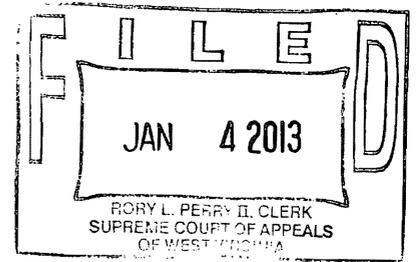


IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NO. 13-0009



STATE EX OF WEST VIRGINIA REL. MICHAEL T. CLIFFORD,

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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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 to prosecute an alleged conflict of interest ethics charge against Petitioner when a circuit court judge, who earlier was asked to address this same alleged conflict of interest, pursuant to this Court's holding in Syllabus Point 1 of *Garlow v. Zakaib*, 186 W.Va. 457, 413 S.E.2d 112 (1991), entered an order that has never been appealed or challenged concluding Petitioner had no such conflict of interest under the same facts forming the basis for the present ethics charge?

II.

Statement of the case

On April 22, 2011, Respondents sent a letter to Petitioner, explaining a complaint had been opened against him regarding a potential conflict of interest Petitioner might have in representing a person named Sandra Shaffer. (App.18). At the time this letter was sent, Petitioner had not yet filed the civil suit on behalf of Ms. Shaffer, but he had notified the potential parties of the possible claim. On April 29, 2011, Petitioner sent a letter in response to Respondents' request, explaining why he believed he did not have any unethical conflict of interest under these facts. (App. 20).

On or about June 3, 2011, Petitioner Michael T. Clifford filed a civil complaint on behalf of Ms. Shaffer against the City of Charleston, the Kanawha County Commission, James Hunt, David H. Armstrong, and John Doe in the Circuit Court of Kanawha County. (App. 48). The case, Civil Action No. 11-C-914, was assigned to the Honorable Judge James C. Stucky. In the complaint, it is alleged that on March 28, 2011, the defendants had destroyed and damaged Ms. Shaffer's personal and real property during a search conducted pursuant to a warrant issued in what is referred to as the sniper investigation. The sniper investigation began in 2003 when three different people were shot and killed by an unknown sniper at various Kanawha County locations. When these sniper shootings occurred, Petitioner was the Kanawha County Prosecuting Attorney. By the time Petitioner left office as the Kanawha County Prosecuting Attorney, no person had been charged with those homicides.

On or about July 6, 2011, counsel for Kanawha County defendants filed **DEFENDANTS' KANAWHA COUNTY COMMISSION, "JOHN DOE" MEMBERS OF THE KANAWHA**

COUNTY SHERIFF'S DEPARTMENT, AND DAVID H. ARMSTRONG'S MOTION TO DISQUALIFY MICHAEL T. CLIFFORD FROM REPRESENTING THE PLAINTIFF SANDRA SHAFFER IN THIS MATTER. (App. 55). On or about July 28, 2011, counsel for the City of Charleston defendants filed **THE CITY OF CHARLESTON AND JAMES HUNT'S MOTION TO DISQUALIFY MICHAEL T. CLIFFORD FROM REPRESENTING SANDRA SHAFFER.** (App. 72). On or about August 5, 2011, Petitioner filed **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISQUALIFY MICHAEL T. CLIFFORD.** (App. 79). On or about August 12, 2011, counsel for Kanawha County defendants filed **DEFENDANTS' KANAWHA COUNTY COMMISSION, "JOHN DOE" MEMBERS OF THE KANAWHA COUNTY SHERIFF'S DEPARTMENT, AND DAVID H. ARMSTRONG'S REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO DISQUALIFY.** (App. 86). On or about August 12, 2011, counsel for City of Charleston defendants filed **THE CITY OF CHARLESTON AND JAMES HUNT'S REPLY TO MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISQUALIFY MICHAEL T. CLIFFORD.** (App. 95).

