IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

LAWYER DISCIPLINARY BOARD,

Petitioner,

v. **NO. 18-0101**

McGINNIS E. HATFIELD, JR.,

Respondent.

RESPONSE BRIEF OF RESPONDENT TO BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. STATEMENT OF THE CASE

A. NATURE OF PROCEEDINGS AND RECOMMENDATIONS OF THE HEARING PANEL SUBCOMMITTEE

Respondent, McGinnis E. Hatfield, Jr. (hereinafter "Respondent") generally agrees with the Board's summary of the proceedings but not its recommendation. Respondent notes that the Hearing Panel Subcommittee heard this matter June 14, 2018 and rendered its recommendation February 10, 2020 a year and almost 8 months later.

B. FINDINGS OF FACT

1. At the time of the events described in the Complaint and in the Sworn Statements and testimony of the Complainant BW (hereinafter ""BW") and Respondent Hatfield (hereinafter "Hatfield"), Hatfield was a 63-year-old divorced, alcoholic lawyer in undiagnosed poor health (within two months he would be hospitalized and in hospital and nursing care for the next year and two months as a Protected Person.)

2. BW was a married woman, mother of two children, estranged from and being divorced by her husband and pregnant through a relationship outside marriage (Bates 0000300 and Bates 0000312). (All Bates references are to the transcript of hearing of June 14, 2018). She was a stripper at the "Cherry Bomb", a "Gentlemen's Club" in Bluefield, Mercer County, West Virginia, and an occasional office worker.

3. Hatfield and BW had met twice prior to the events described in the testimony and materials

filed with the Hearing Panel Subcommittee (hereinafter HPS). The first was at the "Cherry Bomb", a so-called "Gentlemen's Club." While BW alleges not to remember lap dancing with Hatfield, she does admit he "probably gave her money. (Bates 000028, 000029). Hatfield and his affiant witness, Dr. Joseph M. Ascue, testify that this was a nude lap dance where BW sat in Hatfield's lap naked "dancing"" and for which she was paid. (Bates 000277, 000300) Their next, and last, in-person contact was at a Mexican restaurant in Bluefield (Bates 000033). BW apparently gave Hatfield her phone number and the calls complained of began.

4. There were a total of 34 calls between the parties, 18 from Hatfield to BW, and *16 from BW to Hatfield.* In only 9 of these calls did conversation of more than a minute ensue, and the longest - 9 minutes, *was made from BW to Hatfield* (Exhibit 24, Hearing of June 14 2018). Because of the importance of these calls made by BW to Hatfield this Exhibit is again attached to this Brief as Exhibit 1.

5. Although BW was a party to a divorce and had brief conversations with Hatfield concerning it, she never considered him her lawyer. (Bates 000035).

6. Hatfield did not receive or secure any pleadings from B.W, filed no notice of appearance, and never saw her at his office. Other than their exchange of money for sexual favors/contacts at the "Cherry Bomb" and a brief meeting at a Mexican Restaurant, they never met again.

7. At the times Hatfield and BW exchanged the 34 telephone calls in evidence, 18 from him, 16 from her, he and BW had a pre-existing sexual contact interaction, for which BW was paid.

8. BW never, in the calls she made to Hatfield or received from him, refused to talk to him, refused to return his call, or directed him not to call her again.

9. BW falsely swore in the verified Complaint to the Lawyer Disciplinary Committee, that

Hatfield had called her 60 times a day from mid-August to the date of the Complaint. At the hearing before the HPS, confronted with the phone records subpoenaed by Disciplinary Counsel, she claimed her kids were playing with her phone.

10. At some point between the last of the Hatfield-BW calls at issue on August 25, 2013 and her hand-delivery of her Complaint to the Disciplinary Board on August 25, 2013, BW retained private counsel to investigate a claim against Hatfield. (Bates 000002)

11. BW called back Hatfield multiple times, intending to record his calls, and was leading him on in those calls.

12. While Hatfield denied wanting to have sex with BW in his sworn statement, he acknowledged that was a misstatement at the June 14, 2018 hearing. His tone in his recorded statements is jocular and attempting to be persuasive, not threatening or harassing.

13. BW falsely claimed in her sworn Complaint that Hatfield left a business card in her door, and that he called her, alleging that he was "untouchable." These claims are notably absent from her testimony before the HPS and are further belied by her failure to preserve any tape of such an outrageous claim, or present the alleged card left at her door. Hatfield did not know where she lived.

