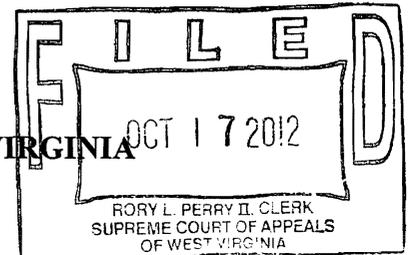


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA ex rel.
VERIZON WEST VIRGINIA INC.,
ANDREA L. CUSTIS, VICTORIA L.
BOSTON, ROBERT ANDERSON,
JUDY ISNER, MARY FREDERICK,
DAWN WATSON, BARBARA
TERWILLIGER, AND JODI DENNIS,

Upon Original Jurisdiction
in Prohibition

No. 12-1209

Petitioners,

v.

THE HONORABLE JAMES A. MATISH,
STEPHANIE SNOW-MCKISIC, RITA L.
KNIGHT, DANNY KNIGHT SR., DAVID
MICHAEL BROSIUS, DANNY KNIGHT
JR., SARAH KNIGHT, RYAN P. BARKER,
LYNET WHITE, KIMBERLY A. RAY,
JEFFREY L. RAY, LISA M. THARP,
TRAVIS N. THARP, and CHARLES R.
BYARD

(Civil Action Nos. 11-C-72-3, 11-C-74-3,
11-C-75-3, 11-C-119-3, 11-C-158-3,
11-C-163-3, 11-C-164-3, 11-C-165-3,
and 11-C-166-3)

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VERIFIED PETITION FOR WRIT OF PROHIBITION

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VERIFIED PETITION FOR WRIT OF PROHIBITION

Petitioners, Verizon West Virginia Inc., Andrea L. Custis, Victoria L. Boston, Robert Anderson, Judy Isner, Mary Frederick, Dawn Watson, Barbara Terwilliger, and Jodi Dennis (collectively, the “Verizon Defendants”), by and through counsel, respectfully petition this Court pursuant to Article 8, § 3 of the West Virginia Constitution, granting the Supreme Court of Appeals original jurisdiction in prohibition, W. Va. Code § 53-1-1, and Rule 16 of the Revised Rules of Appellate Procedure to issue a Writ of Prohibition against Respondents, the Honorable James A. Matish, in his official capacity of Judge of the Circuit Court of Harrison County, West Virginia, and Stephanie Snow-McKisic, Rita L. Knight, Danny Knight Sr., David Michael Brosius, Danny Knight Jr., Sarah Knight, Ryan P. Barker, Lynet White, Kimberly A. Ray, Jeffrey L. Ray, Lisa M. Tharp, Travis N. Tharp, and Charles R. Byard (collectively, “Individual Respondents” or “Current Clients”) to prevent Respondents from enforcing Judge Matish’s orders permitting Steptoe & Johnson PLLC (“Steptoe”) to continue to represent the Current Clients in contravention of Rules 1.7(b) and 1.9 of the West Virginia Rules of Professional Conduct (“WVRPC”). In support of this Petition, the Verizon Defendants state and aver:

QUESTIONS PRESENTED

- I. Did the circuit court abuse its power, commit clear error, and exceed its legitimate authority in refusing to disqualify Steptoe from its representation of the Current Clients where that representation is materially limited by Steptoe’s duties and obligations to two clients it represented in prior substantially related litigation (“Rowh and Radcliff”)?

- II. Did the circuit court abuse its power, commit clear error, and exceed its legitimate authority in refusing to disqualify Steptoe from its representation of the Current Clients

where its prior representation of Rowh and Radcliff is substantially related to its representation of its Current Clients and their interests are materially adverse?

- III. Did the circuit court abuse its power, commit clear error, and exceed its legitimate authority in refusing to disqualify Steptoe from its representation of the Current Clients where Steptoe's use of information relating to its representation of Rowh and Radcliff has been and will continue to be to their disadvantage?
- IV. Did the circuit court abuse its power, commit clear error, and exceed its legitimate authority in refusing to disqualify Steptoe from its representation of the Current Clients where Steptoe improperly used and expressed an intention to continue to use the Verizon Defendants' confidential information in violation of multiple Protective Orders and Settlement Agreements to gain an advantage in subsequent litigation?

STATEMENT OF THE CASE

I. Factual Background (Rowh and Radcliff Cases)

In 2009, Katherine A. Rowh ("Rowh") filed a lawsuit against Verizon West Virginia Inc. ("Verizon") and other defendants alleging wrongful termination and violations of the West Virginia Human Rights Act. Steptoe served as counsel for Ms. Rowh in that case, *Rowh v. Verizon West Virginia Inc.*, No. 09-C-314-3 (Harrison County, W. Va.). In 2010, Clista A. Radcliff ("Radcliff"), also represented by Steptoe, filed her own employment discrimination claim against Verizon in *Radcliff v. Verizon Communications Inc.*, No. 10-C-240-3 (Harrison County, W. Va.), also alleging wrongful termination. Both Ms. Rowh and Ms. Radcliff had been employees at Verizon's Call Center located in Clarksburg, West Virginia.

Near the inception of the *Rowh* case, Steptoe drafted and provided defense counsel with an Agreed Protective Order that required the return of any Confidential Documents produced during discovery after the conclusion of the litigation. (*See Ex. 11 at A292.*)¹ Tom Smith, then counsel for the defendants, requested that Steptoe provide a mechanism for counsel to maintain Confidential Documents after the conclusion of the litigation in order to honor a requirement of his insurance company. (*See id. at A296.*) In response, Steptoe drafted and incorporated additional language into the Agreed Protective Order governing the continuing duty of counsel who retained information to maintain its confidentiality. (*Id. at A292, A296.*)

On January 20, 2010, the circuit court entered the Agreed Protective Order that had been prepared by Steptoe for the *Rowh* case (“*Rowh* Protective Order”). (*Id. at A290-94.*) The *Rowh* Protective Order provided in pertinent part:

- “The Court further **ORDERS** that *protected documents shall not be disclosed* by any party except to the agents, retained experts, employees and members of their counsel’s firm.” (*Id. at A290 (italic emphasis added).*)
- “CONFIDENTIAL documents shall be *used solely for the purposes of this litigation*. This Order shall govern any person receiving or reviewing protected documents or protected information.” (*Id. at A291 (emphasis added).*)
- “In addition to preventing disclosure of the actual documents protected by this Order, any party receiving such documents and his or her counsel are prohibited from disclosing the nature and substance of the protected information contained in the protected documents” (*Id.*)

¹ Appendix Exhibits 10 and 11 are Confidential Materials that were filed under seal in the circuit court pursuant to two Orders of that court at Appendix Exhibits 1 and 2. Although Appendix Exhibits 10 and 11 remain confidential in this Court pursuant to Rule 40(c) of the Revised Rules of Appellate Procedure, Petitioners have redacted monetary amounts from the Settlement Agreements at pages A301 and A312, out of an abundance of caution in response to Steptoe’s position that Steptoe may share such information with its Current Clients, even if the Settlement Agreements are filed under seal. (*See Ex. 23 at A759.*)

- “At the conclusion of this litigation, and all appeals, any party producing protected documents shall be entitled to demand return of the same from any party to whom such documents were produced. Thereupon, within a reasonable period of time, the party receiving protected documents shall return to the producing party all originals and copies of protected documents. In the alternative to returning protected information in accordance with the above, counsel of record for the party in possession of such protected information may retain it in accordance with such counsel’s document retention and destruction policies, in which event such *counsel shall be under a continuing duty to maintain the confidentiality and protect from further use and disclosure the protected information.*” (*Id.* at A292 (emphasis added).)

Thus, the Protective Order prepared by Steptoe included language prohibiting not only disclosure but also use of confidential information, and those obligations continue to bind counsel as long as they retain the protected information.

The circuit court entered a substantially similar Agreed Protective Order in the *Radcliff* case on January 27, 2011 (“*Radcliff* Protective Order”), again prepared by Steptoe. (Ex. 10 at A161-66.) The terms of the *Radcliff* Protective Order were identical to those in the *Rowh* case, with one exception. The *Radcliff* Protective Order specifically provided: “To avoid the significant cost associated with reproducing such documents, the parties have stipulated that documents exchanged during discovery in the [*Rowh*] case . . . are to be included as part of discovery in this case. Such documents shall be subject to this Agreed Protective Order” (*Id.* at A163.)

