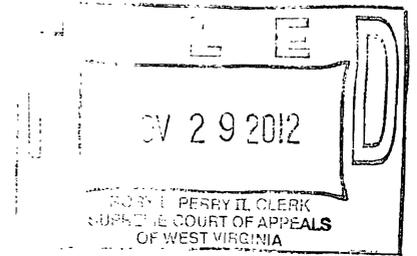


IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA



NO. 12-1410

STATE EX OF WEST VIRGINIA REL. OLEN L. YORK, III,

Petitioner,

v.

**WEST VIRGINIA OFFICE OF DISCIPLINARY COUNSEL, and
WEST VIRGINIA LAWYER DISCIPLINARY BOARD,**

Respondents.

PETITION FOR A WRIT OF PROHIBITION

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**WEST VIRGINIA OFFICE OF DISCIPLINARY COUNSEL, and
WEST VIRGINIA LAWYER DISCIPLINARY BOARD,**

Respondents.

PETITION FOR A WRIT OF PROHIBITION

I.

Question presented

To the Honorable Justices of the

West Virginia Supreme Court of Appeals:

Are Respondents without jurisdiction, under Rule 1 of the West Virginia Rules of Lawyer Discipline and under federal preemption principles, to prosecute alleged violations of the West Virginia Code of Professional Responsibility against a patent lawyer, who is not a member of the West Virginia State Bar, but who has been admitted to and exclusively practiced law before the United States Patent and Trademark Office (USPTO) and never appeared nor prepared pleadings or documents to be filed in any West Virginia court, tribunal or body?

II.

Statement of the case

Counsel for Petitioner Olen L. York, III, and Respondents West Virginia Office of Disciplinary Counsel and West Virginia Lawyer Disciplinary Board stipulated to the following facts:

1. In July, 2002, Petitioner was admitted as a licensed member of the Ohio Bar after graduating from the University of Akron Law School,¹ where he also received an LLM degree in intellectual property.
2. In January, 2003, Petitioner was admitted to practice law before the United States Patent and Trademark Office (USPTO).²
3. The USPTO is a federal agency located in Alexandria, Virginia, within the United States Department of Commerce, dealing with patents and trademarks.
4. Petitioner is not and has never been a member of the West Virginia State Bar.
5. Petitioner is a resident of Milton, West Virginia.
6. At the time the patent and trademark work was performed by Petitioner, as alleged in the Statement of Charges, Petitioner was associated with the Waters Law Group as an independent contractor, according to the Complainant Robert Waters, and Petitioner worked out of the Huntington, West Virginia office.
7. While associated with the Waters Law Group, Petitioner exclusively handled patent and trademark issues before the USPTO, representing clients from Kentucky, Ohio, Texas, California, and West Virginia, and he never appeared in any West Virginia court. (Joint App. 1-2).

¹Petitioner graduated law school in 2001.

²Petitioner obtained his masters in intellectual property in 2005.

On September 24, 2012, a Statement of Charges was issued against Petitioner, based upon a complaint initiated by Robert Waters, the head of the Waters Law Group. (Joint App. 6-12). These charges arise out of a dispute between Mr. Waters and Petitioner over fees earned by Petitioner for work he had performed while associated with the Waters Law Group. In this Statement, it is alleged Petitioner left the Waters Law Group in July, 2009, to be employed by a Charleston, West Virginia law firm, and that Petitioner personally received payments for legal work he had performed for two different patent clients for whom he had represented before the USPTO while he was associated with the Waters Law Group. (Joint App. 7-8). One patent client paid Petitioner \$1,000 and the other patent client paid Petitioner \$3,300. This money was deposited in Petitioner's personal banking account. (*Id.*).

In the Statement, it is alleged that Petitioner violated Rule 1.15 of the Rules of Professional Conduct for failing to have a separate client account, failing to notify the Waters Law Group of money received by a client, and failing to have an IOLTA account. (Joint App. 9-11). Petitioner also allegedly violated Rule 8.4 for commingling, misappropriating, and converting funds for his own use. (Joint App. 11).³ It is not disputed the allegations filed against Petitioner are based upon actions he took in connection with his representation of two patent clients, pursuant to his admission to practice before the USPTO.