After the matter had been fully briefed and counsel were given the opportunity to argue their respective positions, in his September 12, 2011 order, Judge Stucky rejected this motion for disqualification and held, **"The Court finds, as a matter of law, that the Defendants have not met the burden of the substantial relationship test to show a nexus between the sniper case (which is criminal in nature) and the civil suit filed by Mrs. Shaffer, so as to render Mr. Clifford disqualified. The Court further finds as a matter of law, that the Defendants have not shown a genuine adverse interest so as to render Mr. Clifford disqualified from representing Mrs.**

Shaffer.” (Emphasis added). (App. 101). To date, this order has not been appealed or reconsidered by Judge Stucky and the defendants have not sought any extraordinary relief with this Court to challenge Judge Stucky’s conclusions. According to the docket sheet, the underlying civil litigation has not yet been resolved, so theoretically, any of the defendants who objected to Judge Stucky’s ruling could appeal this decision once the case is completed or could seek extraordinary relief from this ruling.

To complete the record of Petitioner’s involvement in the underlying case, on or about December 28, 2011, Ms. Shaffer filed a pro se motion seeking to “fire Mike Clifford, Ed Rebrook and any other lawyer from Clifford’s office.” (App. 103). Ms. Shaffer asserted Petitioner “was there for the publicity and not for helping me get a new home or belongings. He made my case a personal issue between Danny Jones & Kent Carper.” On March 8, 2012, Judge Stucky entered an order relieving Petitioner, Mr. Rebrook, and Richelle Garlow, who works in Petitioner’s office, from any other representation of Ms. Shaffer in the case and noting Ms. Shaffer from that point was going to be acting *pro se*. (App. 106).

On July 5, 2012, Respondents sent a letter to Petitioner with a Lawyer Disciplinary Board Investigative Panel Closing attached. (App. 31). At that time, Respondents, with full knowledge of Judge Stucky’s September 12, 2011 order, stated this complaint would be closed with an admonishment, unless Petitioner filed an objection to the admonishment within fourteen days. After receiving brilliant legal advice from his present counsel, on July 16, 2012, Petitioner filed **RESPONDENT’S OBJECTION TO INVESTIGATIVE PANEL’S CLOSING RECOMMENDATION AND MOTION FOR RECONSIDERATION**. (App. 38).

Despite Judge Stucky's dispositive ruling on this alleged conflict of interest issue and the persuasive arguments asserted in Petitioner's objection, on or about September 24, 2012, Respondents issued a Statement of Charges against Petitioner, asserting he actually did have a conflict of interest in representing Ms. Shaffer against the Kanawha County and City of Charleston defendants. (App. 1). A scheduling conference was held on November 30, 2012, and an order was entered staying the ethics proceedings until the present **PETITION** was resolved by this Court. (App. 16).

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 the dismissal of the Statement of Charges issued against him because Respondents lack jurisdiction to prosecute these ethics charges.

III.

Summary of argument

A petition for a writ of prohibition against Respondents is appropriate if the Court finds Respondents acted in excess of their jurisdiction or to address 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. *State ex rel. Scales v. Committee on Legal Ethics*, 191 W.Va. 507, 446 S.E.2d 729 (1994).

Under *Garlow v. Zakaib*, 186 W.Va. 457, 413 S.E.2d 112 (1991), trial courts have the inherent authority to determine whether a lawyer representing a party has a conflict of interest, in violation of the West Virginia Code of Professional Responsibility, requiring the lawyer to be disqualified from any further representation. *See also* Rule 1.7 of the West Virginia Code of Professional Responsibility; *State ex rel. Bluestone Coal Corp. v. Mazzone*, 226 W.Va. 148, 697 S.E.2d 740 (2010); *State ex rel. Taylor Associates v. Nuzum*, 175 W. Va. 19, 330 S.E.2d 677 (1985).

Similarly, Respondents have the authority to address conflict of interest as well as all other ethics issues based upon the authority granted by this Court, explained in Rule 1 of the West Virginia Rules of Lawyer Disciplinary Procedure, “to investigate complaints of violations of the Rules of Professional Conduct” promulgated by this Court.