On August 13, 2010, the parties in the *Rowh* case executed a confidential Settlement Agreement and Full and Final Release (“*Rowh* Settlement Agreement”). (Ex. 11 at A300-09.) In exchange for certain valuable consideration, Rowh agreed to keep the negotiations, amount, and terms of the settlement confidential, unless authorized in writing by Verizon or compelled to make disclosure by a court order or other law. (*Id.* at A305-06.) Any attempts to circumvent the confidentiality requirements constitute a breach of the agreement. (*Id.*) The Settlement

Agreement also contained a non-disparagement clause pursuant to which Rowh agreed not to make “critical, negative or disparaging remarks” about certain of the Verizon Defendants and others. (*Id.* at A305.) The non-disparagement clause does not preclude Rowh from “honestly responding to any judicial inquiries pursuant to subpoena or other court order.” (*Id.*) On March 2, 2011, the parties in the *Radcliff* case also executed a confidential Settlement Agreement and Full and Final Release (“*Radcliff* Settlement Agreement”), which contained substantially similar provisions concerning confidentiality and non-disparagement. (*Compare id.* at A305-06, *with id.* at A316-17.) Following the conclusion of the *Rowh* and *Radcliff* cases, Steptoe decided to retain the confidential documents produced by Verizon, thereby accepting the “continuing duty” it drafted to “maintain the confidentiality and protect from further use and disclosure the protected information.” (*Id.* at A292; Ex. 10 at A163.)

II. Procedural Background (Currently Pending Litigation)

After settling the *Rowh* and *Radcliff* cases, Steptoe filed nine additional employment discrimination and/or wrongful termination cases against the Verizon Defendants and others, as well as two class actions. The thirteen Individual Respondents are the plaintiffs in the nine individual cases, all of which were filed in the Circuit Court for Harrison County, West Virginia, and which are currently pending before Judge Matish in Civil Action Nos. 11-C-72-3, 11-C-74-3, 11-C-75-3, 11-C-119-3, 11-C-158-3, 11-C-163-3, 11-C-164-3, 11-C-165-3, and 11-C-166-3. Verizon and one or more of the individual Petitioners are named as the defendants in each of the pending cases.²

² Verizon Communications Inc. is also named as a defendant in the nine pending cases; however, it has specially appeared in certain cases solely to challenge personal jurisdiction in pending motions to dismiss. Therefore, Verizon Communications Inc. will not be participating in these writ proceedings.

A. Steptoe violated and repeatedly expressed its intention to continue to violate the terms of the *Rowh* and *Radcliff* Protective Orders and Settlement Agreements while pursuing its Current Clients' claims.

In filing and prosecuting these new cases, Steptoe has expressed its intent to make extensive use of confidential documents and information that were produced in the *Rowh* and *Radcliff* matters—all in violation of the Protective Orders and Settlement Agreements. Indeed, Steptoe attorney Larry J. Rector (“Rector”) initially admitted to violating his continuing obligations under the Protective Orders in a June 18, 2011 email wherein he stated that “the discovery propounded in the subsequent cases is premised on the *Rowh* discovery.” (Ex. 11 at A298.) Subsequently, in response to draft protective orders provided for use in the *Barker, Ray*, and *White* cases, in a series of emails on August 5, 2011, Mr. Rector wrote:

- “I believe the orders must address the use of the *Rowh* documents and specifically state that those documents may be used in these subsequent cases subject to the terms of the confidentiality orders.” (Ex. 7 at A74.)
- “Please be advised that *I intend to use the Rowh documents in these cases* and will treat them as confidential consistent with the orders you have prepared. My clients’ [sic] will be counseled with regard to their confidentiality obligations. *I will use the documents in depositions and in court filings* consistent with the restrictions for such filing set forth in the orders.” (*Id.* at A78 (emphasis added).)
- “[T]he *Rowh* documents are not an issue. *I have them and I intend to use them* in compliance with all orders. . . . I will not be requesting them over again as proposed by [the Verizon Defendants’ counsel]. . . . *We have the spoils of war* and intend to ethically use the documents consistent with Judge Matish’s Orders and all Rules of Civil Procedure.” (*Id.* at A83 (emphasis added).)

Steptoe’s intent to use the confidential documents and information from the *Rowh* and *Radcliff* cases in the new cases was first raised with the circuit court during a hearing on August 19, 2011. At that hearing, Steptoe took the position that it was entitled to use the documents produced subject to the *Rowh* and *Radcliff* Protective Orders without propounding written

discovery seeking their production in the current cases. (Ex. 21 at A599, A601, A603.)

Moreover, Larry Rector affirmatively stated, “Kathy Rowh will be a witness in these subsequent cases.” (*Id.* at A604-05.) The circuit court independently expressed concern about potential violations of the Protective Orders and Settlement Agreements and their implications for disqualification of counsel:

I don't think you can go through your other client's files and pull out documents and bring them to the deposition [to use them in the current cases]
What causes me a little bit of concern in this particular case is the fact that there is this confidentiality agreement. . . . [S]o I think what you need to do on behalf of your clients, and I'm speaking not only of your present clients, but your former clients on behalf of your firm, you need to probably go back and review that confidentiality agreement, and make sure that you're not going to get somebody in trouble by perhaps even continuing to represent these people .

(*Id.* at A608.)

Despite the circuit court's concerns, Steptoe attempted to complete an end-run around the obligations imposed by the Protective Orders that Steptoe drafted and Settlement Agreements to which Rowh and Radcliff agreed. On August 26, 2011, Mr. Rector informed the Verizon Defendants' counsel, “I will be deposing Ms. Rowh in these cases and I likely will be deposing her as the first witness. I will be issuing her a subpoena duces tecum to produce all documents within her possession custody or control with regard to her lawsuit against Verizon.” (Ex. 7 at A89.) Since it was clear Steptoe intended to use confidential information from the *Rowh* and *Radcliff* cases in the current cases in violation of the Protective Orders and Settlement Agreements, on September 28, 2011, the Verizon Defendants filed a Motion to Disqualify Plaintiff's Counsel and Law Firm (“Motion to Disqualify”) in each case. (Ex. 7.)

B. After the Motion to Disqualify was filed, Steptoe backpedaled, minimizing the use that Steptoe will make of Rowh and Radcliff and their confidential information in the current cases little by little in an effort to avoid disqualification.

Steptoe's position has changed repeatedly during the course of this disqualification dispute concerning the confidential documents and information that it obtained during its representation of Rowh and Radcliff and the use that it will make thereof in the current litigation. Steptoe has backpedaled and minimized the role that the Rowh and Radcliff information will play in the current litigation in an attempt to avoid disqualification. In a Motion for Leave to File Under Seal Plaintiffs' Response to Defendants' Motions to Disqualify Plaintiffs' Counsel and Law Firm and Exhibits Thereto filed on November 4, 2011, Steptoe represented only that "information regarding the amount and terms of the settlements or settlement agreements or the negotiations leading up to the settlement agreements has not been and will not be disclosed to the plaintiffs in these consolidated actions in connection with the Plaintiffs' Response to Motions to Disqualify Plaintiff's Counsel and Law Firm" (Ex. 9 at A110) and said nothing about non-settlement related confidential documents and information.

On November 10, 2011, Steptoe filed Plaintiffs' Response to Motions to Disqualify Plaintiff's Counsel and Law Firm, which attached the original Affidavit of Larry J. Rector expanding on Steptoe's prior representations. (Ex. 10.) According to Steptoe:

- "Mr. Rector has executed an affidavit affirming that he has not violated any confidentiality provisions, that he reasonably believes that Steptoe & Johnson's representation of each of the Plaintiffs will not be adversely affected or limited by its current representation of the other Plaintiffs or its former representation of Ms. Rowh and Ms. Radcliff, that he further reasonably believes that Plaintiffs' interests are not adverse to the interests of each other or Ms. Rowh and Ms. Radcliff, and that he has advised Plaintiffs of potential conflicts of interest, that he has advised them to consult independent counsel on this issue if they wish and that he has obtained conflict waivers." (*Id.* at A123.)

- “Mr. Rector has since affirmed that he will neither disclose nor use any confidential documents produced by Verizon in *Rowh* and *Radcliff* in these actions unless and until such documents are produced in discovery herein or they become public information.” (*Id.* at A128.)
- “Mr. Rector has further affirmed that he will never disclose confidential information under the settlement agreements unless and until it may be disclosed under its terms pursuant to a subpoena, Court order or other law or it becomes public information.” (*Id.* at A129.)

Step toe further represented that “Plaintiffs in these actions have executed affidavits affirming that they have not violated any confidentiality provisions, that their interests are not adverse to each other or to Steptoe & Johnson PLLC’s former clients Katherine A. Rowh and Clista L. Radcliff, that they understand the potential conflicts of interest asserted by Defendants in the Motions to Disqualify, and that they waive any potential conflicts of interest in Steptoe & Johnston’s representation.” (*Id.* at A123.) However, the Affidavits provided by Steptoe’s Current Clients are identical, cookie-cutter documents drafted by Steptoe and filled with legalese. (*Id.* at A216-267.) With respect to the risks posed by Steptoe’s obligations to Rowh and Radcliff and their inability to use any confidential information from the *Rowh* and *Radcliff* cases in support of the Current Clients’ claims, the Affidavits state only,

I understand that if Plaintiffs in these consolidated actions proceed with Mr. Rector and Steptoe & Johnson PLLC, Defendants may attempt to preclude them from calling Ms. Rowh and Ms. Radcliff as witnesses in these consolidated actions. Nevertheless, taking into consideration that risk, I choose to continue with Mr. Rector and Steptoe & Johnson PLLC representing me as my counsel, even if that means that I will be precluded from calling Ms. Rowh and Ms. Radcliff to testify on my behalf.