³For purposes of this **PETITION** addressing this jurisdictional issue, counsel for Petitioner and Respondents were able to agree to the contents of the attached **JOINT APPENDIX**. Petitioner has not included in this record facts and evidence refuting the substance of these allegations or supporting any defenses he has against these charges. While Petitioner does deny he committed any acts in violation of the Code of Professional Responsibility, those issues need only be addressed in the event this Court determines Respondents have jurisdiction to prosecute these charges.

In accordance with the West Virginia Rules of Lawyer Disciplinary Procedure, a schedule was approved setting a pretrial and evidentiary hearing. However, during a telephonic hearing held on October 31, 2012, the parties agreed that this jurisdictional issue needed to be resolved before the parties engaged in any further proceedings. As a result, all proceedings in this case were continued generally until the present matter is resolved by this Court. (Joint App. 19-20).

Based upon the foregoing facts, Petitioner respectfully files this **PETITION FOR WRIT OF PROHIBITION**, requesting that this Court issue a rule to show cause against Respondents West Virginia Office of Disciplinary Counsel and West Virginia Lawyer Disciplinary Board, asking them to show cause why a writ of prohibition should not be granted, ordering Respondents immediately to dismiss the Statement of Charges issued against him because Respondent lacks jurisdiction to prosecute these ethics charges.

III.

Summary of argument

A petition for a writ of prohibition against Respondents is the appropriate remedy in this case based on the fact that Respondents lack jurisdiction to prosecute ethics charges against Petitioner, who is not a member of the West Virginia State Bar and whose legal practice was limited to patent and trademark matters before the USPTO. Rule 1, West Virginia Rules of Disciplinary Procedure; *Lawyer Disciplinary Board v. Allen*, 198 W.Va. 18, 479 S.E.2d 317 (1996).

When the regulation of the practice of law by a state court conflicts with federal courts, the state court regulation is preempted by federal law, pursuant to the Supremacy Clause of the United States Constitution. In this case, because Petitioner was authorized by the USPTO to represent clients before that federal agency, he was authorized to take whatever actions were necessary to

represent his clients, even if such actions occurred in West Virginia. To hold otherwise would unnecessarily burden both the bar and the agencies themselves, would impact the availability to the public of lawyers admitted to practice law before federal courts and agencies, and would be preempted by federal law under the Supremacy Clause. Article VI, Section 2 of the United States Constitution; *Sperry v. Florida*, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963).

The Court should consider adopting ABA Model Rule 5.5, which helps to clarify the situation where a lawyer is involved in a multijurisdictional practice while not being admitted to practice law in the state where he or she resides.⁴

IV.

Statement regarding oral argument and decision

While the issue raised in this case is well settled, based upon decisions by the United States Supreme Court as well as many other jurisdictions, this Court has not yet addressed this issue. Thus, due to the novelty of this dispositive jurisdictional issue, Petitioner requests, at a minimum, Rule 19 oral argument in this matter.

V.

Argument

A.

This Court has the exclusive authority to define, supervise, regulate, and control the practice of law within West Virginia courts

⁴It could be the Court presently is considering the adoption of ABA Model Rule 5.5 at this time. However, the Court's proposed changes to the West Virginia Code of Professional Conduct have not yet been made public. This case illustrates the utility of this rule and demonstrates how it is needed to clarify the status of lawyers who are admitted to practice law in a federal court or agency and who live and work in West Virginia, but who are not members of the West Virginia State Bar.

Petitioner is not and has never been a member of the West Virginia State Bar and has never appeared before nor prepared pleadings or documents to be filed in any West Virginia court, tribunal or body. However, as a lawyer admitted to practice before the USPTO, the federal agency responsible for administering patents, Petitioner is required to abide by the Canons and Disciplinary Rules set out in 37 CFR 10.20, *et seq.* Furthermore, in connection with his admission to practice before the USPTO, Petitioner is authorized by that federal agency to take whatever actions are necessary to represent a client before that entity, including meeting with clients, drafting appropriate pleadings, and otherwise doing what is necessary to promote the client's interests in pursuing a patent.

