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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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In Re: McGINNIS E HATFIELD, JR., **Bar No.:** 1637
A Member of The West Virginia State Bar **Supreme Court No.:** 18-0101
I.D. No.: 13-02-399

REPORT OF THE HEARING PANEL SUBCOMMITEE

I. PROCEDURAL HISTORY

Formal charges were filed against McGinnis E. Hatfield, Jr. (hereinafter "Respondent"), with the Clerk of the Supreme Court of Appeals on or about February 9, 2018, and served upon Respondent via certified mail by the Clerk on February 13, 2018. Lawyer Disciplinary Counsel filed her mandatory discovery on or about March 7, 2018. Respondent filed his Answer to the Statement of Charges on or about March 23, 2018, and "Respondent's Discovery Disclosures," on or about April 9, 2018. No pre-trial motions were filed by either party in this matter.

Thereafter, this matter proceeded to hearing in Charleston, West Virginia, at the Office of Lawyer Disciplinary Counsel (hereinafter "ODC"), on June 14, 2018. The Hearing Panel Subcommittee was comprised of Steven K. Nord, Esquire, former Chairperson; Anne Werum Lambright, Esquire; and Dr. K. Edward Grose, Layperson. Renee N. Frymyer, Lawyer Disciplinary Counsel, appeared on behalf of the ODC, John W. Feuchtenberger, Esquire, appeared on behalf of Respondent, who also appeared, in person. The Hearing Panel Subcommittee heard testimony from

B.W.[1] and Respondent. In addition, Exhibits 1-24 were admitted into evidence, without objection.

Based upon the evidence and the record, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board submits the following Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions regarding the final disposition of this matter.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a lawyer who practices in Bluefield, located in Mercer County, West Virginia. Respondent was admitted to The West Virginia State Bar on May 20, 1975, by diploma privilege. As such, he is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.

2. By complaint received by the ODC on August 29, 2013, Complainant B.W. alleged that in August of 2013, she asked Respondent to represent her in a divorce action in Mercer County, West Virginia. [Ex. 1]

3. B.W.'s complaint stated that Respondent asked whether she had One Thousand Five Hundred Dollars ($1,500.00) for his services. When she informed Respondent that she did not have the money, B.W. alleged that

[1] Because of the sensitive nature of the facts alleged in this case, initials are used herein for the victim. *See* State v. Edward Charles L., 183 W.Va. 641, 645 n. 1, 398 S.E.2d 123, 127 n.1 (1990). *See also* Rule 40(e)(1) of the Rules of Appellate Procedure.

Respondent indicated that he would represent her in exchange for sexual relations. [Ex. 1]

4. B.W.'s complaint further stated that Respondent persisted in trying to get sexual favors from her in exchange for representation. [Ex. 1]

5. With her complaint, B.W. provided copies of six separate audio recordings which she claimed contained telephone conversations with Respondent wherein he requested sex from B.W. in exchange for his representation in her divorce. [Hrg. Tr. 10]

6. Below are excerpts from the recordings provided by B.W.:

Respondent: "... Did you take your papers over to the courthouse?"
B.W.: "No not yet because I have to go over there tomorrow."
Respondent: "Well, take them there and show them to them face to face, show them what you've got and say, look, I need to have forms for me to file, you know, to reply to this."
B.W.: "I know, but I thought like when we first started out, I was just going to pay you. I didn't know that you wanted sex out of the whole thing."
Respondent: "Well, I'd have to charge you like 1,500 bucks. You don't have $1,500, do you?"
B.W.: "No."
Respondent: "So come on out here. Just come. What time do you want to come?"

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Respondent: "... [I]t's just not going to work unless you do what I say."
B.W.: "What do you want me to do?"
Respondent: "You know what I want you to do. I told you."
B.W.: "Well, I'm a little confused."
Respondent: "Well, there's nothing to be confused about."
B.W.: "Well, what do you want me to do?"
Respondent: "Well, I want you to let me eat your p* ***, and then I want you to let - I want you to suck my d* * *, and then, you know, I just have to - I'm as straight forward as I can be. And if you don't want to do that, then fine. I don't have any - I like you. And if you don't want to do that, then we'll just have to call it off."