(*E.g., id.* at A254.) This averment contrasts sharply with Rector’s prior statements about the prominent role Rowh would play in the current cases. (Ex. 21 at A604-05; Ex. 7 at A89.)

Notably, no affidavits were provided by Rowh and Radcliff.

On November 17, 2011, the Verizon Defendants filed their Sealed Reply in Support of Defendants' Motion[s] to Disqualify Plaintiff[s] Counsel and Law Firm (*see* Ex. 11), and the circuit court held a hearing on the motion on December 2, 2011 (*see* Ex. 22). At that hearing, the circuit court voiced concern that Steptoe had not obtained consents from Rowh and Radcliff. (*Id.* at A674.) Mr. Rector argued that those consents were unnecessary because "in light of the additional discovery that's taken place, we've got enough evidence and documentation to do the negligent retention claim." (*Id.*) Eventually, Mr. Rector indicated that he had changed his mind about the value Rowh and Radcliff add to his Current Clients' claims. Asked by the Court, "So are you telling [me] now that you're not going to use Ms. Rowh and Radcliff in this matter?" (*Id.* at A710.) Mr. Rector responded, "I think the likelihood is very remote. We don't need to . . . I think it's very remote right now as to whether they would ever become parties or witnesses in this case." (*Id.*) Yet, in that same response, Mr. Rector conceded that the documentary evidence he had to present concerning the Current Clients' negligent retention and supervision claims, which he believed would be supported by direct testimony from Rowh and Radcliff, could be challenged and potentially rebutted at trial by the Verizon Defendants. (*Id.*)

Ultimately, the Court reserved final ruling until the issuance of an opinion, but expressed concern that Steptoe had not obtained consents from Rowh and Radcliff. (*Id.* at A716.) The Court went on to state:

[I]f plaintiffs' counsel does decide to use Rowh and Radcliff in this matter, they obviously should have independent advice from someone other than Steptoe and Johnson because that creates a situation where, in the eyes of the public, that I don't think it would be appropriate for Steptoe and Johnson to advise them that they can honestly respond to a judicial inquiry pursuant to a subpoena or other court order with immunity in this matter.

(*Id.* at A717-18.)

C. The circuit court found conflicts under Rules 1.7(b) and 1.9 and disqualified Steptoe for violating Rule 1.9, subject to Steptoe's ability to seek consents after consultation.

The circuit court issued its Order Holding in Abeyance the Court's Ruling on Defendants' Motion to Disqualify on February 24, 2012 ("Order Holding in Abeyance"). (Ex. 3.) The circuit court found that the cases filed by the Current Clients involve "the same or similar subject matter" as the *Rowh* and *Radcliff* cases. (*Id.* at A16.) The circuit court found that Rule 1.7(b) was implicated by the motion because Steptoe's representation of the Current Clients "may be materially limited" by Steptoe's responsibilities to Rowh and Radcliff, who constituted "third person[s]" as contemplated by the Rule. (*Id.* at A19-20.) However, the circuit court did not disqualify Steptoe pursuant to Rule 1.7(b) because it found that Mr. Rector's original Affidavit and the Affidavits submitted by the Current Clients satisfied the exception to Rule 1.7(b). (*Id.* at A20.)

The circuit court then considered Rule 1.9: "The Court is of the opinion that Rule 1.9 is violated; therefore, Steptoe & Johnson may not continue to represent the current plaintiffs in this matter, unless Ms. Radcliff and Ms. Rowh consent after consultation." (*Id.*) The Court ordered that the Motion to Disqualify would be held in abeyance for a period of twenty days, during which Steptoe was granted the opportunity to obtain consents after consultation with Rowh and Radcliff in order to continue with its representation of the Current Clients. (*Id.* at A29-30.) The twenty-day period was set to expire on March 24, 2012. (*Id.* at A30.) In reaching this result, the circuit court considered Steptoe's argument that disqualification would violate Rule 5.6(b) of the West Virginia Rules of Professional Conduct, and, for that reason, viewed the Verizon Defendants' Motion to Disqualify with "extreme caution." (*Id.* at A17, A25, A27-28.)

D. Steptoe elected to seek reconsideration and submitted additional attorney affidavits in lieu of the court-ordered client consents.

Steptoe chose not to provide the requested consents from Rowh and Radcliff. Instead, on February 28, 2012, Steptoe filed a Motion to Reconsider the Order Holding in Abeyance (“Motion to Reconsider”). (*See* Ex. 12.) Steptoe argued that the circuit court’s finding of material adversity under Rule 1.9(a) was in error and asked the circuit court to reconsider its prior holding in light of a Supplemental Affidavit submitted by Mr. Rector. (*Id.* at A345, A353-55.) In the Supplemental Affidavit, Mr. Rector affirmed that he would not subpoena or otherwise seek documents, deposition testimony or trial testimony from Rowh or Radcliff in connection with his representation of the Current Clients. (*Id.* at A354-55.) Steptoe sought a finding that the interests of Rowh and Radcliff and the Current Clients are not materially adverse and, therefore, there was no need for Rowh and Radcliff to consent. (*Id.* at A351.)

On March 9, 2012, Steptoe submitted a Second Supplemental Affidavit of Larry J. Rector, which went even further in distancing Steptoe from the use of Rowh and Radcliff in the current cases. (Ex. 13.) In his Second Supplemental Affidavit, Mr. Rector affirmed that he would not seek to obtain affidavits or written testimony from Rowh and Radcliff, that he would not subpoena ad testificandum or duces tecum or otherwise call Rowh or Radcliff to testify, and that if either Rowh or Radcliff was called to testify, he would not examine either of them. (*Id.* at A402-03.) He further affirmed that he would not seek to introduce into evidence any deposition testimony taken from Rowh in connection with her case in the current cases. (*Id.* at A403.) Finally, Mr. Rector affirmed that he had met with the Current Clients after the circuit court issued its Order Holding in Abeyance, that they understand that he is “agreeing on their behalf that they will not call Ms. Rowh or Ms. Radcliff at the trial of these cases or involve Ms. Rowh in the consolidated actions in any manner,” and that they nonetheless chose to go forward with

Step toe as their counsel. (*Id.* at A404.) The Current Clients' Affidavits themselves were not updated to provide this information.

E. In light of Steptoe's defiance of the Order Holding in Abeyance, and after fully reconsidering the issues, the circuit court disqualified Steptoe.

On August 14, 2012, in light of Steptoe's defiance of the Order Holding in Abeyance, the circuit court entered an Order Granting Defendants' Motion to Disqualify ("Disqualification Order"). (Ex. 4.) The circuit court disqualified Steptoe because "Steptoe & Johnson refused to abide by the Court's order to consult their former clients and to obtain the necessary consents." (*Id.* at A34.) Rejecting the arguments in Steptoe's Motion for Reconsideration, the circuit court reaffirmed its holding that Rule 1.9(a) had been violated. (*Id.* at A42 ("[T]he Court is still of the opinion that Steptoe & Johnson's continued representation under these circumstances gives rise to an apparent conflict of interest or material adversity that may disadvantage Steptoe & Johnson's clients, both former and current.")) The circuit court also found that Rule 1.9(b) was implicated. (*Id.* at A43-44.) Nonetheless, the circuit court permitted Steptoe an additional ten days from entry of the Order to obtain the necessary consents from Rowh and Radcliff and thereby avoid disqualification. (*Id.* at A48.)

F. After Steptoe filed belated and deficient Consents on behalf of Rowh and Radcliff, the circuit court permitted Steptoe to continue representing the Current Clients.

On August 20, 2012, Steptoe filed identical Consents on behalf of Rowh and Radcliff. (Exs. 16, 17.) The Consents, which purport to waive any conflict of interest after consultation with Mr. Rector, provide: "I understand that Mr. Rector has submitted an affidavit to this Court stating that neither he nor any other attorney associated with Steptoe & Johnson PLLC will call me as a witness for deposition or trial in any subsequent case." (*Id.* at ¶¶ 5, 7.) In a boilerplate conclusory statement, the Consents also affirm, "I understand the issues with respect to Mr.

Rector and Steptoe & Johnson PLLC's representation of Plaintiffs in these consolidated actions.” (*Id.* at ¶ 6.) After receiving the Consents of Rowh and Radcliff, on August 24, 2012, the circuit court entered an Order Filing Consents and Permitting Steptoe & Johnson to Continue as Plaintiffs' Counsel. (Ex. 5.)

The Verizon Defendants filed a Motion for Clarification and/or Reconsideration of the Court's Order Filing Consents and Permitting Steptoe & Johnson to Continue as Plaintiffs' Counsel (“Motion for Clarification”) on September 11, 2012. (Ex. 18.) The Motion for Clarification asked the circuit court to make clear that Steptoe may not disclose or use any confidential information from the *Rowh* and *Radcliff* cases in representing the Current Clients, or, in the alternative, to find the Rowh and Radcliff Consents inadequate to demonstrate informed consent and disqualify Steptoe. (*Id.* at A529.) The circuit court heard argument on September 20 and entered its Order Denying Defendants' Motion for Clarification on October 1, 2012. (Exs. 23, 6.)

