawyer Disciplinary Counsel v. Jordan</i> , 204 W. Va. 495, 513 S.E.2d 722 (1998).....	19
<i>State ex rel. DeFrances v. Bedell</i> , 191 W. Va. 513, 517, 446 S.E.2d 906, 910 (1994).....	17

Other Authorities

41 A.L.R. 6th 1, <i>Legal Malpractice in Connection with Attorney’s Withdrawal as Counsel</i> (2014)	18
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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”), which commenced with an Ethics Complaint filed on June 27, 2011 by James Calvert LaFollette (hereinafter “Calvert LaFollette”) against Respondent. Consistent with his testimony throughout this case, Respondent stated in his Verified Response to that Complaint, filed on or about August 1, 2011, that: (1) He was retained by the LaFollete family — four separate couples — in September of 2009 for estate-planning work; (2) he performed only 2.5 hours of work in total for Calvert LaFollette and his wife, Carolyn LaFollette; (3) neither of the LaFollettes ever provided any of their financial or confidential information to Respondent; (4) the attorney-client relationship ended on January 10, 2010 when Calvert LaFollette in person, verbally terminated the relationship; (4) Respondent never performed any legal work for either Calvert or Carolyn LaFollette after January 10, 2010; and (5) Respondent engaged in a regrettable and morally inappropriate relationship with Carolyn LaFollette that commenced months after the attorney-client relationship ended. [ODC Ex. 4.] On January 9, 2013, Respondent provided a Sworn Statement before the Investigative Panel of the Lawyer Disciplinary Board, without counsel present, in which he testified to the same facts. [Sworn Statement, Bates No. 153, 171, 186.]

The present proceeding arises as the result of a Statement of Charges issued against Respondent and filed with the Supreme Court of Appeals on or about May 24, 2013. Respondent was served with the Statement of Charges on May 29, 2013, and the parties subsequently exchanged their mandatory discovery. Thereafter, on October 29, 2013, this matter proceeded to hearing in Charleston, West Virginia. The Hearing Panel Subcommittee (hereinafter the “Panel”) 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 Panel heard testimony from Carolyn LaFollette, 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 Panel 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 "Panel Report"). The Panel found that Respondent had 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 Panel issued the following recommendations 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;
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.

On May 12, 2014, the Office of Disciplinary Counsel consented to the Panel's recommended sanctions. Respondent, while not in agreement with all the Panel's conclusions, consented to its recommended sanctions on May 14, 2014. This Court scheduled the matter for

oral argument on September 3, 2014. On July 2, 2014, the Office of Disciplinary Counsel filed its Brief, in which it urged this Court to uphold the recommended sanctions. [Petitioner's Br. at p. 21.] Respondent likewise requests that the recommended sanctions be imposed, but writes separately to bring significant errors in the Panel's findings of fact and conclusions of law to the Court's attention.

B. Evidence Presented to the Panel and the Panel's Findings of Fact

i. Genesis of this Proceeding

Respondent is a lawyer practicing in Charleston, Kanawha County, West Virginia, who was admitted to the West Virginia State Bar on October 3, 1994. 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. Prior to this action, Respondent has never before been found to have violated any of the Rules of Professional Conduct. [Sworn Statement, Bates No. 143.] On June 27, 2011, an ethics complaint was filed against Respondent by Calvert LaFollette arising from an intimate relationship between Respondent and Calvert LaFollette's wife, Carolyn LaFollette, that occurred after the LaFollettes' marital separation in January 2010.

ii. Respondent's Limited Representation of Calvert and Carolyn LaFollette

Respondent and the LaFollette family became acquainted in approximately 2008 after the Respondent and his family purchased property and built a cabin in Greenbrier County near property owned by Calvert and Carolyn LaFollette. [Hrg. Tr. at pp. 232-233.] Respondent and his wife and children were social acquaintances of Calvert and Carolyn LaFollette and their family. [*Id.* at pp. 301, 305.] Thereafter, on September 12, 2009, Respondent was engaged by multiple members of the LaFollette family to assist them with estate-planning services. On that date, Respondent was retained by the following couples: (1) Latelle M. LaFollette, III, and Alice

LaFollette, who are the parents of the Complainant; (2) Complainant and his wife, Carolyn LaFollette; (3) Rodger & Dede Arbogast, who are the brother-in-law and sister of the Complainant; and (4) Latelle M. LaFollette, IV, and Kirsten LaFollette, who are the brother and sister-in-law of the Complainant. Respondent entered into a separate written engagement letter for each couple. [Resp. Ex. 3.] Respondent further explained to each couple that he would keep their information separate and confidential from the other couples. [Hrg. Trans. at pp. 264-265.]