Thus, this Court has authorized circuit courts and Respondents to determine whether a lawyer has a conflict of interest in violation of the West Virginia Code of Professional Responsibility.

Just as one circuit court lacks the authority and jurisdiction to directly or indirectly interfere with or correct the ruling of another circuit court, Respondents do not have the authority to act as an appellate court over circuit court judges and, more specifically, Respondents cannot directly or indirectly interfere with or correct the conflict of interest ruling issued by Judge Stucky. Syllabus Point 3 of *State ex rel. Bell & Bands, PLLC v. Kaufman*, 213 W.Va. 718, 584 S.E.2d 574 (2003).

Respondents’ action in seeking to relitigate Judge Stucky’s final and binding decision on whether or not Petitioner had a conflict of interest also is barred by the doctrines of res judicata and collateral estoppel. Syllabus Points 2 and 3 of *Conley v. Spillers*, 171 W.Va. 584, 301 S.E.2d 216 (1983).

Under these facts, Respondents and Judge Stucky are, in this very limited sense, in privity with each other because both have the authority, recognized and granted by this Court, to determine whether a lawyer has a conflict of interest in violation of the West Virginia Code of Professional Responsibility. Both Judge Stucky and Respondents are asked to make the same determination—in representing Ms. Shaffer in this civil case, did Petitioner violate the conflict of interest provisions of the West Virginia Code of Professional Responsibility. The applicable facts are the same, the procedural protections are the same, the applicable ethical provisions are the same, and the purposes in both proceedings are the same. *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

IV.

Statement regarding oral argument and decision

Due to the novelty of this dispositive jurisdictional issue, Petitioner requests, at a minimum, Rule 19 oral argument in this matter.

V.

Argument

A.

Prohibition is appropriate under these facts

When Respondents issue a statement of charges against a lawyer, only this Court has the authority to dismiss the charges. Syllabus Point 6, *Lawyer Disciplinary Board v. Kupec*, 202 W.Va. 556, 505 S.E.2d 619 (1998). This holding is based upon Rule 3.3 of the West Virginia Rules of Lawyer Disciplinary Procedure and this Court's inherent power to define, supervise, regulate, and control the practice of law within West Virginia. *State ex rel. Partain v. Oxley*, 159 W.Va. 805, 815, 227 S.E.2d 314, 320 (1976). Therefore, when Respondents file a statement of charges in excess of

their jurisdiction, a petition for a writ of prohibition is the only available remedy to stop the process from going forward.

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), 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).

B.

Judge Stucky's ruling is dispositive

In the present case, Respondents have exceeded their jurisdiction by asserting a conflict of interest ethics charge against Petitioner that already has been resolved by a circuit court. In *Garlow v. Zakaib*, 186 W.Va. 457, 413 S.E.2d 112 (1991), this Court was asked to decide whether trial courts had the authority to resolve whether a lawyer had a conflict of interest, in violation of the West Virginia Code of Professional Responsibility, requiring the disqualification of that lawyer in that case. To decide this issue, this Court first noted the comment to Rule 1.7 of the West Virginia Code of Professional Responsibility contemplates trial courts have this authority:

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a **court** may raise the question when there is reason to infer that the lawyer has neglected the responsibility.... Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. (Emphasis added).

After reviewing decisions from other jurisdictions upholding this authority, this Court concluded in Syllabus Point 1:

A circuit court, upon motion of a party, by its inherent power to do what is reasonably necessary for the administration of justice, may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict of interest where the conflict is such as clearly to call in question the fair or efficient administration of justice. Such motion should be viewed with extreme caution because of the interference with the lawyer-client relationship.

See also Syllabus point 2, *State ex rel. Taylor Associates v. Nuzum*, 175 W. Va. 19, 330 S.E.2d 677 (1985).