SUMMARY OF ARGUMENT

Steptoe has settled two individual claims on behalf of its former clients Rowh and Radcliff and filed nine new individual cases plus two class actions—all stemming, in whole or in part, from alleged employment violations at Verizon's Call Center in Clarksburg, West Virginia. Now Steptoe is facing disabling and irremediable conflicts of interest of its own making in connection with those current and past cases against the Verizon Defendants. The Protective Orders drafted by Steptoe and the Settlement Agreements executed in the two earlier cases, as well as Steptoe's duties and obligations to its former clients Rowh and Radcliff, create conflicts of interest in the current cases that cannot be ameliorated, even with client consent. Steptoe has admitted breaches of the *Rowh* and *Radcliff* Protective Orders, and the circuit court found

violations of both Rule 1.7(b) and Rule 1.9 sufficient to warrant disqualification. Because Steptoe's duty to zealously represent its Current Clients will continue to lead to further violations of the *Rowh* and *Radcliff* Protective Orders and Settlement Agreements that will cause harm to Rowh and Radcliff, as well as the Verizon Defendants, Steptoe must be disqualified.

The Verizon Defendants filed the Motion to Disqualify Steptoe following receipt of email correspondence making clear Steptoe's plan to involve Rowh and Radcliff in the current litigation to their potential detriment. This correspondence and subsequent positions taken by Steptoe revealed serious conflicts of interest and the appearance of impropriety. Steptoe intended to make Rowh and Radcliff, and the confidential information gleaned during their cases, the lynchpin of its new cases against the Verizon Defendants, even though doing so would put Rowh and Radcliff at risk for breaching their Protective Orders and Settlement Agreements. Steptoe initially declared that it was in the best interests of its Current Clients for Rowh to be the first witness to be deposed. However, since the Motion to Disqualify was filed, Steptoe has repeatedly backpedaled, filing multiple affidavits and providing more and greater assurances, in unsuccessful attempts to avoid these conflicts and the requirements of the WVRPC. Now Mr. Rector promises he will never depose or question Rowh or Radcliff, even if the Verizon Defendants call them at trial, but these concessions disadvantage Steptoe's Current Clients.

As the circuit court found, Steptoe cannot simultaneously advance the interests of the Current Clients while also protecting the interests of Rowh and Radcliff. In accordance with Rules 1.7(b) and 1.9 of the WVRPC and the concomitant goals of ensuring public confidence in the judicial system, protecting the duties of loyalty and fidelity between attorney and client, and safeguarding the interests of justice, Steptoe cannot be permitted to continue its representation of the Current Clients. The Verizon Defendants respectfully request that this Court order that the

underlying actions be stayed pending resolution of this Verified Petition, issue a rule to show cause why a writ of prohibition should not be issued, and enter a writ prohibiting the circuit court's enforcement of its orders permitting Steptoe to continue to represent the Current Clients and further disqualifying Steptoe from representing the Current Clients.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners do not waive oral argument and believe oral argument to be necessary under Rule 18(a) because the decisional process will be significantly aided by oral argument. Oral argument will assist this Court in evaluating whether the circuit court erred in refusing to disqualify Steptoe, a determination that will require an understanding of a complex series of facts developed over the course of several different cases and involving a lengthy procedural history in the circuit court. Petitioners request oral argument pursuant to Rule 19 for the reason that their basis for seeking a writ of prohibition arises from the circuit court's unsustainable exercise of discretion permitting Steptoe to continue representing its Current Clients where the law governing that discretion is settled and because this Petition presents narrow issues of law. Petitioners believe this case is appropriate for a memorandum decision or opinion.

STANDARD OF REVIEW

The Verizon Defendants are requesting a writ of prohibition under the original jurisdiction of this Court. A "writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court . . . having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1. A rule to show cause will issue "to correct only substantial, clear-cut legal errors . . . where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." Syl. pt. 3, *State ex rel. Blackhawk*

Enters., Inc. v. Bloom, 219 W. Va. 333, 633 S.E.2d 278 (2006). In the context of a circuit court's ruling on a motion for disqualification, however, this Court has specifically acknowledged that 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 writ of prohibition. *Id.* at 337, 633 S.E.2d at 282; Syl. pt. 1, *State ex rel. Bluestone Coal Corp. v. Mazzone*, 226 W. Va. 148, 697 S.E.2d 740 (2010); see, e.g., *State ex rel. Ogden Newspapers, Inc. (Ogden I)*, 198 W. Va. 587, 482 S.E.2d 204 (1996).

In determining whether the circuit court has exceeded its legitimate powers such that a writ of prohibition should issue, this Court considers the following five factors:

(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Bluestone Coal, 226 W. Va. at 155, 697 S.E.2d at 747.

There is no question that the first two factors have been satisfied in this case. This Court has described the importance of the writ procedure for a party whose motion to disqualify has been denied at some length:

[I]f a party who is unsuccessful in its motion to disqualify is forced to wait until after the trial to appeal, and then is successful on appeal, not only is that party exposed to undue costs and delay, but by the end of the first trial, the confidential information the party sought to protect may be disclosed The harm that would be done to the client if it were not allowed to challenge the decision by the exercise of original jurisdiction in this Court through a writ of prohibition would effectively emasculate any other remedy.

Ogden I, 198 W. Va. at 589-90, 482 S.E.2d at 206-07 (citation omitted). Moreover, for the reasons set forth in the Argument Section below, the circuit court's refusal to disqualify Steptoe was clearly erroneous as a matter of law. The third and most important factor, therefore, is also met, and this Court should issue the writ requested.

ARGUMENT

This Court has expressly recognized West Virginia courts' inherent power to disqualify a lawyer facing a conflict of interest. Syl. pt. 4, *State ex rel. Cosenza v. Hill*, 216 W. Va. 482, 488, 607 S.E.2d 811, 817 (2004) ("As the repository of public trust and confidence in the judicial system, courts are given broad discretion to disqualify counsel when their continued representation of a client threatens the integrity of the legal profession."); Syl. pt. 1, *Garlow v. Zakaib*, 186 W. Va. 457, 413 S.E.2d 112 (1991) ("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."). Although motions to disqualify are "viewed with extreme caution because of the interference with the lawyer-client relationship," this Court has declared that it is important to avoid even the appearance of impropriety:

In determining whether to disqualify counsel for conflict of interest, the trial court is not to weigh the circumstances "with hair-splitting nicety" but, in the proper exercise of its supervisory power over the members of the bar and with a view of preventing "the appearance of impropriety," it is to resolve all doubts in favor of disqualification.

Syl. pt. 1, *Garlow*, 186 W. Va. at 460-61, 413 S.E.2d at 115-16 (*quoting United States v. Clarkson*, 567 F.2d 270, 273 n.3 (4th Cir. 1977)); *Graf v. Frame*, 177 W. Va. 282, 289, 352 S.E.2d 31, 38 (1986) (preventing the appearance of impropriety "is essential [so] that the public

has absolute confidence in the integrity and impartiality of our system of justice.”); *see Rissler v. Jefferson County Bd. of Zoning Appeals*, 225 W. Va. 346, 357, 693 S.E.2d 321, 332 (2010); *see also Bank of Mill Creek v. Elk Horn Coal Corp.*, 133 W. Va. 639, 657, 57 S.E.2d 736, 748 (1950) (“An attorney owes to his client the high duty to diligently, faithfully and legitimately perform every act necessary to protect, conserve and advance the interests of his client. No deviation from that duty can be permitted”.); *Burgess-Lester v. Ford Motor Co.*, 643 F. Supp. 2d 811, 813 (N.D. W. Va. 2008) (“Anything less than the strictest safeguarding by the lawyer of the client’s confidences would irreparably erode the sanctity of the lawyer-client relationship.”) (quoting *State ex rel. Keenan v. Hatcher*, 210 W. Va. 307, 313, 557 S.E.2d 361, 367 (2001)).

Here, Steptoe’s failure to follow the WVRPC and its substantial deviation from its highest fiduciary duties to its clients, both current and former, threatens the integrity of both these proceedings and the legal profession. As discussed below, Steptoe continues to represent the Current Clients, even though Steptoe’s responsibilities to Rowh and Radcliff materially limit its representation of the Current Clients in violation of Rule 1.7(b). *See* Section I, *infra*. Steptoe’s prior representation of Rowh and Radcliff is substantially related to its representation of its Current Clients, and their interests are materially adverse in violation of Rule 1.9(a). *See* Section II, *infra*. Moreover, Steptoe’s use of confidential information relating to its representation of Rowh and Radcliff has been and will continue to be to their disadvantage in violation of Rule 1.9(b). *See* Section III, *infra*. Finally, Steptoe’s intention to use confidential information from the *Rowh* and *Radcliff* litigation in the current cases, in violation of the Protective Orders and Settlement Agreements in which the Verizon Defendants have vested interests, necessitates disqualification to protect not only Rowh and Radcliff but also the Verizon Defendants’ interests in both the confidential information itself and the enforcement of the court

orders and contractual provisions designed to protect it. *See* Section IV, *infra*. Each of the foregoing four separate grounds provides an independently sufficient basis for disqualifying Steptoe from representing the Current Clients.