Thereafter, separate matter numbers, case files, and billing and time records were established within Respondent's law firm for each of the four couples. [*Id.* at p. 293.] Respondent agreed to charge a fixed fee of \$10,000 for all four matters, or \$2,500 per couple, which was to be paid by the LaFollette parents at the conclusion of the estate planning. [*Id.* at p. 290.] Respondent then attempted to meet with each of the four couples separately to go over their personal information and estate planning needs.

On November 3, 2009, Respondent met in his office in Charleston with Carolyn LaFollette and Calvert LaFollette (Calvert LaFollette participated by phone) to have them fill out a standard questionnaire for estate planning clients. [ODC Ex. 25, Bates No. 250-259.] The meeting quickly concluded, however, when the LaFollettes were unable to complete the questionnaire due to their disagreement over the guardianship of their children. [Hrg. Trans. at p. 36.] After that meeting, the LaFollettes never completed the questionnaire nor provided the requested information. [*Id.* at p. 37] As a result, Respondent received no information during the representation regarding their assets or financial situation. [*Id.* at p. 260.]

Consequently, Respondent did not perform any estate planning services for Calvert LaFollette or Carolyn LaFollette after the November 2009 meeting, nor did he ever have any communications with either of them regarding their estate planning after November 2009. [*Id.* at

p. 240.] From the fall of 2009 through January 7, 2010, Respondent logged a total of 2.5 hours in attorney time to Calvert LaFollette's estate-planning matter. [Resp. Ex. 2, Bates No. 1.] Moreover, because all of the LaFollette family estate-planning matters were later transferred to another lawyer, Respondent did not receive a fee for his work on any of the four different LaFollette matters, including that of Calvert LaFollette. [*Id.* at pp. 306-307]

iii. Calvert LaFollette Verbally Terminates the Attorney-Client Relationship.

The sequence of events in early 2010 is important, and repeatedly misstated by the Office of Disciplinary Counsel in their brief. [Petitioner's Br. at p. 11, 13.] Shortly after January 1, 2010, Carolyn LaFollette telephoned Respondent to tell him that she and Calvert LaFollette had decided to separate. In response, on January 6, 2010 (not, as the Office of Disciplinary Counsel states in its Brief, on January 10, 2010), Respondent mailed Calvert and Carolyn LaFollette a letter to their home in Roanoke, Virginia. [ODC Ex. 1, Bates No. 6.] The letter was a standard form letter, used by Respondent when married estate planning clients wish to keep their information separate. [Hrg. Trans. p. 262.] The letter explained that, if Calvert and Carolyn LaFollette gave their consent, Respondent could continue to represent them separately in their estate planning. [ODC Ex. 1, Bates No. 6.] On January 14, 2010, Mr. and Mrs. LaFollette both signed the letter and returned it to Respondent. [ODC, Ex. 1, Bates No. 6-7.] Respondent looked at the letter and placed it in the Calvert LaFollette billing file. [Hrg. Trans. at p. 246.]

On approximately January 10, 2010 — after Respondent sent the January 6th letter to Calvert and Carolyn LaFollette to their home in Roanoke, but before it was signed and returned — Respondent and Calvert LaFollette had a conversation in person outside of the swimming pool area of The Greenbrier. Mr. LaFollette asked to speak to Respondent privately.

[Hrg. Trans. at p. 100.] In the course of their conversation, Calvert LaFollette terminated Respondent's representation of both Calvert and Carolyn LaFollette. According to his testimony, and confirming Respondent's testimony, Mr. LaFollette explained that he was uncomfortable with Respondent continuing the estate planning representation. [*Id.* at p. 134.] Calvert LaFollette further informed Respondent that he had spoken with Ditsy Keightley, a banker at BB&T, about recommending a different estate planning attorney. [*Id.* at p. 134.] **Significantly, and contrary to the Office of Disciplinary Counsel's representation in its Brief, this conversation took place four days after Respondent sent the consent to representation letter to Calvert and Carolyn LaFollette.**

In addition, Calvert LaFollette testified that he did not have any further conversations or meetings with Respondent concerning his estate planning after their conversation at The Greenbrier in January 2010. [*Id.* at p. 176.] Mr. LaFollette further testified that he understood at that time that he could not actually engage in any estate planning until the resolution of his separation and pending divorce from his wife. [*Id.* at pp. 138-139.] As Calvert LaFollette testified, "I felt like I needed to get [the post-nuptial agreement] done first." [*Id.* at p. 139.] Then, shortly after Mr. LaFollette's divorce and post-nuptial agreement was finalized in May 2010, he engaged an estate planning lawyer in Roanoke, Virginia, to draft a will and set up a revocable trust. [*Id.* at pp. 112, 160-161.] The fact that Calvert LaFollette engaged another lawyer to handle his estate-planning matters, without any involvement or communication with the Respondent, further confirms that Respondent's representation was terminated by Mr. LaFollette in January 2010.