In this case, Respondents are attempting to expand its authority to assert jurisdiction over Petitioner, who is authorized by the USPTO to practice patent law, but who neither is a member of the West Virginia State Bar nor practices law in any West Virginia court. Respondents' attempt to impact Petitioner's ability to practice law directly contradicts the authority he has been granted by the USPTO and thus, is preempted by federal law. Consequently, Petitioner respectfully submits the appropriate remedy under these facts is for this Court to issue a writ of prohibition against Respondents, prohibiting them from exercising jurisdiction over Petitioner, whose actions are authorized by his admission to practice law before the USPTO.

This Court has exercised its authority to grant a rule to show cause and writ of prohibition against Respondents or their predecessors when it was determined Respondents either had exceeded their jurisdiction or otherwise found such relief was appropriate. In the Syllabus of *State ex rel. Scales v. Committee on Legal Ethics*, 191 W.Va. 507, 446 S.E.2d 729 (1994)(per curiam), this Court held:

"In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as

appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." Syllabus Point 1, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979).

It cannot be disputed this Court has the exclusive authority to regulate the practice of law in West Virginia courts, as explained in *State ex rel. Partain v. Oxley*, 159 W.Va. 805, 815, 227 S.E.2d 314, 320 (1976):

We start with the proposition that this Court clearly has the authority to deal with the question of whether attorneys will or will not be required to provide service under appointment. **As the highest judicial body in this State, this Court has the inherent power to define, supervise, regulate and control the practice of law within West Virginia.** This power exists both inherently and by specific recognition in our Constitution and statutes. *W. Va. State Bar v. Graziani*, *W. Va.* , 200 S.E.2d 353 (1973); *W. Va. State Bar v. Earley*, 144 W. Va. 504, 109 S.E.2d 420 (1959). *See also*, Article VIII, § 3 of the Constitution of West Virginia and, W. Va. Code 51-1-4a, as amended. (Emphasis added).

To implement this Court's regulation of the practice of law in this State, this Court adopted the West Virginia Rules of Lawyer Disciplinary Procedure and, in particular, defined the jurisdiction of Respondents in Rule 1, which provides, in relevant part:

Every member of the legal profession shall observe the highest standards of professional conduct. In furtherance of this goal, the Supreme Court of Appeals does hereby establish a Lawyer Disciplinary Board [Board] to investigate complaints of violations of the Rules of Professional Conduct promulgated by the Supreme Court of Appeals to govern the professional conduct of those admitted to the practice of law in West Virginia or **any individual admitted to the practice of law in another jurisdiction who engaged in the practice of law in West Virginia** and to take appropriate action in accordance with the provisions of the Rules of Lawyer Disciplinary Procedure. (Emphasis added).

When a lawyer is a member of the West Virginia State Bar, there is no question Respondents have jurisdiction to investigate and prosecute complaints of unprofessional conduct against such a lawyer. For example, in *Lawyer Disciplinary Board v. Smoot*, 228 W.Va. 1, 716 S.E.2d 491 (2010), although this Court sanctioned the lawyer for actions committed before a federal regulatory agency, the lawyer actually was a member of the West Virginia State Bar.⁵ However, when a lawyer is not a member of the West Virginia State Bar, as in the present case, Respondents' jurisdiction only reaches those lawyers admitted to practice law in another jurisdiction who engage "in the practice of law in West Virginia."

The Court has not had many cases addressing the extent of this jurisdiction over out of state lawyers. In *Lawyer Disciplinary Board v. Allen*, 198 W.Va. 18, 479 S.E.2d 317 (1996), Respondents filed ethics charges against several out of state lawyers, who were not members of the West Virginia State Bar, but who allegedly had solicited clients from West Virginia for cases that could have been filed in this State. In Syllabus Point 2, this Court held:

A lawyer who initially contacts a prospective client who is located in West Virginia regarding a cause of action that may be initiated in West Virginia courts is subject to discipline in this State if he or she violates the West Virginia Rules of Professional Conduct with respect to such prospective client, even if the conduct constituting a violation occurs outside of our State.