B.W.: "Is that not - all right. That's fine. Whatever."
Respondent: "Is that okay?"
B.W.: "I mean no, not really because I'm not a whore."

* * *

Respondent:"... And like I said, if you won't want to do that, then that's fine by me. I wish you luck. And if you don't want to do that, then I'm not going to try to represent you. So that's a benefit for you. And I'll give you some money, too[.]"

* * *

Respondent: "Why did you hang up on - why did you hang up on me?"
B.W.: "Because I'm not really that type of person, like I'm not just going to up and have sex with people."
Respondent: "... You know, I'm shooting straight with you. I told you from the beginning that sex was important to me. I want some now. Nobody's tried to trick you. And it would be safe, too. But anyway, if you don't want to do it, that's fine by me, honey, but you'll have to get somebody to help you with your divorce, too."
B.W.: "Okay, That's fine."

[Ex. 2 and Ex. 21]

7. By letter dated August 30, 2013, the ODC mailed Respondent a copy of B.W.'s complaint and directed him to file a verified response within twenty (20) days. [Ex. 3]

8. In his timely-filed response, Respondent stated as follows, in totality: "In response to your letter dated August 20, 2013, in regards of complainant [B.W.], there was no attorney/client relationship." [Ex. 4]

9. On November 5, 2013, B.W. provided a Statement Under Oath to Lawyer Disciplinary Counsel in which she verified that the female voice contained on the recordings was hers and the male voice contained on the recordings was that of Respondent. B.W. also stated that Respondent's offer made her feel

very uncomfortable, and that she never proceeded to have a sexual relationship with him. [Ex. 23 at pp. 13; 19; 25]

10. On or about March 31, 2014, Lawyer Disciplinary Counsel filed a Motion to Stay Complaint in which she requested the proceedings with respect to the above-referenced ethics complaint be stayed based upon the knowledge that in or about October of 2013, Respondent had sustained a significant brain injury and, as a result, had been residing in a nursing facility. At that time, it was unknown when and if Respondent would recover from his injury, but it was the understanding of Lawyer Disciplinary Counsel that he was no longer competent to practice law and was on "inactive" status with the State Bar. [Ex. 6, 8, 9, 10]

11. Respondent received his head injury due to a fall that occurred while he was drunk [Hrg. Tr. 57].

12. On or about March 31, 2014, the Investigative Panel of the Lawyer Disciplinary Board voted to place the complaint on administrative stay until which time Complainant returned to the active practice of law. [Admitted; Ex. 11 at 000059]

13. By letter dated May 25, 2017, James J. Palmer, III, Esquire, advised the ODC that Respondent had agreed to reactivate his law license in order to supervise

Mr. Palmer's law practice.[2] Mr. Palmer's letter also provided an updated address for Respondent. [Ex. 13]

14. Thereafter, by letter dated May 31, 2017, Lawyer Disciplinary Counsel provided to Respondent at his updated address a copy of B.W.'s complaint and asked that he update the ODC with the current status of his health. [Ex. 14]

15. The State Bar subsequently advised the ODC that on July 18, 2017, Respondent had reactivated his law license. [Admitted]

16. By letter dated July 24, 2017, Respondent stated that his health was "good" and that he had "completely recovered from the traumatic brain injury." Respondent further stated that he did not now, nor had he ever, represented B.W. [Ex. 15 at 000272]

17. At its meeting held on September 23, 2017, the Investigative Panel of the Lawyer Disciplinary Board voted to lift the previously-granted stay. [Ex. 17]

18. On October 26, 2017, Respondent appeared at the ODC, with counsel, to provide a sworn statement. [Admitted]

19. At his sworn statement, Respondent confirmed that he had listened to the audio recordings submitted with B.W.'s complaint and that it was his voice on

[2] Mr. Palmer had previously been ordered by the Supreme Court of Appeals to undergo six months of probation with his practice supervised by an active attorney in his geographic area in a separate disciplinary proceeding.

