

**STATE OF WEST VIRGINIA**

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th day of February, 1995, the following order was made and entered:

**Lawyer Disciplinary Board, Complainant**

vs.) No. 22521

**Marcia L. Ashdown, a member of The West  
Virginia State Bar, Respondent**

**AND**

**Lawyer Disciplinary Board, Complainant**

vs.) No. 22522

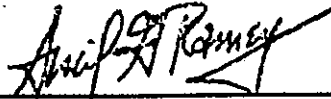
**Susan B. Tucker, a member of The West  
Virginia State Bar, Respondent**

On a former day, to-wit, February 8, 1995, came the Hearing Panel Subcommittee of the Lawyer Disciplinary Board, by R. Kemp Morton, its chairperson, and presented to the Court its written recommended dispositions in the above-captioned cases, recommending that the charges filed against the respondents, Marcia L. Ashdown and Susan B. Tucker, be dismissed, and that no costs be assessed against the respondents.

Upon consideration whereof, the Court is of opinion to and doth hereby adopt the written recommended dispositions of the Hearing Panel Subcommittee of the Lawyer Disciplinary Board. It is therefore ordered that the charges filed against the respondents in the above-captioned cases be, and they hereby are, dismissed. It is further ordered that no costs be assessed against the respondents. Chief Justice Neely and Justice Brotherton absent. Judge Fred L. Fox, II, sitting by temporary assignment.

A True Copy

Attest:



Clerk, Supreme Court of Appeals

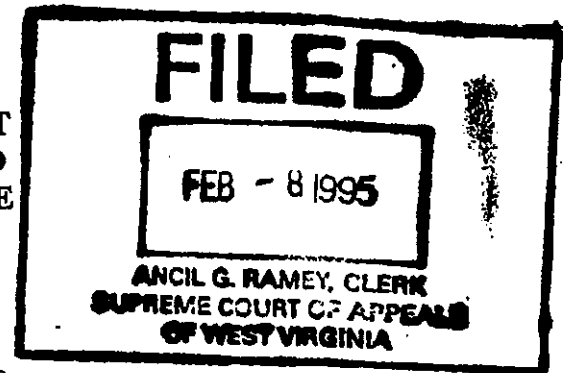
**BEFORE THE LAWYER DISCIPLINARY BOARD  
OF THE WEST VIRGINIA STATE BAR**

**IN RE: SUSAN B. TUCKER  
MARCIA L. ASHDOWN  
Members of the West Virginia State Bar**

**I.D. Nos. 94-02-072  
94-02-073**

**AGREED FINDINGS OF FACT  
CONCLUSIONS OF LAW AND  
RECOMMENDED DISCIPLINE**

**PROCEEDINGS**



Statements of Charges were issued against Susan B. Tucker and Marcia L. Ashdown, Respondents herein, alleging violations of Rule 3.5(b) of the Rules of Professional Conduct. Statements of Charges were mailed to Respondents and filed with the West Virginia Supreme Court of Appeals on September 23, 1994. A hearing was duly noticed and took place on December 16, 1994, in Morgantown, West Virginia. Present at the hearing were the Hearing Panel Subcommittee members: R. Kemp Morton, Esquire, Chairman; C. Blaine Myers, Esquire; and Priscilla Haden, Laymember. Also in attendance were Sherri D. Goodman, Esquire, Lawyer Disciplinary Counsel; Respondents in person and by and through counsel, Professor Patrick McGinley, Esquire. A stipulation of fact was entered into between the parties and filed as a part of the record, whereupon counsel for the Lawyer Disciplinary Board rested. Respondents testified in person and called witnesses upon their behalf. Judge Ed Friend was allowed to testify by telephone.

## FINDINGS OF FACT

1. Respondent Susan B. Tucker is the duly elected Prosecuting Attorney of Monongalia County, West Virginia, and a member of The West Virginia State Bar.
2. Respondent Marcia L. Ashdown is an Assistant Prosecuting Attorney of Monongalia County, West Virginia, and a member of The West Virginia State Bar.
3. Both Respondents are subject to the disciplinary jurisdiction of the Lawyer Disciplinary Board and the Supreme Court of Appeals of West Virginia.
4. Respondents Ashdown and Tucker represented the State in a criminal prosecution entitled State of West Virginia v. Jack E. Hawkins, Felony No. 93-F-13 (hereafter "Hawkins"), before the Circuit Court of Monongalia County.
5. The defendant in Hawkins was charged with three counts of First Degree Sexual Assault.
6. The nine (9) day jury trial held in Hawkins was presided over by the Honorable Larry V. Starcher.
7. Closing arguments in Hawkins were scheduled for the morning of December 16, 1993.
8. Linda Gutsell, an attorney unconnected with the pending criminal matter, came to Judge Starcher's office on December 16, 1993, at approximately 7:55 A.M. for a prearranged meeting on an unrelated matter. Judge Starcher met Ms. Gutsell at the door to his secretary's office and asked her to be seated in that office while they waited for other

Individuals to arrive for the meeting. Judge Starcher went into his chambers in the adjoining room, leaving open the door between his office and his secretary's office.