Allen explicitly recognized that for Respondents to have jurisdiction over the out of state lawyers involved in that case, factually it had to be shown that a potential claim **was going to be initiated in West Virginia**. Clearly, *Allen* is distinguishable from the present case because Petitioner never solicited any West Virginia clients regarding any cause of action **that would have**

⁵In *Smoot*, in addition to the distinction that Mr. Smoot was a member of the West Virginia State Bar where here Petitioner is not, it does not appear from the decision that any issue of federal preemption, discussed in the next section of this **PETITION**, was raised.

been filed in West Virginia. Petitioner’s specialized practice was limited to drafting and prosecuting patent and trademark applications, as well as patent appeals, and trademark cancellation proceedings, all before the USPTO.⁶ When Petitioner appeared in United States District Courts in California and Florida, he first was admitted *pro hac vice* in accordance with the applicable rules for those federal courts. At no time did Petitioner actually or intend to practice law in any West Virginia court.⁷

Thus, in the event this Court continues to interpret Rule 1 consistent with its holding in *Allen*, then jurisdiction can be maintained over a lawyer, who is not a member of the West Virginia State Bar, only where such lawyer takes actions in West Virginia constituting the practice of law in connection with a case that may be initiated in a West Virginia court or tribunal. Since Petitioner never took any action in West Virginia constituting the practice of law, which could have been made a part of an action before a West Virginia court or tribunal, Respondents have no jurisdiction to pursue the pending ethics charges against him.

⁶Petitioner also notes *Allen* was decided under Article VI, §4 of the West Virginia State Bar By-Laws, which used the phrase “regularly engaged in the practice of law.” Article VI was superseded in 1994 by the West Virginia Rules of Lawyer Disciplinary Procedure. While Rule 1 of the West Virginia Rules of Lawyer Disciplinary Procedure does broaden Respondents’ jurisdiction from its predecessor, Petitioner respectfully submits this Court’s holding in *Allen*, limiting the practice of law to West Virginia courts, is controlling.

⁷If Petitioner or any other lawyer admitted to the bar of another state wanted to appear “in a particular action, suit, proceeding or other matter in any court of this State or before any judge, tribunal or body of this State,” then the *pro hac vice* process outlined in Rule 8.0 of the West Virginia Rules for Admission to the Practice of Law would be triggered. Once again, *pro hac vice* is only applicable to a lawyer admitted to the bar in another state where such lawyer seeks to appear either in a West Virginia court or before any West Virginia judge, tribunal, or body. Because Petitioner’s law practice was limited to the USPTO, which is not a West Virginia court, tribunal, or body, this *pro hac vice* rule was inapplicable to that practice.

B.

Under Supremacy Clause, federal law preempts any conflicting state law regulation of the practice of law

While this Court has the exclusive authority to define, supervise, regulate and control the practice of law within West Virginia courts, the practice of law also is regulated by federal courts. When the regulation of the practice of law by a state court conflicts with federal courts, the state court regulation is preempted by federal law, pursuant to the Supremacy Clause of the United States Constitution.⁸ While it is not directly on point, in *Rehmann v. Maynard*, 180 W.Va. 275, 376 S.E.2d 169 (1988), this Court did apply federal preemption principles and held federal law prohibited a state court judge from appointing a lawyer employed by a federally funded Legal Services Corporation to a state criminal case.

In *Surrick v. Killion*, 449 F.3d 520, 529-30 (3rd Cir. 2006), the Third Circuit gave the following summary about how the practice of law is governed separately by federal and state courts:

Although federal courts have traditionally used admission to the bar of a state court as a standard for initial admission to their bars, admission to practice law before a state's courts and admission to practice before the federal courts in that state are separate, independent privileges. *See Theard v. United States*, 354 U.S. 278, 281, 77 S. Ct. 1274, 1 L. Ed. 2d 1342 (1957) ("The two judicial systems of courts, the state judiciatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom . . . lawyers are included."). Consistent with this settled proposition, the United States Supreme Court "has repeatedly emphasized . . . that disqualification from membership from a state bar does not necessarily lead to disqualification from a federal bar." *Frazier v. Heebe*, 482 U.S. 641, 647 n.7, 107 S. Ct. 2607, 96 L. Ed. 2d 557 (1987); *see Theard*, 354 U.S. at 282 ("[D]isbarment by federal courts does not automatically flow from disbarment from state courts."); *Selling v. Radford*, 243 U.S. 46, 49, 37 S. Ct. 377, 61 L. Ed. 585 (1917). (Emphasis added).

⁸Article VI, Section 2 of the United States Constitution.