I. **Steptoe Must Be Disqualified Under Rule 1.7(b) Because Its Representation of the Current Clients Is Materially Limited by Steptoe's Responsibilities to Rowh and Radcliff and the Conflict Cannot Be Cured by Consent.**

West Virginia Rule of Professional Conduct 1.7(b) addresses conflicts of interest and provides, in pertinent part, "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests." The single exception to mandatory disqualification under Rule 1.7(b) applies only if both (1) "the lawyer reasonably believes the representation will not be adversely affected" and (2) "the client consents after consultation." The American Bar Association has noted that "[w]hat triggers Rule 1.7(b) is a lawyer's recognition of the possibility that a particular representation may be materially limited by the lawyer's responsibilities to another client" and that rule applies "to situations when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests." ABA Formal Ethics Op. 95-390 (1995). In this case, the circuit court correctly found a violation of Rule 1.7(b) (Ex. 3 at A19-20) because Steptoe's ability to effectively represent the Current Clients is materially limited by Steptoe's duties to ensure that neither Steptoe nor Rowh and Radcliff violate the terms of the prior Protective Orders and Settlement Agreements. However, the circuit court erroneously permitted Steptoe to continue its representation because it found that the Current Clients' Affidavits satisfied the exception to Rule 1.7. (*Id.* at A20.) Because it is unreasonable to believe that

Step toe's representation of the thirteen Current Clients will not be adversely affected, an irremediable conflict of interest exists that is not subject to consent after consultation.

A. Steptoe cannot continue to represent the Current Clients because that representation is materially limited by its responsibilities to Rowh and Radcliff.

Step toe's representation of the Current Clients is materially limited by its responsibilities to Rowh and Radcliff. First, Steptoe is under a continuing duty of its own making to protect from use or disclosure the confidential information contained in documents produced pursuant to the Protective Orders. Yet, it is impossible for Steptoe to zealously advocate on behalf of the Current Clients while refraining from using the confidential discovery information in the current litigation. Indeed, Mr. Rector has already admitted to violating this continuing obligation in a June 18, 2011 email wherein he stated that "the discovery propounded in the subsequent cases is premised on the Rowh discovery." (Ex. 11 at A298.)

Second, while representing Rowh and Radcliff, Steptoe came into possession of highly confidential information concerning the amount and nature of their settlements with Verizon. Some of that information, including the amount of various settlement offers and certain representations made during negotiations, was Verizon's and was shared in the spirit of compromise only to the extent its confidentiality was assured. Other confidential information, including information relating to the strengths of their claims and personal concerns affecting their willingness to settle for various amounts, belongs to Rowh and Radcliff and is known only to them and Steptoe. Under the terms of the Settlement Agreements and its duties to Rowh and Radcliff, Steptoe may not use that information in its representation of the Current Clients. But, the confidential information is material to the valuation of the Current Clients' claims. If Steptoe does not use the information and communicate it to the current clients, it will be failing to live up

to its duties to the Current Clients, and its representation of the Current Clients will be materially limited. *See Bassman v. Blackstone Assocs.*, 279 A.D.2d 280, 281 (N.Y. App. Div. 2001) (affirming disqualification where confidentiality provisions in a settlement agreement conflicted with counsel's "ability to freely contemplate settlement strategies" in pending litigation).

Third, Steptoe is ethically and contractually prohibited from pursuing testimony from Rowh and Radcliff. Rowh and Radcliff have nothing to gain and everything to lose from testifying in any of the nine individual matters currently pending before the circuit court. If they choose to testify, that testimony may subject them to suit or court-imposed sanctions for violating the terms of their Settlement Agreements and the Protective Orders. Conversely, the best interests of the Current Clients require Steptoe to push Rowh and Radcliff to participate and likely violate the terms of their Protective Orders and Settlement Agreements in order to obtain as much information as possible in support of the Current Client's negligent retention and supervision claims. Steptoe's own conduct makes this point crystal clear. (*See Ex. 7 at A89* (email from Mr. Rector stating that Rowh will be his first deponent).)

While this is not an exhaustive list of the limitations placed upon Steptoe's representation of its Current Clients as a result of its obligations to Rowh and Radcliff, any one of these material limitations on Steptoe's representation of the Current Clients is sufficient to warrant disqualification. Steptoe must zealously represent the Current Clients' interests in the pending litigation. *State ex rel. McClanahan v. Hamilton*, 189 W. Va. 290, 294, 430 S.E.2d 569, 573 (1993). In order to do so, Steptoe would need to use all information and documents at its disposal to make the strongest argument possible in alleging that the Verizon Defendants engaged in some form of wrongful conduct. Steptoe cannot do this because it is boxed in by its obligations to Rowh and Radcliff. *See Gilbert v. National Corp.*, 71 Cal. App. 4th 1240 (Cal. Ct.

App. 1999) (disqualifying plaintiffs' counsel in employment litigation where confidentiality requirements from prior mediation and settlement agreement limited counsel's ability to present testimony on behalf of current clients); ABA Formal Ethics Op. 95-395 (1995) (where a lawyer has information relating to his prior representation that he could neither disclose nor utilize because of his obligations to his former client, his inability to use the information might adversely affect his ability to carry out his responsibilities in the new matter).

In support of its argument that Rule 1.7(b) does not apply here, Steptoe argued to the circuit court that it "is in exactly the same shoes as any other counsel with respect to confidential information under the settlement agreements in *Rowh* and *Radcliff*" because the confidential information is subject to disclosure pursuant to subpoena, Court order, or other law. (Ex. 10 at A132.) This contention ignores the crux of the conflict—the competing duties to Rowh and Radcliff on the one hand, and the Current Clients on the other hand—to which no other firm would be subject. To the extent Steptoe went through the motions and subpoenaed any particular documents or information, Rowh and Radcliff would not have available the unbiased advice of their former attorneys that they should fight those disclosure attempts as adverse to their interests in maintaining their settlements. Rather, Steptoe's interest on behalf of its Current Clients would be to maximize the amount of disclosure, even to the detriment of Rowh and Radcliff, their former clients. If another firm represented the Current Clients and they tried to secure Rowh's or Radcliff's testimony, Steptoe could properly advise them how to avoid the risks associated with such testimony, and, if they were forced to testify, Steptoe could advocate on their behalf to avoiding violating the Protective Orders and Settlement Agreements. Under the current circumstances, Steptoe is faced with a duty to the Current Clients to obtain as much information

as possible from Ms. Rowh and Ms. Radcliff as it is able regardless of whether providing such testimony would expose either individual to risk. No other firm would face that dilemma.

- B. A disinterested lawyer would conclude that Steptoe’s representation of the Current Clients has been and will continue to be materially limited by Steptoe’s responsibilities to Rowh and Radcliff; therefore, the conflict of interest cannot be cured by consent.**

Steptoe cannot establish a reasonable belief that its representation of the Current Clients will not be adversely affected by its responsibilities to Rowh and Radcliff. Absent this reasonable belief, Rule 1.7(b) requires disqualification, regardless of whether the clients consent after consultation. Indeed, the comments to Rule 1.7 state, “when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.” Such is clearly the circumstance before this Court. All plaintiffs—including those currently suing the Verizon Defendants—deserve representation from attorneys who do not put their interests above their clients’ interests or subject their clients to substantial and unnecessary risks. This Court should not permit Steptoe’s conflicts of interest to limit the Current Clients’ ability to have the representation they deserve.

- 1. Rule 1.7(b) requires disqualification because Steptoe cannot carry out appropriate courses of action in the pursuit of the Current Clients’ claims because of Steptoe’s other responsibilities to Rowh and Radcliff.**

As discussed above, Steptoe’s obligations to Rowh and Radcliff, as well as its own interests in avoiding violations of the Protective Orders and Settlement Agreements, limit its ability to (1) conduct complete discovery, (2) advise the Current Clients as to valuation and potential settlement of their claims, and (3) present evidence in support of the Current Clients’ negligent retention and supervision claims. *See* Section I.A, *supra*. If Rowh or Radcliff is sworn

in to testify in the pending litigation, each faces a very real and significant risk of violating the confidentiality and non-disparagement clauses of the Protective Orders and Settlement Agreements. Steptoe placed itself in a precarious position: (1) zealously represent the Current Clients by encouraging Rowh and Radcliff to participate and likely violate the terms of their respective Protective Orders and Settlement Agreements or (2) handicap their representation of the Current Clients by advising Rowh and Radcliff to avoid any involvement in the pending cases. Steptoe must decide which clients' interests to give a preference—a choice that disqualifies the firm from representation of the Current Clients.

2. The two Supplemental Affidavits filed by Steptoe demonstrate that Steptoe cannot reasonably believe that its representation of the Current Clients will not be materially limited by its duties to Rowh and Radcliff.