The Panel nevertheless found Respondent's factually accurate statement that the representation was terminated by Calvert LaFollette on January 10, 2010 to be "false," [Panel

Rpt. at ¶ 21], despite the fact that Calvert LaFollette's oral termination of the representation on January 10, 2010 is not in dispute and was corroborated by the testimony of the other witnesses, including Carolyn LaFollette, Calvert LaFollette's sister, and Respondent himself. Indeed, consistent with the testimony of Calvert LaFollette, Respondent testified that Mr. LaFollette told him during their conversation that he and his wife were getting a divorce and that Calvert LaFollette was "uncomfortable" with Respondent's continued representation of him. [*Id.* at pp. 244, 280.] Respondent further testified that Calvert LaFollette told him that he had spoken with Ditsy Keightley at BB&T and intended to go in a "different direction with his representation, and that he no longer wanted me to be their attorney." [*Id.* at p. 245.] Moreover, Respondent testified that Carolyn LaFollette called him shortly after the January 10th meeting and relayed her knowledge of the fact that Calvert LaFollette had "fired" the Respondent. [*Id.* at pp. 247-248.]

Carolyn LaFollette also recalled that her husband had a conversation with Respondent in January 2010, during which Calvert LaFollette told Respondent "that he wasn't comfortable with [Respondent] representing him because of the fact that [Respondent] and I were such good friends." [*Id.* at p. 69.] In addition, Calvert LaFollette's sister testified that she was present when Calvert LaFollette and Respondent stepped aside to speak privately in January 2010. [*Id.* at pp. 210-211.] She further testified that Calvert LaFollette told her that he had informed Respondent that he "just didn't really want to continue to have [Respondent] work with him" on his estate planning matters. [*Id.* at p. 211.]

Calvert LaFollette's oral termination of the representation in January 2010 is also corroborated by the documents contained in the files of Craig Kay, Esq., whom Calvert LaFollette and his other family members retained in May 2010 to handle the LaFollette family

estate-planning matters. Mr. Kay's handwritten notes from his initial meeting with Calvert LaFollette reflect that a confrontation took place in January or February at the Greenbrier. [ODC Ex. 25, Bates No. 221.] In addition, Respondent's letter to Mr. Kay, dated June 17, 2010, transmitting the files for the four different LaFollette estate planning matters refers to a conversation with Calvert LaFollette in January 2010 "concerning his desire to utilize separate counsel." [ODC Ex. 25, Bates No. 222.]

Respondent candidly testified at the Hearing that he wished he had sent a follow-up letter to Calvert LaFollette to confirm that the representation had indeed concluded when Mr. LaFollette verbally terminated in on January 10, 2010. He similarly acknowledged that, which he does not specifically recall it, the January 6 letter was received by his office on or about January 22, and was placed in his billing file for "administrative things that are not substantive." [Hrg. Trans. at pp. 246-9, 298.] However, it was clear to Respondent that the representation had definitively been terminated on January 10, both due to the substance of his conversation with Calvert LaFollette on that date and due to Carolyn LaFollette's subsequent corroboration of that understanding. [*Id.*] Respondent expressed the same regret about not sending a letter when providing his Sworn Statement. [Sworn Statement at Bates Nos. 172-3 ("I wish I had sent a disengagement letter. But let me make it clear today, there was no uncertainty with respect to what Mr. LaFollette told me that day. . . I really didn't follow up, because one it was absolutely clear to me that he was seeking a different path, and number two, it's embarrassing to send out an engagement letter saying you fired me.")] Moreover, it was not Respondent's practice to send termination letters to clients. [Hrg. Trans. at p.243.]

iv. Respondent's Post-Termination Relationship with Carolyn LaFollette

Thereafter, in approximately March 2010, Respondent and Carolyn LaFollette first began an intimate relationship that ended in approximately June 2010. [Hrg. Trans. at pp. 41, 43.] Respondent has since described the relationship as morally inappropriate, and he regrets having engaged in such behavior. [Sworn Statement, Bates No. 000017.] However, the testimony from all parties was unequivocal that the relationship did not commence until well after the termination of the representation in January 2010. [*Id.* at pp. 23, 41, 285.] Nevertheless, the Panel found, based on its conclusion that the representation had continued even after Calvert LaFollette verbally terminated it since Mr. and Mrs. LaFollette apparently signed and returned the consent to representation letter after that date, that Respondent had engaged in a sexual relationship with Carolyn LaFollette during the representation. [Panel Rpt. at ¶ 22.]

The Panel further found that the Respondent provided Carolyn LaFollette with “independent legal advice concerning marital property and alimony matters” while both Mr. and Mrs. LaFollette were his clients. [Panel Rpt. at ¶ 23.] Carolyn LaFollette testified, however, that Respondent “never advised me on anything. He would tell me that that was between my divorce attorney and myself because he was not a divorce attorney and he was not an attorney in Virginia.” [Hrg. Trans. at p. 22.] Carolyn LaFollette also expressly disavowed a portion of an earlier affidavit — which was attached to the ethics complaint filed against Respondent — stating that she and Respondent would “discuss the formula for alimony and he would give me feed back [*sic*].” [ODC Ex. 1, Bates No. 8; Hrg. Trans. at p. 45.] Carolyn LaFollette testified that the statement in her affidavit was not true, that she explained as much to the attorney who prepared the affidavit, and that she believed that the statement in the affidavit that Respondent provided her with “feedback” was “misleading.” [Hrg. Trans. at pp. 45-46.]