In *Surrick*, although the lawyer in that case had been suspended for five years from practicing law by the Supreme Court of Pennsylvania, because his license to practice before a federal district court in Pennsylvania was still valid, the Third Circuit held this lawyer had to be permitted to continue practicing law in Pennsylvania, as long as his practice was limited to federal court.

The most critical decision by the United States Supreme Court recognizing this dual system of federal and state courts regulating the practice of law is *Sperry v. Florida*, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963). In *Sperry*, the Florida Bar had issued an injunction against a nonlawyer “patent attorney,” who was licensed by the USPTO to practice before that entity, but who otherwise had no law license and, therefore, was not a member of the Florida Bar. This injunction would have prevented this nonlawyer patent attorney from doing any of the actions necessary to engage in a patent law practice before the USPTO.

While the United States Supreme Court certainly recognized and respected the right of states to regulate the practice of law within that state’s courts, such state regulation is preempted where it conflicts with federal law. “[T]he law of the State, though enacted in the exercise of powers not contravened, must yield’ when incompatible with federal legislation.” 373 U.S. at 384, 83 S.Ct at 1325, 10 L.Ed.2d at _____. After determining Congress had provided the authority to the Commissioner of Patents to regulate the practice of patent law before the USPTO, the United States Supreme Court concluded:

The statute thus expressly permits the Commissioner to authorize practice before the Patent Office by nonlawyers, and the Commissioner has explicitly granted such authority. If the authorization is unqualified, then, by virtue of the *Supremacy Clause*, Florida may not deny to those failing to meet its own qualifications the right to perform the function within the scope of federal authority.

A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give “the State’s licensing bar a virtual power of review over the federal determination” that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress. “No State law can hinder or obstruct the free use of a license granted under an act of Congress.” *Pennsylvania v. Wheeling & B. Bridge Co.*, 13 How. 518, 566. 373 U.S. at 385, 83 S.Ct at 1326, 10 L.Ed.2d at ____.

In rejecting Florida’s attempt to sanction this nonlawyer patent attorney for the unauthorized practice of law, the United States Supreme Court reasoned, “[S]ince patent practitioners are authorized to practice only before the Patent Office, the State maintains control over the practice of law within its borders except to the limited extent necessary for the accomplishment of the federal objectives.” 373 U.S. at 402, 83 S.Ct at 1335, 10 L.Ed.2d at _____. See also *People v. Miller*, 659 N.Y.S.2d 647, 23 A.D.2d 144 (1965).

This holding in *Sperry*, recognizing that the state regulation of the practice of law may be preempted by federal law, has been applied in a wide variety of circumstances. In *Augustine v. Department of Veterans Affairs*, 429 F.3d 1334 (Fed. Cir. 2005), a veteran seeking a veteran’s preference before the Merit Systems Protection Board was represented by a lawyer who was not a member of the California bar, where this case was litigated. In rejecting the suggestion that this lawyer was not entitled to recover attorneys’ fees, the Federal Circuit noted one of the concerns stated in *Sperry* was the potential impact state regulation may have on the availability of lawyers admitted to practice before various specialized federal courts or agencies:

It would indeed adversely affect proceedings before federal administrative agencies if state licensing rules were applied, since the pool of available attorney representatives would be severely impaired. In addition to finding an attorney who is accessible and familiar with Board practice, the private party would also have to find an attorney

who is licensed in the state in which services are to be rendered. In a similar situation, the Supreme Court in *Sperry*, while not directly addressing the incorporation issue, concluded that applying state licensing requirements to practitioners appearing before the PTO would have a “disruptive effect,” given that one-quarter of the attorney practitioners before the PTO would have been disqualified because they were not licensed in the state in which they were practicing. 373 U.S. at 401. Moreover, the various state bar rules governing unauthorized practice are not uniform. *See generally* ABA Section of Legal Educ. and Admissions to the Bar & Nat’l Conference of Bar Examiners, *Comprehensive Guide to Bar Admissions Requirements* (2005). **To require the federal agency and those practicing before it to determine in every case whether a representative was authorized to perform particular services within the state as an attorney would burden both the bar and the agencies themselves.** We thus conclude that the federal statute here does not incorporate state law and that an attorney licensed in any state or federal jurisdiction is authorized to practice as an attorney before the Board. 429 F.3d at 1341-42. (Emphasis added).