Relying on an affidavit submitted by Mr. Rector, the circuit court reasoned that the exception to Rule 1.7(b) was satisfied because Steptoe and Mr. Rector “reasonably believe[] the representation will not be adversely affected.” Rule 1.7(b); (Ex. 3 at A20). This finding was in error and is belied by the terms of Mr. Rector’s affidavits themselves. Despite Mr. Rector’s statements disclaiming any undue restrictions or limitations on Steptoe’s representation of the Current Clients (Ex. 10 at A154; Ex. 12 at A355; Ex. 13 at A403), in those very affidavits Mr. Rector relinquished progressively greater rights and placed greater restrictions on the Current Clients’ ability to prosecute their negligence claims. In the Second Supplemental Affidavit, Steptoe avers that it will not (1) call Rowh or Radcliff to testify at any proceeding associated with this litigation; (2) question Rowh or Radcliff if they are called by counsel for the Verizon Defendants; or (3) introduce any deposition testimony of Rowh. (Ex. 13 at A402-03.) It is remarkable that an attorney would agree, early in the discovery process, to waive cross-examination of a witness he has admitted has information material to his case.

The exception to disqualification in Rule 1.7(b) requires Steptoe's belief to be reasonable. In light of its repeated insistence that it planned to involve Rowh in the pending litigation, Steptoe cannot credibly claim that excluding Rowh and Radcliff as witnesses will not adversely affect the Current Clients' cases. Because a disinterested lawyer would conclude that the restrictions on Steptoe's representation of the Current Clients created by its obligations to Rowh and Radcliff materially limit the representation of the Current Clients, Steptoe's conflict of interest cannot be cured by consent. Accordingly, the exception in Rule 1.7(b) is not satisfied, and Steptoe should be disqualified.

C. The Affidavits executed by the Current Clients are insufficient to cure the conflict of interest.

Steptoe tried to sidestep the irremediable conflicts in these cases by providing identical form Affidavits wherein the Current Clients purported to excuse Steptoe from the above conflicts of interest. These alleged waivers are ineffective. As an initial matter, as discussed above, consent following consultation is ineffective where counsel's purported belief that the representation will not be adversely affected is unreasonable. *See* Section I.B, *supra*. Moreover, the Affidavits drafted by Steptoe and blindly signed by the Current Clients without the benefit of independent counsel show that Steptoe has not been forthcoming with its Current Clients regarding the conflicts. As a result, the Affidavits do not constitute effective, knowledgeable waivers. *See* Rule 1.9, comment ("A waiver [of a conflict of interest by a client] is effective only if there is a disclosure of the circumstances, including the lawyer's intended role on behalf of the new client."). The Affidavits were drafted with the goal of permitting Steptoe to continue its representation of the Current Clients, not protecting the Current Clients' interests.

For example, the Affidavits are very narrow with respect to the scope of the risks addressed. In Paragraph 9, the Affidavits refer to the fact that confidential settlement

information may be subject to subpoena or other order and that the Current Clients understand that any such use will be subject to further unspecified restrictions, with which they agree to comply. (*E.g.*, Ex. 10 at A254.) In Paragraph 10 the Affidavits go on affirm that the Current Clients understand that the Verizon Defendants may attempt to preclude Steptoe from calling Rowh and Radcliff as witnesses, but the Current Clients choose to continue with Steptoe after considering that risk. (*Id.*) There is no indication that the Current Clients understand Steptoe's latest representation to the circuit court that Steptoe will not question Rowh and Radcliff even if called to testify at trial by the Verizon Defendants, or that Steptoe's inability to use confidential information from the *Rowh* and *Radcliff* cases will weaken the Current Clients' claims. There is no indication that the Current Clients were informed about the difficulties Steptoe will face in advising them concerning the appropriate settlement value of each Current Client's claims in light of its duties to maintain confidentiality. Finally, there is no indication that any of the Current Clients actually spoke with another, disinterested lawyer. Thus, under Rule 1.7(b), there has not been a meaningful approval by the Current Clients of the risks posed by Steptoe's conflict of interest, and Steptoe must be disqualified.

II. Steptoe Must Be Disqualified Under Rule 1.9(a) Because Its Prior Representation of Rowh and Radcliff Is Substantially Related to Its Representation of Its Current Clients and Their Interests Are Materially Adverse.

Rule 1.9 applies when conflicts of interest arise between current and former clients. Under Rule 1.9(a), “[a] lawyer who has formerly represented a client in a matter shall not thereafter: (a) represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.” The circuit court properly found a violation of Rule 1.9(a) (Ex. 3 at A20; Ex. 4 at A42) but erroneously allowed Steptoe's continued representation on the

basis of facially deficient consents (Ex. 5 at A52). Because the Consents signed by Rowh and Radcliff are insufficient to waive the material adversity in this case, Steptoe must be disqualified.

This Court has held that “five criteria must be satisfied” in order to disqualify counsel under Rule 1.9(a):

(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.

Syl. pt. 5, *Bluestone Coal*, 226 W. Va. 148, 697 S.E.2d 740. In this case, elements one and two are clearly met; Steptoe has never taken the position that it did not have an attorney-client relationship with Rowh and Radcliff, whom it represented in prior litigation, or that it does not have an attorney-client relationship with its Current Clients, whom it represents in pending litigation.

A. The current litigation involves work Steptoe performed for Rowh and Radcliff, and Steptoe’s representation of the Current Clients has involved and will continue to involve the use of information acquired in the course of representing Rowh and Radcliff.

The third criterion necessary for disqualification pursuant to Rule 1.9(a) is that the subject matter of Steptoe’s representation of the Current Clients is either the same as or substantially related to the subject matter of Steptoe’s representation of Rowh and Radcliff. With respect to this requirement, this Court has explained that “[u]nder Rule 1.9(a) of the Rules of Professional Conduct, determining whether an attorney’s current representation involves a substantially related matter to that of a former client requires an analysis of the facts, circumstances, and legal issues of the two representations.” Syl. pt. 3, *McClanahan*, 189 W. Va.

290, 430 S.E.2d 569. More specifically, “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.” Syl. pt. 1, *Keenan*, 210 W. Va. 307, 557 S.E.2d 361. If the representations are similar enough that confidential information gleaned in one could be used in the other, the attorney’s receipt of confidential information from the former representation is presumed. *McClanahan*, 189 W. Va. at 294, 430 S.E.2d at 573.

As the circuit court correctly held, “the current and former clients’ interests share a substantial relationship because all of the cases involve claims of wrongful termination that stemmed from alleged employment violations at Verizon’s call center in Clarksburg, West Virginia.” (Ex. 3 at A22.) Steptoe itself concedes that the confidential information that Steptoe received both in the form of client confidences and confidential information disclosed in discovery and subject to the Protective Orders is directly relevant to its Current Clients’ claims for negligent retention and supervision. Rowh and Radcliff, and their alleged mistreatment by the Verizon Defendants, are a critical cornerstone to the way in which Steptoe intends to pursue the pending litigation. As Mr. Rector put it at the December 2011 hearing on this issue, “where their testimony becomes – would it become relevant – frankly, it would have become relevant, would be on that negligent retention and supervision claim. We talked about that claim in prior hearings, but the gist of that claim was and is that Verizon had managers that it knew were out there discriminating against employees in violation of law, didn’t take appropriate action and, therefore, you know, my current clients were exposed to that kind of treatment that then caused them adverse employment actions.” (Ex. 22 at A670.) Because Steptoe’s representation of the

Current Clients has involved and will continue to involve use of confidential information from the *Rowh* and *Radcliff* cases, the third criterion is met.

B. Steptoe cannot represent the Current Clients because their interests are materially adverse to the interests of Rowh and Radcliff.

The fourth criterion necessary for the disqualification of counsel pursuant to Rule 1.9(a) is that the Current Clients' representation is materially adverse to the interests of Rowh and Radcliff. While "switching sides" and suing a former client would certainly create material adversity, as this Court explained in *McClanahan*, "it is impossible to devise a single statement that will reveal whether an interest is adverse." 182 W. Va. at 294, 430 S.E.2d at 573. For guidance in determining "material adversity," in *McClanahan*, this Court outlined two scenarios where material adversity can be found: (1) the attorney's exercise of individual loyalty to one client might harm the other client or (2) his zealous representation will induce him to use confidential information that could adversely affect the former client. *Id.*

As the circuit court correctly found, both types of material adversity are present here. (See Ex. 3 at A22 ("[T]he Court is concerned that Plaintiffs' Counsel's individual loyalty to the current plaintiffs *might* harm Ms. Rowh and Ms. Radcliff. Specifically, Mr. Rector's zealous representation of his current clients may induce him to use confidential information that could adversely affect Ms. Rowh and Ms. Radcliff and, ultimately, may result in a breach of their respective settlement agreements.")) Steptoe's exercise of unfettered loyalty to the Current Clients will necessarily cause harm to Rowh and Radcliff, and Steptoe's zealous representation of the Current Clients will induce Steptoe to use confidential information in a manner that will adversely affect Rowh and Radcliff. See Section I.A, *supra*.