Carolyn LaFollette further testified that she and Calvert LaFollette were both represented by divorce lawyers in Roanoke, Virginia, and that Respondent never had any contact with her divorce lawyer. [*Id.* at pp. 44-45.] Mrs. LaFollette did testify that she mentioned to Respondent that an appraisal of certain marital property had been performed by a LaFollette family friend and that a friend had recommended that she get a second appraisal. [*Id.* at pp. 21-22.] She testified that she shared that information with Respondent, who told her a second appraisal would “always be a good idea” in order to “be on the safe side,” and that she did, in fact, obtain a second appraisal. [*Id.* at p. 22.] Carolyn LaFollette testified, however, that she never actually gave Respondent a copy of the appraisal, and reiterated that Respondent never shared any information with her regarding her husband’s estate or financial information — in addition to the fact that he had none to share. [*Id.* at pp. 44, 49.] Mrs. LaFollette testified that, in her view, she had those conversations with Respondent in his role as her friend, not as her attorney. [*Id.* at pp. 48-49.] In fact, she testified that, from her standpoint, Respondent never gave her anything she considered to be “legal advice.” [*Id.* at p. 55.] In other words, Carolyn LaFollette testified that her only “lawyer,” after January 2010, for purposes of her Virginia divorce proceedings was her lawyer in Roanoke, and not Respondent. [*Id.* at pp. 60-61.]

Respondent’s testimony was in accord. Respondent testified that he did not have any involvement in the Virginia divorce proceedings and that he did not give Carolyn LaFollette any advice regarding those proceedings. [*Id.* at p. 284.] Respondent also explained that he was not aware of the appraised value of any marital property. [*Id.* at p. 257.] As for the appraisal, Carolyn LaFollette had mentioned a friend’s recommendation that she obtain a second appraisal of certain marital property. [*Id.* at p. 257.] Respondent testified that he simply told Mrs. LaFollette to follow the advice of her attorney, with whom Respondent never had any contact.

[*Id.* at p. 257.] In short, Respondent testified that he informed Carolyn LaFollette on multiple occasions that he did not practice in the area of domestic relations, that he was not a Virginia lawyer, and that she should rely on her divorce lawyer's advice in those proceedings. [*Id.* at p. 284.]

Despite this consistent testimony by the only two parties to the supposed "attorney-client" conversation that Respondent did not provide Mrs. LaFollette with any legal advice, the Panel found that Respondent "gave advice to client Carolyn LaFollette regarding her divorce from Calvert LaFollette which harmed his client Calvert LaFollette." [Panel Rpt. at p. 19.]¹

v. Respondent's Circumstances Since June 2010

Respondent's relationship with Carolyn LaFollette ended in June 2010, and Carolyn and Calvert LaFollette have since reconciled. [Hrg. Trans. at pp. 43, 66.] As for Respondent, the proposed sanctions will not be the first repercussions he will incur as a result of this disciplinary proceeding. Respondent has suffered profound embarrassment and, more recently, the loss of his marriage. In addition, this proceeding led to Respondent's withdrawal on June 11, 2014 from the partnership at Dinsmore & Shohl, where he had practiced for nine years and where he was the managing partner of the Charleston office.

C. The Hearing Panel's Conclusions of Law

Based on its finding that Respondent had "falsely" stated that the representation was terminated by Calvert LaFollette on January 10, 2010, the Panel held that Respondent had violated Rules 8.1(a) and 8.4(c) of the Rules of Professional Conduct, which provide as follows:

Rule 8.1. Bar admission and disciplinary matters.

¹ The Panel Report also includes a statement that Respondent "continued to represent his client in Court matters for months while he continued to have sexual conversations with the client's then wife." [Panel Rpt. at p. 20.] This is unquestionably an error, as Respondent made no court appearances whatsoever on behalf of any member of the LaFollette family. Nor is there any evidence of "sexual conversations" in the record.

[A] lawyer in connection with . . . a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact.

and

Rule 8.4 Misconduct.

It is professional misconduct for a lawyer to:

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

[Panel Rpt. at pp. 8-9.] Respondent respectfully submits that, in reaching this conclusion, the Panel failed to consider Respondent's good faith belief that the representation had in fact terminated when Calvert LaFollette verbally terminated it on January 10, 2010. *See* discussion, *infra*.