the recordings. Respondent asserted that it sounded, to him, like he was "joking with her." [Ex. 20 at 000325-000326]

20. Respondent admitted that he is an alcoholic, but has been sober for approximately four (4) years. [Ex. 20 at 000322-000323; Hrg. Tr. 58]

21. Respondent does not participate in recovery programs, however, nor does he attend Alcoholics Anonymous meetings. [Ex. 20 at 000323; Hrg. Tr. 62]

22. At the hearing, B.W. testified that she had asked Respondent to represent her in a divorce and, because she did not have the money for a retainer at the time, asked if she could make payments to him. B.W. said that is when Respondent started asking her for sexual favors. [Hrg Tr. 9]

23. B.W. testified that she recorded some of her conversations with Respondent because one is "not supposed to talk to anyone that way." B.W. also testified that it made her feel "horrible" and "disgusting" when Respondent said the things contained in or on the recordings [Ex. 2 was played during B.W.'s testimony]. [Hrg. Tr. 12; 18]

24. B.W. believed Respondent was attempting to solicit her into committing an act of prostitution. [Hrg. Tr. 13]

25. B.W. stated that it was her understanding that Respondent would not handle her divorce unless she had sex with him [Hrg. Tr. 51]

26. B.W. testified that she never had sexual relations with Respondent. [Hrg. Tr. 13]

27. B.W. was ultimately unable to retain counsel for her divorce hearing, as she said she could not afford counsel at that time and did not have any trust in lawyers. [Hrg. Tr. 14-15]

28. B.W. also testified that the situation with Respondent prompted her to seek treatment from a psychiatrist, whom she has seen approximately once a month since these incidents occurred in 2013, although she admitted that other factors also contributed to her seeking treatment by a psychiatrist. [Hrg. Tr. 19; 22]

29. Respondent agreed at the hearing that he had offered to represent B.W. in her divorce in exchange for sex. [Hr. Tr. 67][3]

30. Respondent doubted that he would have allowed B.W. to make payments to him in exchange for his representation, because he was tired of doing divorces and just wanted sex. [Hr. Tr. 69]

31. Respondent acknowledged that because B.W. had been employed as an exotic dancer, he thought that she might be amendable to having sex with him in exchange for some other compensation. [Hr. Tr. 75]

32. Respondent referred to B.W. as "not your average perspective client" because she had performed a lap dance for him, [Hrg. Tr. 73], and when he was asked

[3] Respondent was inadvertently not sworn under oath prior to his testimony at the hearing. Respondent's counsel has advised Lawyer Disciplinary Counsel that respondent is providing a verification to the Hearing Panel Subcommittee indicating that all of his testimony at the hearing was truthful.

if clients came in all different shapes, sizes, professions, sexes, etc., his unexpected response was, "Perfect example, I like gypsies as clients. They're always in trouble and they always have names." [Hrg. Tr. 100].

33. Respondent said that he thought what he had going on with B.W. was a "dating scenario." He said he "wanted to take her out and give her money," and "maybe barter a little dating," and, in this case, "trade the representation for sex." [Hrg. Tr. 103-104]

34. Although he couldn't explain why and he testified that she never asked him for money, he felt "victimized" by her and felt that she had set him up for a fall. [Hrg. Tr. 100-101].

35. The Rules of Professional Conduct have long prohibited a lawyer from having 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.[4] [Admitted]

36. B.W. was a prospective client of Respondent at the time the voice recordings contained in evidence were made. The record is clear that she was seeking to form a client -lawyer relationship with Respondent with respect to her divorce proceeding.

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[4] Rule 8.4(g) of the Rules of Professional Conduct, effective until January 1, 2015; Rule 1.8(j) of the Rules of Professional Conduct, effective January 1, 2015.