14. BW provided no documentary or corroborative evidence of her alleged psychiatric consultations.

C. CONCLUSIONS OF LAW

1. Prior to any interaction between BW and Hatfield that could conceivably be called lawyer-potential client contact. Hatfield and BW had sexual contact, for which Hatfield had given BW money. West Virginia Code §61-8B-1(6) defines sexual contact as "... any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the next organs of

another person . . . for the purpose of gratifying the sexual desire of either party."

2. Substantial portions of BW's sworn testimony are false, specifically her claims that he called her 60 times a day from mid-August 2013 until he received the Lawyer Disciplinary Board Complaint in early September, that he claimed that he was "untouchable"(in an apparently unrecorded call) and that he had left a card in her door.

3. A secondary gain motivation on BW's part cannot be ruled out, in that she obviously leads him on in the only two conversations that actually occurred between them (the other three recorded conversations were recorded messages), the lengthiest conversation, of 9.0 minutes on August 15, 2013, is obviously the one recorded and transcribed in BW's sworn statement - Bates 000015-000020. BW made that call to Hatfield. Thereafter, BW retained civil counsel, prepared or had prepared a professionally typed Complaint, and hand delivered it several days after her last conversation with Hatfield.

4. No lawyer client relationship ever existed between Hatfield and BW.

5. BW may have been a potential client, but Hatfield at no point committed "coercion, duress, or harassment", as prohibited by Rule 7.3(b)(2). There is no question of coercion and duress- the plain English meaning of each of these terms requires an element of actual or threatened force, entirely absent here. This obvious consensual relationship between BW and Hatfield of a nude lap dance, a brief restaurant encounter, and a series of back-and- forth telephone calls cannot qualify as harassment because BW voluntarily and willingly consented to these contacts, continued to return Hatfield's calls and further independently called him. She gave him her private cell phone number; no point did she forbid him to call her.

6. The element of obvious voluntary consent to contact with Hatfield on BW's part also

negates any violation of Rule 8.4. Their relationship existed prior to any discussion of professional services (on Hatfield's part); he volunteered to help her in her bitter divorce if she wanted, but the main thrust of his comments was to prolong and intensify the existing relationship, not to become her attorney.

7. West Virginia is one of the states where naked touching "dances" in strip clubs is not considered to violate the law, even though it constitutes sexual contact and involved exchange of money for such favors. Here we have only a series of telephone calls between willing participants (although the motivations were different - a sexual relation on Hatfield's part; secondary gain on BW's) to further a pre-existing relationship. Hatfield offers help with her divorce, taking her out for dinner at a nice restaurant, "and give you some money and everything" (This last comment immediately follows his comment to her commiserating that she had only made six dollars at her recent strip dance.) The language may be offensive, but not astonishing between a stripper and her customer.

8. Hatfield's conduct did not rise to the criminal intent necessary to prove a case of solicitation for prostitution. It was a one-time suggestion, over the telephone, and must be seen as an attempt to further and intensify an existing relationship.

II. SUMMARY OF ARGUMENT

The findings of facts and conclusions of law set forth by the HPS of the Lawyer Disciplinary Board in its Report are based in large part upon its uncritical acceptance of the testimony, written and oral, of BW, whose credibility is belied by unquestionably false and exaggerated elements in her sworn written Complaint. Hatfield's conduct, shown by his frank admissions and by the two surreptitiously

recorded telephone calls transcribed, one made by Hatfield to BW, and one made by BW to Hatfield is not admirable, but it does not constitute "coercion, duress, or harassment", nor "conduct prejudicial to the administration of justice", and certainly does not constitute the commission of "...a criminal act..." as contemplated respectively by Rules of Professional Conduct 7.3 or 8.4. The recommended sanction of annulment is overly severe, in that the actions complained of were limited to several brief, private telephone calls between parties to a pre-existing sexual relationship, and caused no injury to the complainant BW.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

By previous Orders, this matter is scheduled for oral argument under Rule 19 of the Rules of Appellate Procedure for September 15, 2020.

IV. ARGUMENT

A. THE FACTUAL FINDINGS OF THE HPS ARE NOT SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE ON THE WHOLE ADJUDICATORY RECORD MADE BEFORE THE BOARD

The HPS has given undue deference and credulity to the oral testimony of the Complainant BW, entirely overlooking patent falsity in the sworn Complaint she hand-delivered to the Lawyer Disciplinary Board August 29, 2013, nearly five years before her oral testimony on June 14, 2018.