9. Within a couple of minutes Ms. Gutsell heard Judge Starcher's voice, but she did not immediately listen to what he was saying.

10. After a couple of moments, Ms. Gutsell realized that she was overhearing a telephone conversation.

11. Ms. Gutsell realized that the conversation she was hearing was a result of Judge Starcher's placing of a telephone call to the Office of the Prosecuting Attorney.

12. The telephone call was received by the Prosecutor's Office receptionist; the receptionist directed the call to Ms. Ashdown's office where she and Ms. Tucker were located. The Judge's call was placed on a speaker phone.

13. The open door to Judge Starcher's chambers allowed Attorney Gutsell to overhear the Judge state to Respondents that he wanted to share some thoughts about Respondent Ashdown's closing arguments. The Judge said that they should have as many of the victims and witnesses as possible in the courtroom sitting where the jurors could see them, since defense counsel would have the defendant's family present. He further suggested that they should frequently use the term "serial rapist". He stated that Ms. Ashdown should be careful about how she modulated her voice during the course of the closing arguments. He told her that at some point she should step out and get closer to the jury and speak in a very soft, slow voice and tell them why they should not buy certain points that defense counsel would be sure to make in closing. At this point, there was a knock on the door, and Ms. Gutsell opened it and admitted to the office individuals who were there to attend the

Scheduled eight (8) o'clock, A.M. meeting. At this time Ms. Gutsell ceased to overhear Judge Starcher's telephone conversation.

14. Within a few minutes after the two (2) individuals were admitted by Ms. Gutsell to the office of Judge Starcher's secretary, the three (3) were asked by the Judge to come into his office.

15. On the basis of the portion of Judge Starcher's statements that she had overhear, Linda Gutsell reported the matter to defense counsel, the Judicial Investigation Commission and the Investigative Panel of the Lawyer Disciplinary Board.

16. The telephone call made by Judge Starcher was made ex parte, without the prior knowledge of defense counsel or the Respondents.

17. The defendant was convicted of all counts charged.

18. Subsequently, upon motion by defense counsel, Judge Starcher recused himself from the case, and a Special Judge granted the defendant a new trial. The Special Judge's order did not specify reasons for the grant of a new trial.

19. The Respondents did not initiate the telephone call with the Court, they only listened to what the Court was recommending and did not solicit any of the advice or recommendations made by the Court, nor were they influenced by said recommendations.

20. The Respondents enjoy a reputation for being honest, truthful, ethical and are perceived by members of the judiciary and the Monongalia County Bar to discharge the duties of their respective offices in adherence to the highest ethical standards. (Tr., pp. 27-29; Respondents' Exhibits 1, 2, and 3).

21. In the opinion of a member of the Monongalia County Bar experienced in the defense of criminal cases, the Respondents were not guilty of any misconduct in the trial of the criminal matter which is the subject of this proceeding and Respondents have always exhibited, in their actions, the duty of fairness required of prosecuting attorneys. (Tr., pp. 27-29).

### CONCLUSIONS OF LAW

The Office of Disciplinary Counsel has the burden of proving the charges contained in the complaint by full, preponderating and clear evidence. *Committee on Legal Ethics v. Moore*, 411 S.E.2d 452 (W.Va. 1991); *Committee on Legal Ethics v. Pence*, 216 S.E.2d 236 (W.Va. 1975); *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987); and *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).

The Respondents did not engage in ex parte communications with the Court. The Respondents did not initiate the telephone call in question, they only listened and did not solicit any advice or recommendations, nor were they influenced by the Court's comments. The Office of Disciplinary Counsel has not shown the Respondents communicated anything to the Court, in an attempt to influence the Court's actions on a pending matter.

Rule 3.5(b) provides, in pertinent part:

"A lawyer shall not communicate ex parte with a judge . . . except as permitted by law."

Under the facts contained in the record, in this case, there have been no ex parte communications by the Respondents to the Court, in violation of Rule 3.5(b).

The Office of Disciplinary Counsel has not proved that the Respondents violated the provisions of Rule 3.5(b) by full, clear and preponderating evidence. *Committee on Legal Ethics v. Daniel*, 160 W.Va. 588, 235 S.E.2d 369 (1977).

The Subcommittee hereby recommends to the West Virginia Supreme Court that these matters by dismissed without costs being awarded against the Respondents.

1/30/95  
Date

R. Kemp Morton  
R. Kemp Morton, Chairperson  
Hearing Panel Subcommittee

1/31/95  
Date

C. Blaine Myers  
C. Blaine Myers, Esquire  
Member Hearing Panel Subcommittee

2/13/95  
Date

Priscilla Haden  
Priscilla Haden  
Member Hearing Panel Subcommittee