In *In re: Desilets v. Delta Home Improvement, Inc.*, 291 F.3d 925 (6th Cir. 2002), the Sixth Circuit held the lawyer, who was admitted to practice law by a Michigan district court, but not by the Michigan State Bar, could not be found guilty of the unauthorized practice of law in Michigan. In *State Unauthorized Practice of Law Committee v. Paul Mason & Associates, Inc.*, 159 B.R. 773, 1993 U.S. Dist. LEXIS 14938 (N.D. Tex. 1993), the District Court concluded that the company authorized by the bankruptcy rules to represent creditors before bankruptcy courts preempts the Texas regulation prohibiting the unauthorized practice of law. In *Silverman v. State Bar of Texas*, 405 F.2d 410 (5th Cir. 1968), the Sixth Circuit held, under federal preemption principles, that a rule adopted by the Texas State Bar prohibiting a patent lawyer, who was admitted to practice before the USPTO, from advertising that he specializes in patent law.⁹

⁹In *Kroll v. Finnerty*, 242 F.3d 1359 (Fed. Cir. 2001), the New York State Bar did have jurisdiction to pursue disciplinary action against a patent lawyer because the lawyer also was a member of the New York State Bar. Thus, *Kroll* is readily distinguishable from the facts in the present case because here, Petitioner is not a member of the West Virginia State Bar.

In this case, Respondents are attempting to discipline Petitioner for actions he took in connection with his patent law practice. Petitioner had the right and authority to represent patent clients before the USPTO because he is admitted to practice law before that federal agency. Consistent with that right, Petitioner was authorized to take whatever actions were necessary to represent his clients. The foregoing cases demonstrate that any action taken by Respondents, which may impact his ability to represent patent clients before the USPTO, is preempted by the Supremacy Clause and, therefore, is prohibited.

C.

Consider adoption of ABA Model Rule 5.5

For a growing number of lawyers, the practice of law no longer takes place exclusively in the courts of one state. Advances in technology have allowed lawyers to practice law virtually from any place of their choosing, regardless of where the lawyer actually lives. In house counsel, transactional lawyers, lawyers involved in alternative dispute resolution, and lawyers with specialized practices in securities, antitrust, labor, and intellectual property often provide legal services in federal courts or agencies outside of the state in which they were admitted to practice law.¹⁰ A West Virginia

¹⁰The ABA Committee on Professional Responsibility conducted an in depth study of the multijurisdictional practices of lawyers in this country and found:

Testimony before the Commission was unanimous in recognizing that lawyers commonly engage in cross-border legal practice. Further, there was a general consensus that such practice is on the increase and that this trend is not only inevitable, but also necessary. The explosion of technology and the increasing complexity of legal practice have resulted in the need for lawyers to cross state borders to afford clients competent representation. *Client Representation in the 21st Century: Report of the Commission on Multijurisdictional Practice*, American Bar Association Committee on Professional Responsibility, adopted August 12, 2002, at p. 10 (<http://www.nysba.org/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=58760>).

plaintiff's lawyer litigating a case filed in West Virginia often will travel to another state to take the deposition of an expert or other witness. All of these examples involve situations where a lawyer licensed to practice law in one state may physically be in another state taking actions that would fall within the broad definition of the practice of law.

The American Bar Association (ABA) determined this trend toward lawyers practicing in multiple jurisdictions required it to amend its existing Rule 5.5, which only addressed the unauthorized practice of law, and broadened it to include the multijurisdictional practice of law.¹¹

¹¹ In 2002, ABA Model Rule 5.5, entitled "Unauthorized Practice of Law; Multijurisdictional Practice of Law," was adopted and provides:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to

This change was prompted because the ABA determined the existing Rule 5.5 simply was inadequate to address the growing number of lawyers, whose practice involves multiple jurisdictions. By September 27, 2011, every jurisdiction in this country, except for Kansas, Montana, and **West Virginia**, either had adopted a version of this model rule or was in the process of doing so.¹²

appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

In September, 2012, an amendment to this rule was proposed, adding provisions covering lawyers admitted in foreign jurisdictions. At the time this **PETITION** was filed, this proposed amendment had not been adopted.

¹²The chart showing which jurisdictions have adopted some version of ABA Model Rule 5.5 can be found at: http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick_guide_5_5_authcheckdam.pdf. At the time this **PETITION** was drafted, the Court had not yet made the proposed revisions to the West Virginia Code of Professional Conduct available for public comment, so it is unknown whether or not this Court will be adopting some version of ABA Model Rule 5.5.

