

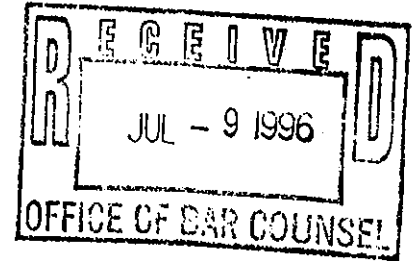
**STATE OF WEST VIRGINIA**

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 2nd day of July, 1996, the following order was made and entered:

**Lawyer Disciplinary Board,  
Complainant**

vs.) No. 22919

**Charles Walker Ferguson, IV, an active  
member of The West Virginia State Bar,  
Respondent**



On a former day, to-wit, June 28, 1996, came the Hearing Panel Subcommittee of the Lawyer Disciplinary Board, by David J. Romano, its chairman, pursuant to Rule 3.12, Rules of Lawyer Disciplinary Procedure, and presented to the Court a proposed stipulation between the parties for discipline of the respondent, Charles Walker Ferguson, IV, for his violation of Rule 1.16(a)(1), Rules of Professional Conduct, wherein respondent will (1) perform pro bono representation in six meaningful cases through the Judicare program or a similar program, within a period of one year, supplying the Hearing Panel Subcommittee with verification of the cases and of the dates of representation; and (2) reimburse the Lawyer Disciplinary Board for costs and expenses incurred in the investigation of this matter within sixty days of notice thereof.


Upon consideration whereof, the Court is of opinion to and doth hereby approve said stipulation between the parties. It is therefore ordered that the respondent (1) perform pro bono representation in six meaningful cases through the Judicare program or a similar program, within a period of one year of the entry of this order, supplying the Hearing Panel Subcommittee with verification of the cases and of

the dates of representation; and (2) reimburse the Lawyer Disciplinary Board for costs and expenses incurred in the investigation of this matter within sixty days of notice thereof. Justice Recht deemed himself disqualified and did not participate in the consideration or decision of this matter.

Service of an attested copy of this order shall constitute sufficient notice of the contents herein.

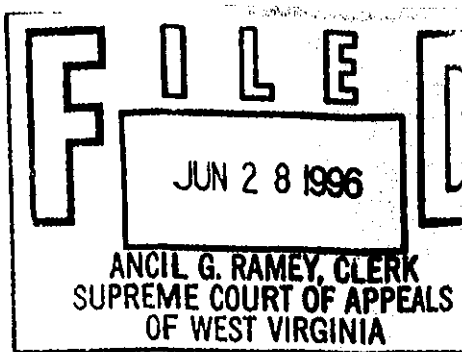
A True Copy

Attest:



Clerk, Supreme Court of Appeals

BEFORE THE COMMITTEE ON LEGAL ETHICS  
OF THE  
WEST VIRGINIA STATE BAR



IN RE: C. WALKER FERGUSON, IV, member  
of The West Virginia State Bar

I.D.NOS. 93-01-245

DECISION OF THE LAWYER DISCIPLINARY BOARD

This matter was brought on for hearing on December 13, 1995, after being duly matured and notice being given to all parties. At that time the Office of Disciplinary Counsel was represented by Chief Disciplinary Counsel, Sherri D. Goodman, and the Respondent, Charles Walker Ferguson, IV, was present in person and by his counsel David J. Lockwood.

After listening to several of the witnesses, the parties conferred and announced to the Subcommittee that an agreement had been reached with regard to the charges filed herein with respect to violations and recommended discipline. At that time the Subcommittee listened to the proposed stipulation of the parties and after considering the same, the Subcommittee was of the opinion that the proposed stipulation of the parties was fair and reasonable considering the interest of the Bar, the Respondent and the public. Accordingly, the stipulation of the Respondent admitting that there were violations of Rule 1.16(a)(1) of the Rules of Professional Conduct is accepted and made part of this Decision herein as Exhibit A. Further, the stipulation that the sanction to be imposed would be pro bono representation by the Respondent in six (6) meaningful cases referred from the Judicare pro bono program or referral from a legal services organization

including the Public Defenders Office<sup>1</sup> is likewise accepted by the Subcommittee.

It was further requested by the parties that the Subcommittee set forth in its Decision criteria for guidance to part-time prosecutors in this State and the potential for conflicts of interest. This request seemed appropriate because it was obvious to the Subcommittee that the Respondent had not specifically intended to violate Rule 1.16(a)(1), but that the violations had occurred through the Respondent's failure to appreciate the potential for conflicts of interest arising when a part-time prosecutor represents private litigants in domestic relations matters and for his failing to take remedial actions as promptly as practical.