Thus, it cannot be disputed that Judge Stucky had the authority and jurisdiction to decide whether or not Petitioner had a conflict of interest, in violation of the West Virginia Code of Professional Responsibility, requiring his disqualification. Furthermore, Judge Stucky and the parties in the underlying civil litigation followed the procedure required to address such motions for disqualification, as explained by this Court in Syllabus Point 5 of *Garlow*:

Before a circuit court disqualifies a lawyer in a case because the lawyer's representation may conflict with the Rules of Professional Conduct, a record must be made so that the circuit court may determine whether disqualification is proper. Furthermore, this Court will not review a circuit court's order disqualifying a lawyer unless the circuit court's order is based upon an adequately developed record. In the alternative, if the circuit court's order disqualifying a

lawyer is based upon an inadequately developed record, this Court, under appropriate circumstances, may remand a case to the circuit court for development of an adequate record.

Once Judge Stucky issued his ruling, all of the parties and counsel involved in the underlying civil litigation were required, as a matter of law, to follow his decision. With this ruling, Petitioner had the right to rely upon Judge Stucky's analysis that under these facts, Petitioner did not suffer from any unethical disqualifying conflict of interest. Otherwise, Judge Stucky's ruling is rendered completely meaningless.

The underlying defendants certainly have the option either of appealing this ruling at the appropriate time or seeking extraordinary relief, as explained in Syllabus Point 1 of *State ex rel. Bluestone Coal Corp. v. Mazzone*, 226 W.Va. 148, 697 S.E.2d 740 (2010):

A party aggrieved by a lower court's decision on a motion to disqualify an attorney may properly challenge the lower court's decision by way of a petition for a writ of prohibition.

As noted above, the defendants have not sought any extraordinary relief from this September 12, 2011 order. Thus, at this time, the September 12, 2011 order continues to be and is the final and binding ruling on this ethical issue as to whether or not Petitioner had a conflict of interest in representing Ms. Shaffer.

In this case, the Court is presented with a unique situation where two different entities—a circuit court judge and Respondents—have been granted authority by this Court to address and resolve ethical issues involving conflicts of interest. As noted above, the authority of circuit court judges to address conflict of interest issues was discussed in *Garlow* and subsequent decisions by this Court. Respondents have the authority to address conflict of interest as well as all other ethics issues based upon the authority granted by this Court, explained in Rule 1 of the West Virginia Rules of Lawyer

Disciplinary Procedure, “to investigate complaints of violations of the Rules of Professional Conduct” promulgated by this Court. Thus, this case presents the question as to whether Respondents can pursue conflict of interest ethics charges against a lawyer **after** a circuit court, following the procedure outlined in *Garlow*, has issued an order addressing the same facts and the same lawyer and holding no unethical conflict of interest exists.

The West Virginia Rules of Lawyer Disciplinary Procedure include several examples where Respondents are prompted to take action **consistent with the action** taken by a circuit or federal court. For example, Rule 3.18 requires a lawyer, within thirty days after entry of judgment, to notify Respondents when the lawyer is “convicted of crime that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” Such conviction then forms the basis for Respondents to prepare formal ethics charges against that lawyer. Also, Rule 3.20 permits Respondents to take reciprocal disciplinary action against a lawyer, who has been disciplined by another state or federal jurisdiction.

Clearly, Respondents do not have the authority to act as an appellate court over circuit court judges. In an analogous situation, this Court has made it clear that one circuit court cannot directly or indirectly interfere with or correct a ruling made by another circuit court. In Syllabus Point 3 of *State ex rel. Bell & Bands, PLLC v. Kaufman*, 213 W.Va. 718, 584 S.E.2d 574 (2003), this Court held:

“W.Va. Const., art. 8 § 1, W.Va. Const., art. 8 § 3, and W.Va. Const., art. 8 § 6 when read together provide an orderly and exclusive system by which errors of circuit courts may be corrected only by the West Virginia Supreme Court of Appeals and not by other circuit courts. One circuit court may not directly or indirectly interfere with the orders of another circuit court unless specifically provided by statute or civil rule regardless of how erroneous such orders may be.” Syllabus Point 2, *State ex rel. Shamblin v. Dostert*, 163 W.Va. 361, 255 S.E.2d 911 (1979).