The Current Clients have every interest in obtaining maximum advantage from Rowh and Radcliff's testimony or other involvement, even if it would result in Rowh or Radcliff breaching

their contractual confidentiality and non-disparagement obligations. Involvement of Rowh and Radcliff is so important to the Current Clients that their counsel has submitted three affidavits, each more restrictive than the last, in an effort to hold on to as much access to Rowh and Radcliff in the current litigation as possible. Ultimately, Steptoe has agreed to forego the ability to question Rowh and Radcliff but is attempting to preserve the right to relitigate their allegations against the Verizon Defendants through the use of documents. Steptoe makes clear, in its Second Supplemental Affidavit, discovery requests, and pending Motion to Compel, that it intends to make the facts associated with Rowh and Radcliff central to its current prosecution of the negligent supervision and retention claims. (Ex. 13; Ex. 14 at A430-32, A440, A473-77.) In order to counter arguments or innuendo based on those documents, it may be necessary for the Verizon Defendants to call Rowh and Radcliff as witnesses. Should this occur, Rowh and Radcliff risk breaching both the Settlement Agreements and the Protective Orders.

Steptoe argued below that Rule 1.9(a) is not implicated by its representation of the Current Clients because “obviously the representation of none of these clients is adverse to the interests of Ms. Rowh and Ms. Radcliff – who like Plaintiffs in these actions are former Verizon employees who claimed disparate treatment employment discrimination based upon a disability or perceived disability.” (Ex. 10 at A133.) Steptoe’s willful blindness to the fact that Rowh and Radcliff have significant interests beyond supporting their former co-workers in suing the Verizon Defendants is itself emblematic of the disabling conflicts Steptoe faces. At this time, the litigation goal identified by Steptoe may not be critical for Rowh and Radcliff, but avoiding potential breach of contract litigation and holding on to their settlement proceeds is undeniably important to them. Steptoe cannot be permitted to continue to represent the Current Clients because their interests are materially adverse to Rowh and Radcliff.

C. The Consents executed by Rowh and Radcliff are insufficient to cure the conflict of interest.

“Rule 1.9(a) of the Rules of Professional Conduct recognizes that even though an attorney may have a conflict of interest with regard to a former client, the attorney may continue the representation if the former client, after consultation, consents to the representation. During this consultation, the attorney must make a full disclosure to the former client so that an intelligent decision may be made on the consent.” Syl. pt. 5, *McClanahan*, 189 W. Va. 290, 430 S.E. 2d 569. In order to give informed consent, a client must be informed in detail of the nature of the conflict and of any risks and foreseeable pitfalls resulting from the conflict. *See, e.g., Unified Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339, 1345-46 (9th Cir. 1981) (defining informed consent as explaining the nature of the conflict in detail); *Celgene Corp. v. KV Pharm. Co.*, No. 07-4819, 2008 U.S. Dist. LEXIS 58735, at *15 (D.N.J. June 29, 2008) (defining “truly informed consent” as “consent that an attorney obtained after a consultation with the client in which the attorney proposed a course of conduct using adequate information, explained the material risks of this course of conduct, and stated reasonably available alternatives to the proposed course of conduct”); *Acheson v. White*, 487 A.2d 197, 199 n.5 (Conn. 1985) (informed consent requires that the lawyer disclose in detail risks and foreseeable pitfalls); *see also* Restatement (Third) of Law Governing Lawyers § 122(1) (2000) (“Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.”).

On their face, the Consents signed by Rowh and Radcliff do not demonstrate that they have been informed of the potential risks and consequences that they may face if Steptoe discloses or uses confidential information from their cases during the course of representing the Current Clients. The Consents state that Rowh and Radcliff understand that Steptoe has

represented to the Court that Steptoe will not call them as witnesses in the current litigation. (Exs. 16, 17 at ¶ 5.) Further, Steptoe provides a conclusory statement in the Consents that Rowh and Radcliff “understand the issues” without providing any detail as to any other “issues” they supposedly understand. (*Id.* at ¶ 6.) Steptoe’s representation that it will not call these former clients as witnesses is insufficient to address the potential risks to Rowh and Radcliff posed by the possibility that Steptoe may use, deliberately or inadvertently, confidential information from the prior cases. This is because, of course, Steptoe may breach the Protective Orders and Settlement Agreements in any number of ways, not simply by calling its former clients as witnesses and asking them questions, thereby exposing its former clients to liability. (*See* Ex. 3 at A25-26 n.1; Ex. 4 at A45-48.) There are no statements in the Consents demonstrating that Rowh and Radcliff have been informed of this risk, and despite their knowledge of that risk, consent to Steptoe’s representation of the Current Clients. To the contrary, Rowh’s and Radcliff’s references to Steptoe’s limited promise not to call them as witnesses indicate that they are under the misapprehension that the only peril to their interests arises from such an event, and nothing else.

In sum, the Consents do not convey any basis for concluding that Rowh and Radcliff have been informed in detail of the risks posed to their interests of any disclosure by Steptoe of confidential information from the prior cases. Indeed, the Consents do not even state that Rowh and Radcliff have read the circuit court’s Disqualification Order. If anything, the Consents convey the impression that Rowh and Radcliff are placing undue emphasis on Steptoe’s promise not to call them as witnesses, a representation that is inadequate to resolve Steptoe’s actual and potential conflicts and to protect Rowh and Radcliff from potential liability. Accordingly, the Consents fail to satisfy the requirements of the circuit court’s Disqualification Order and West

Virginia law, and Steptoe must be disqualified under Rule 1.9(a).³ See *Healthnet, Inc. v. Health Net, Inc.*, 289 F. Supp. 2d 755, 758-59 (S.D. W. Va. 2003) (holding disqualification may be warranted where “a reasonable former client would be concerned by the conflict”).

III. Steptoe Must Be Disqualified Under Rule 1.9(b) Because Its Use of Information Relating to Its Representation of Rowh and Radcliff Has Been and Will Continue to Be to Their Disadvantage.

Under Rule 1.9(b), “[a] lawyer who has formerly represented a client in a matter shall not thereafter: . . . (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.” “The rule is concerned, first and foremost, with insuring that a former client will be protected against both intentional and inadvertent disclosure of his confidential information; as well as against the unfair advantage a lawyer could take of her client by using information he communicated in confidence during the course of the earlier representation.” *Bluestone Coal*, 226 W. Va. at 158, 697 S.E.2d at 750. Additionally, Rule 1.9

serve[s] to foster vigorous advocacy on behalf of the lawyer’s current client by removing from the case a lawyer who would otherwise have to be conscious of preserving her former client’s confidences. . . . The rule exists, therefore, not only to protect confidential communications, but to fulfill the client’s reasonable expectations about the loyalty of the lawyer he has retained to represent him in a particular matter; by allaying any apprehension on the part of the client—or the court—that, if a client communicates confidential information to a lawyer, he may be risking adverse consequences somewhere down the line.

Id. at 158-59, 697 S.E.2d at 750-51.

³ While Rule 1.9 does not explicitly require an individual to receive advice from an independent lawyer before deciding whether to provide a written consent, this Court reasoned in a different context that independent consultation is important to show that there is no misunderstanding or duress. *Ware v. Ware*, 224 W. Va. 599, 606, 687 S.E.2d 382, 389 (2009). The same rationale applies here. It is important for Rowh and Radcliff to have a full understanding of the potential liabilities of their involvement and Steptoe’s interest in their involvement. This can be assured only if written consent follows consultation with an independent lawyer, rather than Mr. Rector or another Steptoe lawyer.

Through the *Rowh* and *Radcliff* cases, Steptoe received information protected by Rule 1.9. *See Bluestone Coal*, 226 W. Va. at 158, 697 S.E.2d at 750 (the law presumes that the former client imparted confidential information). By its own admission, Steptoe intends to use that protected information during its representation of the Current Clients. (Ex. 7 at A78, A83, A89; Ex. 13; Ex. 14 at A430-32, A440, A473-77.) Such behavior will work to the disadvantage of Rowh and Radcliff. If confidential information is used or disclosed, Rowh and Radcliff risk a breach of the Protective Orders and Settlement Agreements and may be subjected to litigation, in plain violation of Rule 1.9(b). But, if Steptoe refrains from using that confidential information, its representation of the Current Clients will be hampered by Steptoe's obligations to preserve confidentiality and avoid breaches of the Settlement Agreements. (*See* Ex. 4 at A46-47 (“[T]he Court is concerned that the knowledge that Steptoe & Johnson gained in the previous cases and during the settlement negotiations creates a situation where Steptoe & Johnson may not be able to properly advise the current clients regarding the value of their case without inadvertently breaching the confidential settlement agreements.”).) Thus, as the circuit court correctly found, it is impossible for Steptoe to zealously represent the Current Clients while also maintaining the confidentiality of information relating to its representation of Rowh and Radcliff. (*Id.* at A45 (“The current clients are entitled to the best possible representation and to have all relevant evidence admitted [T]his may not be possible without Steptoe & Johnson violating Rule 1.9(b) and jeopardizing their former clients' interests in their settlement proceeds.”).) The only way to adequately protect the interests of all of Steptoe's clients is to disqualify Steptoe from further representation of the Current Clients so that they may obtain other counsel who has no conflicting loyalties to Rowh and Radcliff.