The Subcommittee recognizes that the rules regarding conflict of interest as it relates to part-time prosecutors and the representation of private clients is both complex and varied. Two excellent articles which set forth the various problems which confront part-time prosecutors and how various jurisdictions have handled the same may be found in a very thorough article on this subject by Professor Richard H. Underwood of the University of Kentucky College of Law and an article by former Chairman of the West Virginia State Bar Committee on Legal Ethics John O. Kiser. Professor Underwood's article appears in the Kentucky Law Journal in Volume 81 Page 1 (1992-93) and Mr. Kiser's article is contained in the West Virginia Law Review Volume 79 Number 3, page 367

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<sup>1</sup>Respondent is no longer an assistant prosecuting attorney.

(1977). Both of these articles are excellent sources for any prosecutor who wishes to review the law in other jurisdictions and to find specific examples of how ethics committees and the courts have handled almost any type of situation. Professor Underwood's article alone contains more than 465 footnotes with numerous citations in each footnote.

The problem that confronted the Respondent in this case was that while engaged as a part-time prosecutor for Wayne County, West Virginia he also conducted a private practice which included representation of individuals in domestic relations matters. It is clear that one of the most fruitful areas for conflict of interest of a part-time prosecutor is where such part-time prosecutor attempts to have a domestic relations practice. This is true because domestic relations law often times results in conduct by one of the parties which eventually involves the local prosecuting attorney's office which thus creates the conflict of interest. State ex rel. Bailey v. Facemire, 413 S.E.2d 183 (W.Va. 1991); State ex rel. McClanahan v. Hamilton, 430 S.E.2d 569 (W.Va. 1993). If there is any area of private practice where a part-time prosecutor should pause and consider carefully before accepting a private client, it is in the area of domestic relations practice. Not only is the potential ripe for future problems to evolve between the spouses which will require participation by the prosecuting attorney's office, but without a thorough debriefing and record check, a part-time prosecutor may be violating Rule 1.16(a)(1) without actually knowing it.

Justice Workman set forth in the Facemire case the requirement that all potential or actual conflicts of interest be identified and that reasonable efforts be undertaken to make this determination. Those reasonable efforts were described by Justice Workman as entailing "a review of pertinent records in the prosecuting attorney's office and other court records to ascertain whether a party to the subject or prospective litigation has filed a petition pursuant to the Prevention of Domestic Violence Act...[or] a petition alleging failure to pay child support, or has initiated any other civil or criminal proceeding which has the potential of involving the prosecutor's office for enforcement purposes." Id Syll. Pt. 2. Such a review is a daunting task and not one that most part-time prosecutors would want to undertake before accepting such representation. Perhaps part-time prosecutors engaging in this type of private representation should prepare a questionnaire to be completed by the prospective client before the initial interview. Such a questionnaire would support one's efforts of reasonable investigation as required by Facemire. However, if such reasonable investigation is not made prior to accepting such representation, and a conflict arises because of some conduct which has occurred prior to the acceptance of such representation, the Lawyer Disciplinary Board may be justified in viewing such conduct by the part-time prosecutor as reckless. Thus rising such conduct to a higher level indicating a greater degree of punishment.

The rationale for such policy is obvious as it is to no one's interest, especially the public's, if, in fact, a married couple are assaulting each other or engaging in other unlawful conduct and the public officer charged with criminally pursuing such matters undertakes an attorney/client relationship with one of the offending parties. In fact, it is problematic whether a part-time prosecutor should engage in any confidential communications with a prospective client until he or she has at least initially satisfied him or herself that there has been no conduct by either spouse which would or could involve the prosecuting attorney's office in a criminal matter or some other enforcement proceeding or otherwise.

Based upon a review of the case law and the scholarly articles, all of which interpret the Rules of Professional Conduct, general principles can be set forth relating to this subject matter.