37. By using inappropriate, sexually-harassing conduct during telephone contact with B.W., a prospective client in a domestic matter, while soliciting professional employment, Respondent violated Rule 7.3(b)(2) of the Rules of Professional Conduct, provided as follows:

> **Rule 7.3. Direct contact with prospective clients.**
>
> [Effective prior to January 1, 2015]
>
> (b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in -person or telephone contact even when not otherwise prohibited by paragraph (a) if:
>
> * * *
>
> (2) the solicitation involves coercion, duress or harassment.

38. By making sexual advances in an attempt to create a sexual relationship with a client or a prospective client in exchange for his professional services, Respondent violated Rule 8.4(a) and (d), provided as follows:

> **Rule 8.4. Misconduct.**
>
> [Effective prior to January 1, 2015]
>
> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> ***
>
> (d) engage in conduct that is prejudicial to the administration of justice[.]

39. Because Respondent committed the criminal acts of solicitation of another to commit an act of prostitution, in violation of W. Va. Code §61-8-5(b)[5], he violated Rule 8.4(b) of the Rules of Professional Conduct, provided as follows:

> **Rule 8.4. Misconduct.**
>
> [Effective prior to January 1, 2015]
>
> It is professional misconduct for a lawyer to:
>
> ***
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects[.]

III. DISCUSSION

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,

[5] W.Va. Code § 61-8-5(b) provides: "Any person who shall engage in prostitution, lewdness, or assignation, or who shall solicit, induce, entice, or procure another to commit an act of prostitution, lewdness, or assignation; or who shall reside in, enter, or remain in any house, place, building, hotel, tourist camp, or other structure, or enter or remain in any vehicle, trailer, or other conveyance for the purpose of prostitution, lewdness, or assignation; or who shall aid, abet, or participate in the doing of any of the acts herein prohibited, shall, upon conviction for the first offense under this section, be punished by imprisonment in the county jail for a period of not less than sixty days nor more than six months, and by a fine of not less than $50 and not to exceed $100[.]"

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). Rule 3.7 of the Rules of Professional Conduct requires that: "In order to recommend the imposition of discipline of any lawyer, the allegations of the formal charge must be proven by clear and convincing evidence."

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

The evidence in this case is clear and convincing that Respondent has violated duties to the public, to the legal system and to the profession. The public expects lawyers to exhibit the highest standards, integrity and honesty, and lawyers have a duty to act in such a manner as to maintain the integrity of the Bar and the profession. Moreover, as an officer of the Court and legal system, a lawyer's conduct should always conform to the requirements of the law, both in professional service to clients and in the lawyer's personal affairs. In this case, Respondent directly suggested and solicited prostitution from his prospective client, B.W., by using rude, lewd, offensive, demeaning and sexually harassing statements. The Respondent tried on multiple occasions to take advantage of the fact that the prospective client had three young children and needed representation in the divorce, and he knew she did not have the resources to pay cash up front for legal services. Respondent's admitted conduct was not only in violation of the Rules of Professional Conduct, but constituted a criminal act. In light of all his professional functions, it is without question that

Respondent's conduct has fallen short of the duties he owes as a member of the legal profession to the public, the court and legal system.

B. Respondent acted intentionally and knowingly.

"Intent" as defined by the American Bar Association is the conscious objective or purpose to accomplish a particular result, whereas "knowledge" as defined by the American Bar Association is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. *Annotated ABA Standards for Imposing Lawyer Sanctions,* Definitions (2015). It is clear that Respondent knowingly and intentionally engaged in an abuse of the professional relationship when he solicited sexual relations from his potential client, B.W.

C. The amount of real and potential injury is great.

The record is clear that Respondent's misconduct caused real harm to his victim, B.W. At the hearing, B.W. was visibly shaken and uncomfortable as she credibly testified to the emotional damage she suffered due to Respondent's misconduct. In addition to her intangible emotional injuries, she testified that her trust in lawyers had been affected [Hrg. Tr. 14]. Moreover, the conduct exhibited by Respondent erodes the integrity of the profession. Although Respondent referred to his attempt to exchange his legal representation for sex as "human," [Hrg. Tr. 79], it has been held that "[a] sexual relationship between lawyer and client during the course of the professional relationship is inherently and insidiously harmful." People v. Easley, 956 P.2d 1257, 1259 (Colo. 1998).