If one circuit court judge is unable to directly or indirectly correct or interfere with another circuit court judge's ruling, then similarly Respondents cannot have the authority to directly or indirectly contradict the ruling issued by Judge Stucky.

Respondents' action in seeking to relitigate Judge Stucky's final and binding decision on whether or not Petitioner had a conflict of interest also is barred by the doctrines of *res judicata* and collateral estoppel. In Syllabus Points 2 and 3 of *Conley v. Spillers*, 171 W.Va. 584, 301 S.E.2d 216 (1983), this Court explained:

2. Collateral estoppel is designed to foreclose relitigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit. We have made this summary of the doctrine of collateral estoppel:

“But where the causes of action are not the same, the parties being identical or in privity, the bar extends to only those matters which were actually litigated in the former proceeding, as distinguished from those matters that might or could have been litigated therein, and arises by way of estoppel rather than by way of strict *res adjudicata*.” *Lane v. Williams*, 150 W.Va. 96, 100, 144 S.E.2d 234, 236 (1965).

3. The doctrine of collateral estoppel also requires as does *res judicata* that the first judgment be rendered on the merits and be a final judgment by a court having competent jurisdiction over the subject matter and the parties.

Respondents do not have the right or authority to relitigate this conflict of interest issue already decided by Judge Stucky in a case where Judge Stucky had the authority to resolve that question. Respondents and Judge Stucky are, in this very limited sense, in privity with each other because both have the authority, recognized and granted by this Court, to determine whether a lawyer has a conflict of interest in violation of the West Virginia Code of Professional Responsibility.

In *State v. Miller*, 194 W.Va. 3, 13, 459 S.E.2d 114, 124 (1995), a nurse was accused of committing a battery on a patient and was fired by the Department of Health and Human Resources (DHHR). This nurse grieved her termination and was exonerated by the administrative law judge, who determined the DHHR had failed to prove she had committed any battery. Subsequent to this administrative proceeding, this nurse was tried for battery by the State of West Virginia in a criminal action and was convicted.

The issue raised on appeal was whether the DHHR and the State were in privity with each other, thus precluding the criminal prosecution under the doctrines of res judicata and collateral estoppel. In addressing this issue, 194 W.Va. at 13, 459 S.E.2d at 124, the Court first acknowledged that different government entities can be in privity with each other:

Although the Supreme Court indicated that privity might exist between officers of the same government, it pointed out that “[t]he crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy.” 310 U.S. at 403, 60 S.Ct. at 917, 84 L.Ed. at 1276. (Citation omitted).

Ultimately, in finding under these facts no privity between the DHHR and the State, the Court, 194 W.Va. at 14, 459 S.E.2d at 125, held:

Thus, we conclude that the State's interest in having guilt or innocence determined is not adequately served in an administrative proceeding because the prosecuting attorney has no control over the timing, substance, or litigation of charges against the defendant at the grievance level. The State is not collaterally estopped from prosecuting the defendant for criminal battery because no privity exists.

In the present case, both Judge Stucky and Respondents are asked to make the same determination—in representing Ms. Shaffer in this civil case, did Petitioner violate the conflict of interest provisions of the West Virginia Code of Professional Responsibility. The applicable facts

are the same, the procedural protections are the same, the applicable ethical provisions are the same, and the purposes in both proceedings are the same. If Judge Stucky had determined Petitioner suffered from an unwaivable and unethical conflict of interest, he not only had the authority under *Garlow* to disqualify Petitioner, he also could have referred the matter to Respondents for any additional discipline. Thus, while *Miller* is distinguishable, the analysis used by the Court actually supports the conclusion that res judicata and collateral estoppel preclude Respondents from pursuing the conflict of interest charges levelled against Petitioner in this matter.