First, there are competing interests at stake, such as the effective representation of the public in matters reposed to the prosecuting attorney's office, and the interest in attracting competent attorneys to work as prosecutors or assistant prosecutors, especially in areas where monetary restraints preclude having full-time prosecutors and their staffs. However, even understanding this, it must be reiterated that the duties of the prosecutor or an assistant prosecutor are paramount and take precedence over any private employment and thus, "any private employment which is in any way inconsistent with or antagonistic to

the prosecuting attorney's statutorily imposed responsibility is improper and should be avoided. The [prosecuting or assistant prosecuting] attorney must avoid actual conflicts or those in which the interests may, with some reasonable degree of probability, become conflicting." Legal Ethics Inquiry 86-3. Although there are no doubt domestic relations matters which would not demonstrate "some reasonable degree of probability" of involving the prosecutor's office and thus becoming a conflict, it is obvious that many do impose such risks and it is the obligation of the prosecutor to make this initial determination before accepting any private representation thus the potential for problems is real. Whether the elected prosecuting attorneys in our State will decide to prohibit their assistants from engaging in domestic relations practice is a matter left for them to decide on a county to county basis considering the difficulties that will arise if in fact a conflict presents itself after the representation has been accepted.

Secondly, if a conflict arises after private employment has been accepted by either the elected prosecuting attorney or any assistant then withdrawal from the private client's legal matter is mandatory. For instance, if a potential criminal matter is raised in a civil matter which the prosecutor or any assistant is representing the private litigant, then withdrawal from the civil matter by the prosecutor or the assistant is required. Whether the prosecutor's office is also disqualified from handling the criminal case or other matter which the office is statutorily required to



handle that gave rise to the conflict, must be determined by reference to other Rules of Professional Conduct with particular attention to Rule 1.10 and 1.11. Whether screening is appropriate under any particular circumstances is a matter to be determined on a case by case basis. However, Legal Ethics Inquiry 92-01 determined that if the elected prosecutor him or herself is disqualified for any reason then that disqualification is imputed to the entire office. The pertinent portion of that Legal Ethics Inquiry states as follows:

"In the interest of fairness to the defendant and public confidence in the impartiality of a prosecution, the Committee believes that when a [elected or appointed] Prosecuting Attorney is disqualified for any reason, that disqualification is imputed to the entire office. When an assistant is disqualified for any reason, he/she may be screened from participation in the matter, and other assistants or the Prosecuting Attorney may represent the State."

Thus if the prosecuting attorney who is permitted to engage in private practice, accepts a private client and it later develops that a conflict of interest arises which requires withdrawal by the prosecutor then that prosecutor's entire office is disqualified from prosecuting the criminal matter or otherwise representing the interests of the State because of the supervisory authority of the prosecutor over all of his or her assistants.

Lastly, whether a conflict of interest arises with the prosecutor's public responsibilities as it relates to any private client must still be determined based upon the particular facts of any given situation when the matter giving rise to the conflict may be unrelated to the current private representation. For instance,

where a part-time assistant prosecutor is representing a private client in some oil and gas property work and that client is arrested for DUI, obviously the assistant part-time prosecutor could not prosecute his private client for the DUI charge but whether the assistant must withdraw from the oil and gas property matter would depend on an application of the criteria set forth in the McClanahan case. However, if the oil and gas client is represented by the elected or appointed prosecutor there would be the requirement that a special prosecutor from another county investigate and prosecute the case.

Finally, the prosecuting attorney in each county, whether that prosecutor be full-time or part-time under the law of this State, should establish guidelines within his or her office to make the assistants aware of these ethical obligations if in fact the assistants are going to be permitted to engage in the private practice of law while also representing the public interest as assistant prosecutors.

Obviously not all factual situations can be explored in this Decision but the criteria set forth herein may be of some benefit to prosecuting attorneys and their staffs throughout the State. In the proceeding involved in this case it was disputed as to whether there had been adequate dissemination to prosecuting attorneys and their staff throughout the State of the Lawyer Disciplinary Counsel's position with respect to conflicts of interest. Although the Facemire case was obviously available to any prosecutor and his or her staff, there was some argument and

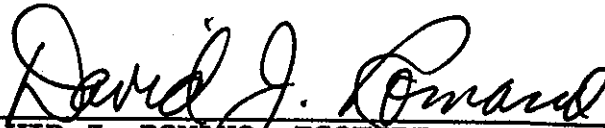
testimony with respect to whether certain seminars presented to the Prosecuting Attorneys Association were attended by the Respondent. Perhaps it would be of some benefit to circulate this Decision so that the references cited herein would be available to all prosecutors and their assistants.