The Panel's determination about the effective termination date also led to its conclusion that Respondent violated Rule 8.4(g) of the Rules of Professional Conduct, which provides, in pertinent part, as follows:

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(g) have sexual relations with a client whom the lawyer personally represents during the legal representation unless a consensual sexual relationship existed between them at the commencement of the lawyer/client relationship.

[Panel Rpt. at p. 9.]

Finally, because the Panel concluded that Respondent had given Carolyn LaFollette independent legal advice concerning marital property and alimony matters while both Calvert LaFollette and Carolyn LaFollette had been his clients for estate planning (despite the fact that both Respondent and Carolyn LaFollette testified to the contrary), it found that Respondent had violated Rule 1.7(a) of the Rules of Professional Conduct, which provides as follows:

Rule 1.7. Conflict of interest: General rules.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(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.

[Panel Rpt. at pp. 9-10.]

II. SUMMARY OF ARGUMENT

Respondent has consented to the recommendation of the sanctions proposed in the Panel Report, and thus shares in the Office of Disciplinary Counsel's request that this Court adopt that tribunal's recommendation. Although the parties ultimately reached agreement as to the appropriate sanctions, Respondent does not share the Office of Disciplinary Counsel's opinion that Respondent has misrepresented any facts, and further disagrees with the Office of Disciplinary Counsel's application of the law to the facts. This case presents this Court with an opportunity to consider when, and how, a client can terminate an attorney/client relationship, and how lawyers should respond.

Respondent understood and held a good faith belief that his representation of Calvert LaFollette and Carolyn LaFollette ended on January 10, 2010, when Calvert LaFollette orally

terminated the representation.² Respondent has consistently testified to this sincere understanding at every turn: when preparing his Verified Response, when providing his initial Sworn Statement without counsel, and when testifying at the Hearing. Accordingly, he simply did not make any false statement or engage in any conduct involving dishonesty in violation of Rules of Professional Conduct 8.1(a) or 8.4(c). In consenting to the Panel's recommendation, Respondent is acknowledging that he should have been more proactive in documenting the termination of the representation, namely by reacting to the January 10 conversation in which he was "fired" and by clarifying any confusion created by Calvert LaFollette and Carolyn LaFollette's signatures on the consent to represent letter sent to them January 6, 2010, but signed January 14, 2010. However, there is no dispute that Respondent and Calvert LaFollette spoke on January 10, 2010 and that the substance of that conversation was that Respondent's representation of both Calvert LaFollette and Carolyn LaFollette was to be terminated. There is also no dispute that Respondent did not perform any legal work for either Calvert LaFollette or Carolyn LaFollette after January 10, 2010. Moreover, both LaFollettes subsequently retained separate divorce attorneys in Virginia, bolstering Respondent's conclusion that his representation had concluded.

This is thus not a case of factual disagreement, but of legal disagreement. In other the question is one of the legal significance of certain facts, not whether Respondent accurately represented the facts to the Office of Disciplinary Counsel or the Panel. Put simply, Respondent does not agree that his conduct violated the Rules of Professional Conduct cited by the Panel. While Respondent agrees that he could have protected his interests and those of his former

² Respondent has *never* taken the position that his representation ended in November 2009 when Calvert and Carolyn LaFollette could not come to an agreement regarding the guardianship of their children. The Panel's finding in this regard, [Panel Rpt. at 18], is wholly uncontested, and thus the Panel's emphasis on that finding is misplaced.

clients better by taking additional steps to formally terminate the representation after Calvert LaFollette orally did so, the Rules contain no such requirement. Respondent therefore urges this Court to decline to hold that the only way for an attorney-client relationship to end is for the lawyer to write a termination letter. Because Respondent held a good faith belief that his representation had been terminated as of January 10, 2010, he did not violate either the Rule pertaining to Conflict of Interest (Rule 1.7) or the Rule prohibiting sexual relations with a client whom the lawyer personally represents *during the representation* (Rule 8.4(g)).

In sum, Respondent's mistake was a negligent one made by a reputable attorney with no other blemishes on a twenty year record of practicing law, and one that resulted in no pecuniary harm to any party. Respondent has already paid a high price for this error, both personally in terms of the profound public embarrassment and end of his marriage, and professionally as he has withdrawn from the partnership and his leadership role at Dinsmore & Shohl. The sanctions recommended by the Panel are sufficient to satisfy the objectives of punishing this attorney and protecting the public, and Respondent therefore requests that this Court adopt them.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument has already been scheduled in this case for September 3, 2014.

IV. ARGUMENT

A. Standard of Proof

Charges against an attorney must be proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. Syl. Pt. 1, *Lawyer Disciplinary Bd. v. McGraw*, 194 W. Va. 788, 461 S.E.2d 850 (1995). The standard for review in lawyer disciplinary proceedings is well-settled:

A *de novo* standard applies to a review of the adjudicatory record made for the Committee on Legal Ethics of the West Virginia State Bar [currently, the Hearing

Panel Subcommittee of the Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the Committee's recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the Committee's finding of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.