To permit this ethics action to proceed would establish a dangerous precedent and would place Petitioner in a no-win situation. Judge Stucky ordered Petitioner had the right to continue representing Ms. Shaffer while Respondents are alleging such continued representation is an unethical conflict of interest. What is a lawyer supposed to do if he or she is given such conflicting opinions?

This case presents a unique fact pattern where trial courts have the jurisdiction and authority to resolve whether or not a lawyer representing a party in the case pending before the court had a disqualifying conflict of interest, in violation of the West Virginia Rules of Professional Conduct. Counsel for Petitioner has been unable to find any authority for an administrative agency, such as Respondents, to ignore the final and binding order issued by a circuit court judge addressing whether or not a lawyer has a disqualifying conflict of interest. In the Statement of Charges, no attempt is made to explain their rationale for asserting they had the authority to ignore Judge Stucky's order. Questions of disqualification arise routinely in circuit court proceedings, where such issues are resolved by a circuit court judge. To permit Respondents to pursue ethics charges against Petitioner for representing a party the circuit court judge held, as a matter of law, he ethically could represent, would establish a very dangerous and unjustifiable precedent.

Substantively, Judge Stucky correctly applied the applicable Rules of Professional Conduct. Both Rule 1.11 and Rule 1.9(a) of the Rules of Professional Conduct require there to be a substantial relationship between the two representations before a conflict of interest is found. In Syllabus Points 4 and 5 of *Bluestone*, this Court explained the analysis required for determining whether Rule 1.9(a) of the Rules of Professional Conduct has been violated, with particular emphasis on showing a substantial nexus between the two representations:

4. "Rule 1.9(a) of the Rules of Professional Conduct, precludes an attorney who has formerly represented a client in a matter from representing another person in the same or a substantially related matter that is materially adverse to the interest of the former client unless the former client consents after consultation." Syllabus point 2, *State ex rel. McClanahan v. Hamilton*, 189 W. Va. 290, 430 S.E.2d 569 (1993).

5. To disqualify an attorney pursuant to Rule 1.9(a) of the West Virginia Rules of Professional Conduct, five criteria must be satisfied: (1) the existence of an attorney-client relationship between the attorney and the former client; (2) the existence of an attorney-client relationship between the attorney and the subsequent client; (3) the subject matter of the subsequent client's representation either is the same as or is substantially related to the subject matter of the former client's representation; (4) the subsequent client's representation is materially adverse to the interests of the former client; and (5) the former client has not consented, after consultation, to the subsequent representation.

In Syllabus Point 8 of *Bluestone*, this Court further explained the substantial relationship test under Rule 1.9(a):

"Under West Virginia Rule of Professional [Conduct] 1.9(a), a current matter is deemed to be substantially related to an earlier matter in which a lawyer acted as counsel if (1) the current matter involves the work the lawyer performed for the former client; or (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known." Syllabus point 1, *State ex rel. Keenan v. Hatcher*, 210 W. Va. 307, 557 S.E.2d 361 (2001).

In the present case, Petitioner's former client, when he was acting as the Kanawha County Prosecuting Attorney in criminal cases, was the State of West Virginia, not the victims of those crimes or the City of Charleston or the Kanawha County Commission or the agents and employees thereof. Petitioner's present client, Ms. Shaffer, was the plaintiff in a civil case, whose property had been destroyed by the defendants almost seven years after Petitioner ceased serving as the Kanawha County Prosecuting Attorney. There is absolutely no evidence that Ms. Shaffer's interests were materially adverse to the interest of the State of West Virginia in investigating and prosecuting the sniper case. There is no substantial relationship between the ongoing sniper criminal investigation and the destruction of Ms. Shaffer's property, which resulted in her filing a civil suit for recovery of monetary damages. Finally, there was no evidence presented to Judge Stucky establishing that Petitioner learned of any information when he served as the Kanawha County Prosecuting Attorney that somehow could be used in litigating Ms. Shaffer's civil action and which was not otherwise available.