Accordingly, it is the decision of the Subcommittee to accept the stipulation of the parties and to therefore order that with respect to the Respondent Charles Walker Ferguson, IV, that the committee finds that he did violate Rule 1.16(a)(1) of the Rules of Professional Conduct by his representation of domestic relations clients after a conflict of interest had arisen between the private domestic relations client and the Respondent in review of his duties as a public prosecutor. It is further ordered that the appropriate sanction for this violation of the Rules of Professional Conduct, which the Subcommittee does not believe was intentional, is that the Respondent undertake on a pro bono basis six (6) meaningful cases through the Judicare program or a referral from a legal services organization including the Public Defenders Office. These pro bono representations should be accomplished within one year from the date of this Decision and any pro bono cases undertaken or completed since the date of this hearing shall be considered towards completion of this part of the sanction.


It is further ordered that all costs of this disciplinary proceeding be assessed against the Respondent and be paid within sixty days after the Respondent receives the same. Disciplinary Counsel will submit a certificate of expenses detailing such items

and if there is any objection such objection should be made to the Subcommittee chairman within fifteen days after receipt of the same.


This decision is being filed with the Clerk of the West Virginia Supreme Court of Appeals and it is requested that he send a certified copy to all counsel of record and to the Respondent.

  
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DAVID J. ROMANO, ESQUIRE  
Chairman, Hearing Panel Subcommittee  
Lawyer Disciplinary Board

DATE: June 26, 1996

  
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ELIZABETH ROSE, ESQUIRE  
Hearing Panel Subcommittee  
Lawyer Disciplinary Board

DATE: June 13, 1996

  
\_\_\_\_\_  
PRISCILLA HADEN  
Hearing Panel Subcommittee  
Lawyer Disciplinary Board

DATE: June 18, 1996

**BEFORE THE LAWYER DISCIPLINARY BOARD  
OF THE STATE OF WEST VIRGINIA**

**RE: CHARLES WALKER FERGUSON, IV, a member of  
The West Virginia State Bar**

**I.D. No. 93-02-329  
94-02-398**

**STIPULATIONS OF THE PARTIES**

The Respondent, Charles Walker Ferguson, IV, in person and by counsel, David J. Lockwood, and the Office of Disciplinary Counsel, by Sherri D. Goodman, do hereby stipulate to the following:

1. There were violations by Respondent of Rule 1.16(a)(1) of the Rules of Professional Conduct by his representation of domestic relations clients in violation of the holding of *State ex rel. Bailey v. Facemire*, 186 W.Va. 528, 413 S.E.2d 183 (1991). Rule 1.16(a)(1) states:

**Rule 1.16 Declining or Terminating Representation**

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

2. As a sanction, Respondent will undertake *pro bono* representation in six meaningful cases through the Judicare program, Pro Bono program or referral from a legal services organization, including the Public Defender's Office. This representation should be accomplished within one year, if possible. For purposes of this stipulation, representation at the family law master and trial court level shall not require representation before the Supreme Court. Respondent will provide the Hearing Panel Subcommittee with verification of the cases undertaken and the dates of representation.

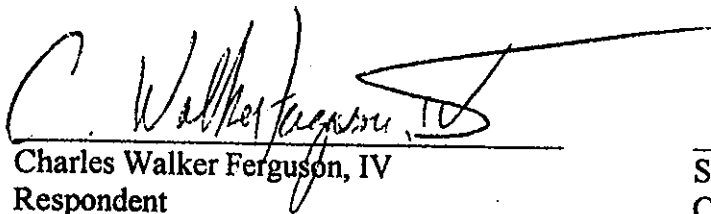
Exhibit


A

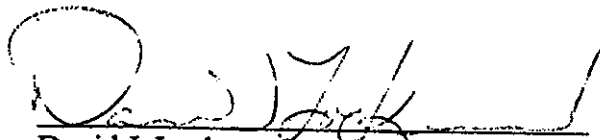
3. Respondent will pay the costs of the disciplinary proceeding. The Office of Disciplinary Counsel will submit a certificate of expenses.

Respondents states that the stipulated violations were unintentional and not knowingly done in violation of *State ex rel. Bailey v. Facemire*.

The parties understand that the Hearing Panel Subcommittee will submit a recommendation to the Supreme Court of Appeals, attaching these stipulations. The Supreme Court has the power to accept or reject the recommendation and these stipulations.

  
Charles Walker Ferguson, IV  
Respondent

  
Sherri D. Goodman  
Office of Disciplinary Counsel

  
David J. Lockwood,  
Counsel for Respondent