Syl. Pt. 3, *Committee on Legal Ethics v. McCorkle*, 192 W. Va. 286, 452 S.E.2d 377 (1994).

However, “[t]his Court is the final arbiter of legal ethics problems 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), cert. denied, 470 U.S. 1028 (1985).

B. The Proposed Sanctions are Appropriate under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure.

Although Respondent has acknowledged that he should have taken more definitive steps to confirm and document the conclusion of his representation of Carolyn and Calvert LaFollette as of January 10, 2010, and accordingly consents to the recommended sanctions, he urges the Court not to hold that his failure to send a termination of representation letter constitutes an ethical violation *per se*.

Such a finding would markedly change the law surrounding attorney-client relationships in this State. In the context of the *commencement* of an attorney-client relationship, West Virginia law holds that the relationship may be implied from the conduct of the parties. *State ex rel. DeFrances v. Bedell*, 191 W. Va. 513, 517, 446 S.E.2d 906, 910 (1994) (quotation omitted). As to what constitutes the *termination* of such a relationship, the Court has only opined that the personal perception of the client is significant to the determination of whether the attorney-client relationship is in continued existence. *Lawyer Disciplinary Bd. v. Battistelli*, 206 W. Va. 197,

205, 523 S.E.2d 257, 265 (1999).³ The consistent testimony of the witnesses at the Hearing was that Calvert LaFollette's personal perception (and Carolyn LaFollette's, as well) on January 10, 2010 of the relationship was that Calvert was terminating Respondent as their attorney. It was thus reasonable for Respondent to believe, based on Calvert LaFollette's conduct and clear expression of his own personal perception as the client, that the representation had concluded. As a leading treatise holds, "[a]n attorney is entitled to notice of discharge, although *it need not be formal, since any act of the client indicating an unmistakable purpose to sever relations is sufficient.*" 41 A.L.R. 6th 1, *Legal Malpractice in Connection with Attorney's Withdrawal as Counsel* (2014) (emphasis added).

Each of the violations the Panel found stems directly from this difference of legal opinion regarding when the representation terminated. Specifically, if Calvert LaFollette's verbal termination of Respondent actually constituted a termination: (i) Respondent would not stand accused of "falsely" claiming his understanding of that fact, in supposed violation of Rules 8.1(a) and 8.4(c); there would have been no sexual relations "with a client" in supposed violation of Rule 8.4(g); and, even if Respondent's suggestion that Carolyn LaFollette follow her attorney's advice with respect to obtaining a second appraisal of the cabin actually constituted legal advice, it would not have created a conflict of interest in supposed violation of Rule 1.7(a) and (b).

That the entirety of Respondent's questionable conduct arises from a reasonable dispute about the date of termination should inform this Court's review of the recommended sanctions. Further, "[i]n 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

³ The Rules of Professional Conduct do not contemplate these circumstances but only prescribe when a lawyer shall withdraw from, or continue, representation of a client. Rule 1.16.

the Bar and at the same time restore public confidence in the ethical standards of the legal profession.” Syl. Pt. 7, *Office of Lawyer Disciplinary Counsel v. Jordan*, 204 W. Va. 495, 513 S.E.2d 722 (1998). Rule 3.16 of the Rules of Lawyer Disciplinary Procedure provides the factors to be considered in imposing sanctions, namely: (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. Application of those considerations to the facts here supports imposition of the recommended sanctions.

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

The Office of Disciplinary Counsel appears to acknowledge in its Brief that Respondent only violated his duty owed to Mr. and Mrs. LaFollette, to the public, to the legal system and to the profession to the extent Calvert LaFollette’s verbal termination of Respondent on January 10, 2010 was legally insufficient to sever the relationship. [Petitioner’s Br. at pp. 11-13.] However, as discussed above, Respondent has never provided any false statement about the underlying facts, and Calvert LaFollette in fact terminated that relationship months before the sexual relationship between Respondent and Carolyn LaFollette began. Importantly, Respondent performed no actions after January 10, 2010 consistent with a belief that he was either Calvert or Carolyn LaFollette’s attorney, and Carolyn LaFollette did not see Mr. Hussell as her attorney during the sexual relationship. [Hrg. Trans. at pp. 63-64.] Again, this matter involves a difference of legal opinion, not a factual dispute.