Based upon the record of this case, including Respondent's lack of remorse for his conduct and the lack of sustained treatment for his alcoholism, there is great potential harm to the public, the legal system, the legal profession, and other vulnerable clients at the hands of Respondent. Because the legal profession is largely self-governing, it is vital that lawyers abide by the rules of substance and procedure that shape the legal system. Indeed, the rules enacted by the Supreme Court of Appeals governing the practice of law and conduct of lawyers have the force and effect of law. *See* W.Va. Const. Art. VIII, §3. Respondent's disregard for the Rules of Professional Conduct and the laws of this State, as exhibited in the record, is clearly detrimental to the legal system and legal profession, his conduct undermines the public confidence in the administration of justice, and he has brought the legal system and profession into disrepute.

D. There are several aggravating factors.

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. 209, 216, 579 S.E. 2d 550, 557 (2003) *quoting ABA Model Standards for Imposing Lawyer Sanctions,* 9.21 (1992). The multiple aggravating factors in this case include dishonest or selfish motive, refusal

to acknowledge the wrongful nature of conduct[6], vulnerability of the victim in this matter, and substantial experience in the practice of law.

Rule 9.22(a) of the *ABA Model Standards for Imposing Lawyer Sanctions* also indicates that prior disciplinary offenses constitutes an aggravating factor. Respondent has been issued admonishments by the Investigative Panel of the Lawyer Disciplinary Board on three (3) prior occasions. On or about August 18, 1990, Respondent was admonished for violating Rule 1.9 and 1.10 of the Rules of Professional Conduct. On or about September 9, 2000, Respondent was admonished for using slight physical force with his former wife in a courtroom incident. On or about March 2, 2010, Respondent was admonished for violating Rule 1.2(a) of the Rules of Professional Conduct.

E. There are no mitigating factors present.

In addition to adopting aggravating factors in Scott, the Scott court also adopted mitigating factors as a consideration in a lawyer disciplinary proceedings 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. 209, 216, 579 S.E.2d 550, 557 (2003) *quoting ABA Model Standards for Imposing Lawyer Sanctions*, 9.31 (1992)[7]. In this case, there are no mitigating

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[6] *See* Hearing Transcript at 79:
Q: Are you remorseful? **Respondent:** No. I have no remorse. I feel like I've been victimized.

[7] The Scott Court held that 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 emotionalproblems; (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

factors present, and thus, Respondent should not receive the benefit of any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

IV. STANDARD FOR SANCTIONS

This disciplinary proceeding involves intentional conduct committed by Respondent that is in violation of Rule 7.3(b)(2) [Solicitation of Clients] and Rules 8.4(a)(b) and (d) [Misconduct] that is supported by the clear and convincing evidence on the record. 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 186 W.Va. 43, 45, 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.

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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.

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). As the Supreme Court of Appeals said in In re Brown, 166 W.Va. 226, 232-33, 273 S.E.2d 567, 570 (1980):

> Woven throughout our disciplinary cases involving attorneys is the thought that they occupy a special position because they are actively involved in administering the legal system whose ultimate goal is the evenhanded administration of justice. Integrity and honor are critical components of a lawyer's character as are a sense of duty and fairness. Because the legal system embraces the whole of society, the public has a vital expectation that it will be properly administered. From this expectancy arises the concept of preserving the public confidence in the administration of justice by disciplining those lawyer who fail to conform to professional standards.

The misconduct exhibited by Respondent is extremely egregious and touches the very essence of the public's perception of the legal profession. Although Respondent and B.W. never engaged in a physical sexual relationship, Respondent clearly initiated an unwelcome sexual dialogue with B.W., offering to only trade his legal services in exchange for sexual favors. Respondent's solicitation occurred when B.W. was at a vulnerable point in her life, having recently been served with divorce papers and being unable to pay a lawyer a retainer fee [Hrg. Tr. 15; 78]. Instead of receiving legal representation, B.W. testified that Respondent treated her like a prostitute [Hrg. Tr. 13]. Respondent's actions were for the sole purpose of gratifying his sexual desire and to exploit B.W., likely due to her employment as an exotic

dancer.[8] Respondent's actions were repugnant, clearly against the public policy and law, and cannot be condoned.