The HPS first finding of fact is an anodyne recitation of Hatfield's bar status. By its second finding of fact, the HPS begins *in medias res* with the allegation that BW represent her in a divorce

action. The HPS elides over the inconvenient facts that BW was a stripper at the "Cherry Bomb" in Bluefield and had performed for Hatfield as a lap dancer. A lap dance is a description of sexual contact between a naked dancer sitting front to front with a clothed patron in exchange for monetary favors. Thereafter, BW meets Hatfield again at a Mexican restaurant at a later time and there was an exchange of telephone numbers. Thus, there is a pre-existing relationship and a sexual one between the parties prior to any discussion of representation. The transcripts of the telephone calls between the parties contained in the record below show that Hatfield's interest was in the furtherance of the sexual relationship and discussion of possible representation in her already ongoing divorce proceeding was peripheral. Hatfield gave BW no legal advice of any kind except that she could go to the Courthouse and get forms. This Court has adopted and prescribed forms to be used by *pro se litigants,* and Hatfield's recommendation constitutes no legal advice. Hatfield did express his entire willingness to represent her if she would pay him or have sex with him, but he also offers to take her out to dinner at a nice restaurant and "give you some money and everything". It is clear that Hatfield was not solely using representation as an inducement for sex.

The HPS found "Respondent persisted in trying to get sexual favors from her in exchange for representation", apparently swayed by BW's sworn Compliant that he called her sixty (60) times a day from mid August, 2013 to the filing of her Complaint in late August, 2013. In fact, clearly shown by Exhibit 1 (and an Exhibit at the hearing) there were thirty-four (34) calls over seven (7) days, and BW made sixteen (16) of those calls when she clearly knew of Hatfield's interests in prolonging their sexual relationship- the second of the longest of the three calls which conversation occurred was made at 8:46 p.m. on August 13, 2013, being four (4) minutes, twenty-three (23) seconds. The total time the BW and Hatfield spent talking to each other in the Complaint of telephone calls was less than seventeen (17)

minutes. Disciplinary counsel inflates this brief interaction as "the record is clear that Respondent tried on multiple occasions to take advantage of the fact that the perspective client had young children and needed representation in her divorce". In fact, the record is clear that BW had obvious economic interests in a relationship with Hatfield and pursued that interest by making or returning sixteen (16) calls to him. It is not victim-shaming to observe that BW, through life circumstances independent of any interaction with Hatfield was being divorced and faced with loss of primary residential custodianship of the children of her failed marriage, and seeking whatever alternative that might present itself to her through Hatfield's foolishness.

HPS further found that Hatfield's actions made her feel horrible and disgusting and that he was attempting to solicit her into committing the act of prostitution. This testimony on BW's part is at best disingenuous. Prior to any interaction with Hatfield, BW's life choices had placed her in a position in exchanging sexual contact for money. Hatfield's offers to take her to a nice restaurant, give her money, help her with her divorce in exchange for sex are simply not criminal or prosecutable offenses under WV Code 61-8B-1(6) and the HPS bootstraps this brief encounter between willing adult individuals to a claim of criminal activity

HPS also found that "the situation with respondent prompted her to seek treatment from a psychiatrist". Without regard to BW's creditability problems as prescribed above, HPS accepted this statement without records or corroborative testimony, although HPS notes "she admitted that other factors also contributed to her seeking treatment", which is a considerable understatement for a person in her circumstances.

It would appear self evident that there is no element "coercion, duress and harassment", and thus no violation of Rule 7.3 (b)(2). BW willingly came, and continued to come to this situation without fear

or threat, but for other motivations; one cannot willingly, continually submit herself to even rude conversation and thereafter claim harassment.

It is further erroneous for the HPS to find that this conduct "... is prejudicial to the administration of justice" as prohibited by Rule 8.4 (d). This Rule clearly refers to a Court or formal legal relationship or environment, and not to a rule of conduct in all aspects of a lawyer's life.

B. THE HPS RECOMMENDED SANCTIONS OF ANNULMENT IS OVERLY SEVERE

This Disciplinary Counsel sites in her Brief 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 legal system.

To support this recommended sanction, HPS found that Hatfield "clearly committed violations o f the Rules of Professional Conduct which caused serious injury and reflect adversely on his fitness as a lawyer". As is shown above, there is no credible evidence of injury to BW except as to her feelings as a result of some sixteen (16) minutes of coarse conversation seven (7) years ago. To call this "serious injury" is abundant overstatement. As far as his fitness as a lawyer, Hatfield freely admitted and apologized for his language and has in fact been inactive as a lawyer, having not maintained his license by paying dues or attending CLE for almost two (2) years. He admits that his language should be the subject of a reprimand.

V. CONCLUSION

The undersigned on behalf of the Respondent, McGinnis E. Hatfield, Jr. respectfully prays that this Court will deny the relief being sought by the Lawyer Disciplinary Board and impose an appropriate sanction.

RESPECTFULLY SUBMITTED,

Respondent, McGinnis E. Hatfield, Jr.,

BY: _____

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