This case is thus materially distinguishable from those where this Court has imposed sanctions upon finding a conflict of interest where an attorney is actively and knowingly

representing the subject client. *See, e.g. Lawyer Disciplinary Bd. v. Stanton*, No. 13-0138, 2014 W. Va. LEXIS 857 (W. Va. June 5, 2014) (three year suspension when, *inter alia*, conflict of interest because lawyer actively engaged in seeking parole for client was refusing to communicate with client due to their romantic problems). Rather, Respondent reasonably believed — based on Calvert LaFollette’s clear expression of his own subjective understanding as well as Carolyn LaFollette’s subsequent corroboration that the representation was terminated — that no attorney-client relationship existed after January 10, 2010. As such, Respondent did not violate any of his duties as a member of the Bar. *See, e.g. In re James*, 223 W. Va. 870, 679 S.E.2d 702 (2009) (all charges of conflict of interest under Rules 1.7 and 1.9 dismissed upon finding that no attorney-client relationship existed between attorney and the parents of driver in accident).

2. *Whether the lawyer acted intentionally, knowingly, or negligently*

Similarly, to the extent Respondent is liable for any wrongdoing, his violation of the Rules was merely negligent because he sincerely and reasonably believed his representation of Calvert and Carolyn LaFollette to have ended as of January 10, 2010, months before he began an intimate relationship with Mrs. LaFollette. Lesser sanctions are thus appropriate. *See, e.g., Lawyer Disciplinary Bd. v. Chittum*, 225 W.Va. 83, 91-92, 689 S.E.2d 811, 819-20 (2010) (accepting Panel’s finding that attorney’s “flirtatious overtures” to client as well as attorney’s failure to deposit client funds into his IOLTA account and commingling of personal and client funds to be negligent and supportive of a reprimand rather than a suspension.)

3. *Amount of actual or potential injury caused by the lawyer’s misconduct*

The Office of Disciplinary Counsel misguidedly urges the Court to find real injury in the supposed facts that Respondent’s conduct “clearly reflects adversely upon the reputation of the

Bar and lawyers in general” and that Carolyn LaFollette received a higher value on the cabin. [Petitioner’s Br. at p. 14.]

The lack of any actual injury to any person supports the imposition of minimal sanctions. *Chittum*, 225 W.Va. at 92, 689 S.E.2d at 820 (reprimand when Panel found there was no actual injury to any client or to attorney’s wife); *Lawyer Disciplinary Bd. v. Santa Barbara*, 231 W. Va. 740, 747, 749 S.E.2d 633, 640 (2013) (Panel adopted stipulation that attorney’s conduct, which included brandishing a handgun and carrying a concealed weapon in court, had resulted in no injuries though “there certainly was the potential that someone may have been harmed or seriously injured if the situation accelerated that evening,” and Court added that there was also “a very great risk not only of bodily injury or death, but of injury to the reputation and integrity of the profession as a result of Mr. Santa Barbara’s actions,” before finding a three month suspension appropriate).

Moreover, Carolyn LaFollette also sought at least one other person’s advice with respect to obtaining a second appraisal on the cabin before mentioning the idea to Respondent. [Hrg. Trans. at pp. 21-22.] The Panel was therefore wrong to find and conclude that Respondent’s mere agreement that it would “always be a good idea” to get a second opinion led directly to Mrs. LaFollette obtaining a second appraisal and receiving a higher value for the cabin. Moreover, Mr. LaFollette’s testimony was that after the second appraisal, “we met in the middle” and “that seemed fair.” [Hrg. Trans. at pp. 110.] A result which he described as “fair” cannot constitute a direct actual injury to Calvert LaFollette, and thus should not be used to enhance the sanctions beyond what has been recommended.

4. *Existence of any aggravating or mitigating factors*

“Mitigating factors in a lawyer disciplinary proceeding are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.” Syl. Pt. 2, *Lawyer Disciplinary Bd. v. Scott*, 213 W. Va. 209, 579 S.E.2d 550 (2003). For guidance, the Court looks to the mitigating factors that may be considered:

Mitigating factors which may be considered in determining the appropriate sanction to be imposed against a lawyer for violating the Rules of Professional Conduct include: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses.

Syl. Pt. 3, *Scott*, 213 W. Va. 209, 579 S.E.2d 550 (2003).

Respondent has demonstrated several of these mitigating factors. First, Respondent has no prior disciplinary record. Second, Respondent did not have a dishonest or selfish motive as he genuinely believed his representation to have terminated prior to beginning his sexual relationship with Carolyn LaFollette, and he did not gain any financial benefit as a result of the misconduct or even as a result of the representation itself. Third, Respondent has been cooperative with the proceedings. Fourth, Respondent has a good reputation in the community and there has been no evidence that his conduct was typical. Fifth, Respondent was remorseful in that he repeatedly testified that he wished he had sent a formal termination letter which would have better protected both his interests and those of his former clients, and he stated that he regretted his personal relationship with Carolyn LaFollette. Each of these mitigating factors weighs in favor of acceptance of the recommended sanctions.