Under ABA Model Rule 5.5(d)(2), there would not be any question that a patent lawyer, such as Petitioner, can practice patent law in a state in which he has not been admitted to practice law because the actions taken in connection with this patent law practice “are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.” Similarly, the plaintiff’s lawyer traveling to another state to take a deposition is covered by ABA Model Rule 5.5(c)(3) as services that “are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission.”

The ABA’s Model Rule 5.5 is designed to address this situation, where a lawyer with a particular practice before a federal agency, for example, is permitted to take actions in connection with that practice that would constitute the practice of law, without being required to become a member of the bar of the state where those actions occurred. In other words, the ABA’s Model Rule 5.5, in recognition of the multijurisdictional nature of the practice of law for many lawyers, permits such actions to be taken in a state, where the lawyer has not been admitted to practice law, and not violate the prohibition against the unauthorized practice of law.

Counsel for Petitioner understands the Court presently is undergoing a major rewriting of the West Virginia Rules of Professional Conduct. Petitioner respectfully submits the Court should consider including an adoption of ABA Model Rule 5.5 because it makes it clear that lawyers, such as Petitioner, have the right to practice law, pursuant to their admission to a federal court or agency, without being required to be a member of the bar of the state in which they live and practice.

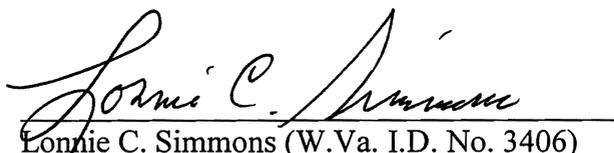
VI.

Conclusion

For the foregoing reasons, Petitioner Olen L. York, III, respectfully files this **PETITION FOR WRIT OF PROHIBITION**, requesting that this Court issue a rule to show cause against Respondent West Virginia Office of Disciplinary Counsel, asking it to show cause why a writ of prohibition should not be granted, ordering Respondent immediately to dismiss the Statement of Charges issued against him because Respondent lacks jurisdiction to prosecute these ethics charges.

STATE EX REL. OLEN L. YORK, III, Petitioner,

–By Counsel–



Lonnie C. Simmons (W. Va. I.D. No. 3406)

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VERIFICATION

State of West Virginia

County of Kanawha, to-wit:

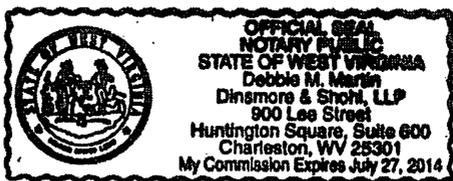
I, Olen L. York, III, having been duly sworn under oath, do hereby verify that the facts asserted in the foregoing **PETITION FOR A WRIT OF PROHIBITION** are true, and that to the extent any allegations are based upon information and belief, I believe them to be true.

Olen L. York, III
Olen L. York, III

Taken, sworn, and subscribed to before me in my said State and County on the 29th day of November, 2012.

Debbie M. Martin
Notary Public

My commission expires July 27, 2014.



IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NO. _____

STATE OF WEST VIRGINIA EX REL. OLEN L. YORK, III,

Petitioner,

v.

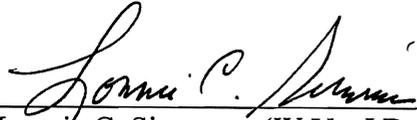
**WEST VIRGINIA OFFICE OF DISCIPLINARY COUNSEL, and
WEST VIRGINIA LAWYER DISCIPLINARY BOARD,**

Respondents.

CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **PETITION FOR A WRIT OF PROHIBITION** was served on counsel of record on the 29th day of November, 2012, through the United States Postal Service, postage prepaid, to the following:

Rachael L. Fletcher Cipoletti
Chief Lawyer Disciplinary Counsel
Renee N. Frymyer
Lawyer Disciplinary Counsel
Office of Disciplinary Counsel
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4700 MacCorkle Avenue SE
Charleston, West Virginia 25304
(304) 558-7999



Lonnie C. Simmons (W.Va. I.D. No. 3406)