The rule prohibiting sexual relations between lawyer and a client during the legal representation, of which Respondent clearly attempted to violate in this case, is principally intended to protect financially vulnerable clients like B.W. from being pressured into an unwanted relationship. Respondent knew that B.W. did not have the resources to pay for a lawyer in her case, and he preyed on her vulnerable position to further his sexual desires. Comment 22 to Rule 1.8 of the Rules of Professional Conduct makes plain that the relationship between an attorney and a client is one that is fiduciary in nature and the attorney occupies a position of power, trust and confidence, and a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role. As noted in Musick v. Musick, 192 W.Va. 527, 453 S.E.2d 361 (1994), there are several concerns and issues that arise when lawyers have sexual relationships with clients that include: concerns of exploitation, effect of sexual relationship on the independence of a lawyer's judgment, conflicts of interest, protection of confidential information disclosed outside the scope of the `normal' attorney client relationship, and the relationship and its dynamics may impair the client's ability to make reasoned decisions. Id. at 530-532, 364-366.

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[8] Respondent said that B.W. was "not your average perspective (sic) client. I've never had a perspective (sic) client that before I started talking to them about legal stuff performed a lap dance on me. You know, she was - she was - didn't - you know, didn't fit the description of your average client by a longshot " [Hrg. Tr. 73]

There are many other cases involving lawyers seeking or starting sexual relationships with clients or prospective clients where courts have found such conduct to be prejudicial to the administration of justice or indicative of the lawyer's unfitness to practice law in some circumstances, and rendered discipline accordingly. In Lawyer Disciplinary Board v. Kenneth E. Chittum, 225 W Va 836, 89 S.E.2d 811(2010), the respondent lawyer was found to have attempted to develop a sexual relationship through telephone calls and letters with a client who was incarcerated. The Supreme Court of Appeals held that the lawyer's "flirtatious remarks" were misconduct under Rule 8.4(a) of the Rules of Professional Conduct because they were an attempt to establish a sexual relationship with his client. Id. at 89, 817. The Supreme Court condemned the lawyer's conduct and found that the behavior was inappropriate and prejudicial to the administration of justice:

> Under the circumstances, [the client] might have felt obligated to respond to [the respondent lawyer]'s flirtatious overtures to ensure that he would fully pursue her interest in the divorce proceeding.

Citing multiple mitigating factors, including remorse, the Supreme Court reprimanded Mr. Chittum for his conduct. Id.

See also, Lawyer Disciplinary Board v. Benjamin F. White, 240 W.Va. 363, 811 S.E.2d 893 (2018) (holding that annulment of lawyer's license to practice law was appropriate sanction for misconduct involving improper relationship with vulnerable client which included sexual relations and other misconduct); Lawyer Disciplinary Board v Stanton, 233 W.Va. 639, 760 S.E.2d 453 (2014) (three-year suspension for lawyer who engaged in conduct prejudicial to the administration of justice by

pursuing and conducting a personal relationship with a vulnerable client); In re Touchet, 753 So.2d 820 (La. 2000) (lawyer disbarred for making unwanted sexual demands on six female clients, including soliciting sexual favors in lieu of legal fees; Supreme Court of Louisiana found lawyer's conduct even more reprehensible by the fact that many of his clients consulted him in connection with emotionally -charged domestic matters); In re Ashy, 721 So. 2d 859 (La. 1998) (two-year suspension for lawyer who promised he would use special effort on client's behalf if she would enter into sexual relationship with him); Att'y Grievance Comm'n of Md. v. Culver, 849 A.2d 423 (Md. 2004) (lawyer disbarred for pressuring divorce client to have sex and for other misconduct); State ex rel. Oklahoma Bar Associate v. Gassaway, 196 P.3d 495 (Okla. 2008) (Supreme Court of Oklahoma held that disbarment was warranted as disciplinary sanction for lawyer's misconduct, which included making false representations to judges and attempting to trade legal services for sexual favors, stated that "sexually suggestive remark to clients will not be tolerated."); Matter of Wood, 489 N.E.2d 1189 (Ind. 1986) (lawyer knowingly and intentionally offering to reduce legal fee in exchange for sexual intercourse or deviant sexual conduct thereby engaging in illegal conduct involving moral turpitude, which is prejudicial to the administration of justice, warrants disbarment).