The Court must also consider aggravating factors, which “are any considerations or factors that may justify an increase in the degree of discipline to be imposed.” Syl. Pt. 4, *Scott*, 213 W. Va. 209, 579 S.E.2d 550 (2003). The Office of Disciplinary Counsel has presented three purported aggravating factors. [Petitioner’s Br. at p. 15.] First, the Office of Disciplinary Counsel states that Respondent has refused to acknowledge the wrongful nature of his conduct. This is not true factually. Respondent has acknowledged all the facts and events at issue since his initial statement, and admits that he should have sent a proper termination letter. However, Respondent disagrees with the Office of Disciplinary Counsel’s legal conclusion that the representation continued after January 10, 2010, and cannot in good conscience “acknowledge” that that good faith understanding based on undisputed facts, was wrong. Second, the Office of Disciplinary Counsel contends that Respondent gave false statements during the proceeding. To the contrary, Respondent has maintained throughout the three year course of this proceeding that his understanding was that the representation terminated as of the date Calvert LaFollette dismissed him, on January 10, 2010. This understanding is corroborated by several witnesses, supported by the record in this case and undisputed factually. There is nothing “false” about this understanding, despite the Office of Disciplinary Counsel’s disagreement with the legal import of Respondent’s failure to send a termination letter confirming the end of the representation. Finally, the Office of Disciplinary Counsel cites Respondent’s substantial experience in the law as an aggravating factor. While it is true that inexperience in the law is a mitigating factor, the Office of Disciplinary Counsel cites no precedent supporting the consideration of a twenty year unblemished record as an aggravating factor.

C. The Recommended Sanctions

When all of the above is considered, the proposed sanctions are appropriate to punish this attorney, serve as an effective deterrent to other members of the Bar, and restore public confidence in the ethical standards of the legal profession. The cases relied on by the Office of Disciplinary Counsel to emphasize the gravity of sexual misconduct by an attorney are readily distinguishable and should not serve to support a harsher sanction than the Panel recommended. [See Petitioner's Br. at pp. 18-19.] In each of those cases, there was no ambiguity regarding the existence of a current attorney-client relationship, and the disciplined attorney committed multiple acts of serious moral turpitude. See *In re Witherspoon*, 203 N.J. 343, 3 A.3d 496 (N.J. 2010) (one year suspension when attorney had history of discipline and repeatedly offered clients discounted legal fees in exchange for sexual favors); *In re Disciplinary Proceedings against Inglimo*, 305 Wis.2d 71, 740 N.W.2d 125 (Wis. 2007) (three year suspension when attorney drew on client trust funds for other clients, accepted sexual favors for legal fees from at least two clients, used cocaine with multiple clients, and supplied marijuana to clients); *Application for Disciplinary Action against Chinquist*, 714 N.W.2d 469 (N.D. 2006) (six month suspension when attorney had sexual relationship with domestic relations client, accepted large cash payments from woman without providing accounting or billing statements, and did not deposit the payments into a trust account).

Instead, Respondent's error is more in line with those cases where this Court has imposed relatively minimal, though still serious, sanctions. See *Chittum, supra* (reprimand for flirtatious overtures to client and commingling of personal and client funds); *Santa Barbara, supra* (three month suspension for brandishing a handgun and carrying a concealed weapon); *Lawyer Disciplinary Bd. v. Sullivan*, 230 W. Va. 460, 740 S.E.2d 55 (2013) (thirty day suspension for

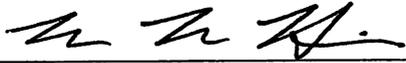
failing to communicate with and assist client in correcting a criminal sentencing order, and failing to respond to lawful requests for information by the Office of Disciplinary Counsel).

In sum, Respondent has no history of discipline before this Court, and has no intention of ever being before the Panel again. He has acknowledged and learned from his error in judgment, and hopes to put this episode behind him and begin to rebuild his career and resurrect his personal and professional reputation. Respondent thus respectfully requests that the Court decline to hold that a failure to send a formal termination letter after an in-person “firing” by a client constitutes an acknowledgment of continued representation that can lead to any greater sanctions than those recommended by the Panel here.

V. CONCLUSION

For the reasons set forth above, Respondent consented to the sanctions recommended by the Panel, and urges this Court to impose no more than those recommended sanctions.

Respondent,
By Counsel


Benjamin L. Bailey (WVSB #200)
Michael B. Hissam (WVSB #11526)
Bailey & Glasser LLP
209 Capitol Street
Charleston, WV 25301
(304) 345-6555
(304) 342-1110 facsimile
bbailey@baileyglasser.com
mhissam@baileyglasser.com

Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 13-0544

JOHN F. HUSSELL, IV,

Respondent.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 1st day of August, 2014 a true copy of the foregoing **BRIEF OF RESPONDENT JOHN F. HUSSELL, IV** was served via hand delivery and U.S. Mail upon counsel addressed as follows:

Jessica H. Donahue Rhodes
State of West Virginia
Office of Disciplinary Counsel
City Center East
Suite 1200C
4700 MacCorkle Avenue, SE
Charleston, WV 25304


Michael B. Hissam (WVSB #11526)