In light of this Court's analysis of this substantial relationship nexus required under Rule 1.9(a) in *State ex rel. McClanahan v. Hamilton*, 189 W.Va. 290, 430 S.E.2d 569 (1993), *State ex rel. DeFrances v. Bedell*, 191 W.Va. 513, 446 S.E.2d 906 (1994), *State ex rel. Keenan v. Hatcher*, 210 W.Va. 307, 557 S.E.2d 361 (2001), *State ex rel. Youngblood v. Sanders*, 212 W.Va. 885, 575 S.E.2d 864 (2002), and *In Re: Daniel R. James*, 223 W.Va. 870, 679 S.E.2d 702 (2009), clearly Petitioner was not disqualified under any of the Rules of Professional Conduct from representing Ms. Shaffer. Of course, such representation presently is only a theoretical proposition because as noted in the Statement of Charges, Petitioner ceased representing Ms. Shaffer before that case was resolved.

Ultimately, this Court's holding in *Garlow* that trial courts have the authority to decide whether or not a lawyer has a conflict of interest, in violation of the West Virginia Rules of

Professional Conduct, warranting that lawyer's disqualification, precludes Respondents from pursuing ethics charges against Petitioner, based upon Judge Stucky's ruling.

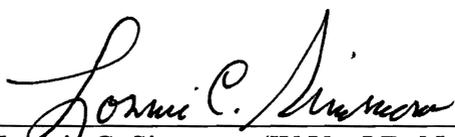
VI.

Conclusion

For the foregoing reasons, Petitioner Michael T. Clifford 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 the dismissal of the Statement of Charges issued against him because Respondents lack jurisdiction to prosecute these ethics charges.

STATE EX REL. MICHAEL T. CLIFFORD, Petitioner,

–By Counsel–



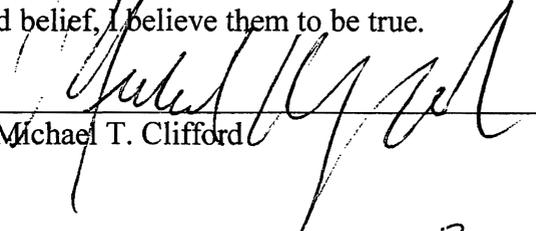
Lonnie C. Simmons (W.Va. I.D. No. 3406)
DITRAPANO, BARRETT, DIPIERO,
McGINLEY & SIMMONS, PLLC
P. O. Box 1631
Charleston, West Virginia 25326-1631
(304) 342-0133

VERIFICATION

State of West Virginia

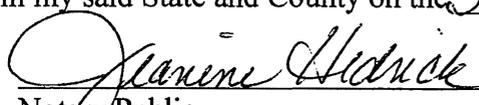
County of Kanawha, to-wit:

I, Michael T. Clifford, 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.



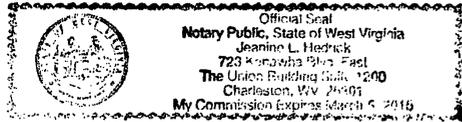
Michael T. Clifford

Taken, sworn, and subscribed to before me in my said State and County on the 3 day of January, 2013.



Notary Public

My commission expires 3/5/15.



IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NO. _____

STATE EX OF WEST VIRGINIA REL. MICHAEL T. CLIFFORD,

Petitioner,

v.

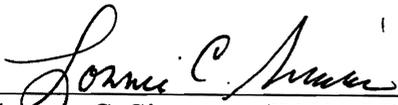
**WEST VIRGINIA OFFICE OF DISCIPLINARY COUNSEL, and
WEST VIRGINIA LAWYER DISCIPLINARY BOARD,**

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 4th day of January, 2013, through the United States Postal Service, postage prepaid, to the following:

Rachael L. Fletcher Cipoletti
Chief Lawyer Disciplinary Counsel
Jessica H. Donahue Rhodes
Lawyer Disciplinary Counsel
Office of Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304
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Lonnie C. Simmons (W.Va. I.D. No. 3406)