In addition, lawyers who engage in criminal conduct involving sexual misconduct are subject to discipline because such conduct adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer. *See, e.g.*, Disciplinary Counsel v. Goldblatt, 888 N.E.2d 1091 (Ohio 2008) (mitigating factors considered, included lawyer's

successful treatment to control sexual deviance and his cooperation, in determining that indefinite suspension was appropriate for conviction of compelling prostitution); In re Tenenbaum, 880 A.2d 1925 (Del. 2005) (approving stipulation to three-year suspension for a pattern of illegal activities involving verbal and physical sexual harassment of female clients and employees). Importantly, Courts have held that lawyers can be disciplined for criminal conduct even when criminal charges have not been filed or convictions obtained. *See, e.g.,* People v. Chappell, 927 P.2d 829 (Colo. 1996) (finding it unimportant that lawyer, who aided client in violating custody order that resulted in felony charge for client, was not herself charged or convicted of the offense); Att'y Grievance Comm'n v. Childress, 692 A.2d 465 (Md. 1997) (a lawyer may be disciplined for engaging in criminal acts that do not result in a conviction, requiring only proof by clear and convincing evidence of a rule violation, not beyond a reasonable doubt); In re Tenenbaum, 918 A.2d 1109 (Del. 2007) (lawyer's sexual assault of former client who reported the criminal conduct 22 years later warranted disbarment although lawyer not convicted).

Lawyers engaged in improper solicitation of clients have likewise been subject to discipline. In these cases, Courts often look to whether the solicitation targets are particularly vulnerable. Fla. Bar v. Weinstein, 624 So. 2d 261, 262 (Fla 1993) (disbarment for, *inter alia,* solicitation of brain -damaged patient in hospital room); In re Weaver, 281 P.3d 502 (Kan. 2012) (disbarment appropriate for lawyer's pattern of misconduct, including solicitation of loan modification clients by false advertising to vuhierable clients, many of whom were in dire financial straits); In re Naquin, 775

So. 2d 1060 (La. 2000) (disbarment for lawyer who improperly solicited an accident victim's widow as a client).

Absent any aggravating or mitigating circumstances, the *ABA Model Standards for Imposing Lawyer Sanctions* provide that:

> Standard 7:1. Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

Respondent has clearly committed violations of the Rules of Professional Conduct which caused serious injury and reflect adversely on his fitness as a lawyer. 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 severely sanctioned. A license to practice law is a revokable privilege; when the privilege is abused, the privilege should be revoked or suspended. Any sanction lighter than disbarment would not be consistent with the seriousness of the rule violations in this case, the multiple aggravating factors present, would not restore the public's confidence in the integrity of the legal profession or deter other lawyers from similar conduct, and would fail to protect the public from future harm. Such sanction is also necessary to restore the faith of the victim in this case and of the general public in the integrity of the legal profession.

V. RECOMMENDED SANCTIONS

For the reasons set forth herein, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board recommends the following sanctions:

A. That Respondent's law license be annulled; and,

B. Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

RESPECTFULLY SUBMITTED,

HEARING PANEL SUBCOMMITTEE
OF LAWYER DISCIPLINARY BOARD

Steven K. Nord, Esquire
Hearing Panel Subcommittee
Former Chairperson

1-29-2020
Date

Anne Werum Lambright, Esquire
Hearing Panel Subcommittee

2.04.2020
Date

Dr. K. Edward Grose
Hearing Panel Subcommittee
Layperson

2/6/2020
Date