Step toe argued below that Rule 1.9(b) does not support disqualification because the confidential information at issue is not client confidences, which Steptoe contends are the only confidential information protected by Rule 1.9(b), but instead is documents and information provided by Verizon subject to the provisions of the Protective Orders and Settlement Agreements. (Ex. 10 at A133.) Steptoe’s argument misconstrues both the reach of Rule 1.9(b) and the facts of these cases. First, Rule 1.9(b) is not limited to confidential information gathered directly from clients, but instead speaks directly to confidential information “relating to the representation.” Clearly not only Rowh and Radcliff’s client confidences but also the Verizon confidential documents and information gathered during discovery and settlement negotiations in the Rowh and Radcliff cases relate to Steptoe’s representation of Rowh and Radcliff. Second, apart from any Verizon confidential documents and information, Steptoe undeniably did receive confidential information from Rowh and Radcliff during its representation of them during their cases that it intends to use during its representation of the Current Clients. For instance, Steptoe has no doubt become aware of the substance of their intended testimony on issues relating to employment conditions at the Clarksburg Call Center, some of which have not yet been subject to discovery and which is impacting Steptoe’s decisions about whether to call its former clients as witnesses in the current litigation. To the extent that information leads Steptoe to urge either or both of these women to testify and puts them at risk under the Protective Orders or Settlement Agreements, Steptoe will have used Rowh and Radcliff’s own client confidences to their disadvantage. This type of conflict is clearly prohibited by Rule 1.9(b).

Rule 1.9(b) does permit use of information to the disadvantage of a former client in certain instances, including “as Rule 1.6 . . . would permit or require with respect to a client.” Although most of the exceptions in Rule 1.6 are inapplicable on their face to this matter, Rule

1.6(a) permits disclosure of “information relating to representation of a client” where “the client consents after consultation.” Here, neither Rowh nor Radcliff has consented to the release of her client confidences or other confidential information in the current litigation, so this exception does not apply. (See Exs. 16, 17); see also Section II.C, *supra*. For these reasons, the circuit court’s finding that the Consents meet the requirements of Rule 1.9(b) is in error, and Steptoe must be disqualified.

IV. Steptoe must be Disqualified Because It Improperly Used and Expressed an Intention to Continue to Use the Verizon Defendants’ Confidential Information in Violation of Several Protective Orders and Settlement Agreements to Gain an Advantage in Subsequent Litigation.

The Verizon Defendants produced confidential documents in reliance upon the Protective Orders in the *Rowh* and *Radcliff* cases and have never consented to the use of those documents or other confidential information from those cases, including confidential information in or relating to the Settlement Agreements and negotiations, in the current litigation. (See, e.g., Ex. 11 at A322, A324.) Steptoe, however, has used the confidential information it obtained during the litigation of the *Rowh* and *Radcliff* matters in violation of the Protective Orders and Settlement Agreements, to gain an unfair advantage in the pending litigation. (*Id.* at A298 (“[T]he discovery propounded in the subsequent cases is premised on the Rowh discovery.”).) Moreover, Steptoe has indicated an intention to continue to violate its obligations under the Protective Orders and Settlement Agreements. (See, e.g., Ex. 7 at A78 (“Please be advised that I intend to use the Rowh documents in these cases . . .”).) Steptoe should not be able to negotiate (and, in the context of the Protective Orders, draft) confidentiality and non-disparagement provisions and then circumvent its own agreements to gain an advantage in subsequent litigation. Without an assurance that no confidential information from the *Rowh* and *Radcliff* litigation will be used in the present litigation, disqualification of Steptoe is required to protect the Verizon

Defendants' interests in the confidential information, Protective Orders and Settlement Agreements.

Use of confidential information acquired in a prior action is grounds for disqualification of counsel, as well as other sanctions. *See, e.g., Cargill v. Budine*, No. CV-F-07-349, 2007 U.S. Dist. LEXIS 48405, at *42-44 (E.D. Cal. June 22, 2007) (disqualifying defendants' counsel in a second action based in part on their potential violation of a protective order entered in a first-filed action in which they served as plaintiffs' counsel, through the potential use of confidential documents and information produced in the first-filed action); *Helgemo v. The Pampered Chef*, No. A04-1434, 2005 Minn. LEXIS 450 (Minn. July 19, 2005) (affirming disqualification of plaintiff's counsel who violated the terms of a protective order in a prior action by using confidential information to his advantage in subsequent litigation); *Biocore Med. Techs., Inc. v. Khosrowshahi*, No. 98-2031, 98-2175, 1998 U.S. Dist. LEXIS 20512 (D. Kan. Nov. 6, 1998) (disqualifying counsel for violating the protective order in that case by providing information and deposition testimony in another litigation); *Bassman*, 279 A.D.2d 280 (N.Y. App. Div. 2001) (disqualifying counsel from representation because of potential breach of confidentiality provisions of settlement agreement in prior litigation); *Gilbert*, 71 Cal. App. 4th at 1243, 1251-54 (Cal. Ct. App. 1999) (disqualifying counsel from representation because of use of confidential information from prior litigation); *see also Whitehead v. Gateway Chevrolet, Oldsmobile*, No. 03-C-5684, 2004 U.S. Dist. LEXIS 11979 (N.D. Ill. June 29, 2004) (imposing sanction of attorneys' fees on attorney who used confidential information from a previous case, in violation of a protective order, to file a new complaint); *Poliquin v. Garden Way, Inc.*, 154 F.R.D. 29, 31-33 (D. Me. 1994) (sanctioning attorney for disclosing an affidavit to co-counsel in a separate case against the same defendant in violation of a protective order).

The Verizon Defendants relied upon the Protective Orders when they produced documents containing confidential information in the *Rowh* and *Radcliff* cases, and they relied upon the confidentiality and non-disparagement provisions in the Settlement Agreements. The interests of the Verizon Defendants are entitled to protection. *See SRS Technologies, Inc. v. Physitron, Inc.*, 216 F.R.D. 525, 531 (N.D. Ala. 2003) (rejecting request to modify protective order because, in part, of “the reliance of the Defendants on the protections afforded by the confidentiality order”); *State ex rel. Butterworth v. Jones Chemicals, Inc.*, 148 F.R.D. 282, 288 (M.D. Fla. 1993) (“Failure to protect Defendants’ reliance on the Protective Order would not only prejudice confidentiality interests of Defendants, it would undermine the effectiveness of protective orders in facilitating discovery.”) In addition, the Verizon Defendants have protectable interests in a trial free from even the risk that confidential information has been unfairly used against them. *Williams v. Trans World Airlines, Inc.*, 588 F. Supp. 1037, 1046 (W.D. Mo. 1984). In this case, the interests of justice and the Verizon Defendants trump the Current Clients’ choice of Steptoe as counsel. *See Cargill*, 2007 U.S. Dist. LEXIS 48405, at *44 (“[T]he policy concerns raised by participation of counsel outweigh [a party’s choice of counsel]; namely, the appearance of impropriety and the threat to the integrity of the trial process, because of the confidential and privileged information involved, and the risk of unfair advantage.”); *see also Biocore*, 1998 U.S. Dist. LEXIS 20512, at *15 (“The Court must assure itself that the protective order issued in this case will be upheld. The Court is unwilling to accept the obvious risk that [counsel] will commit further violations of the protective order.”). Thus, the ongoing threat to the Verizon Defendants’ rights under the Protective Orders and Settlement Agreements in the *Rowh* and *Radcliff* cases posed by Steptoe’s improper use of confidential

information protected by those orders and agreements warrants disqualification even apart from the risks Steptoe's behavior creates for Rowh and Radcliff.

CONCLUSION

Rules 1.7(b) and 1.9 require that Steptoe be disqualified. Steptoe cannot represent its Current Clients without creating irreparable conflicts and the appearance of impropriety that threaten the integrity of the trial process and judicial system. For all of the reasons set forth herein, the Verizon Defendants respectfully submit that this Court should grant a writ of prohibition to correct the manifest errors in the circuit court's orders permitting Steptoe to continue to represent the Current Clients and further disqualifying Steptoe. Moreover, this Court should stay all lower court proceedings pending final resolution of this Verified Petition, so that the discovery process and pre-trial proceedings are not permanently tainted by Steptoe's improper use of confidential information in the meantime.

WHEREFORE, the Petitioners respectfully request that this Verified Petition for Writ of Prohibition be accepted for filing; that this Court issue a rule to show cause against the Respondents directing them to show cause, if any they can, as to why a Writ of Prohibition should not be issued; that all proceedings in the Circuit Court of Harrison County be stayed until resolution of the issues raised in this Petition as provided by West Virginia Code § 53-1-9; that this Court award a Writ of Prohibition against the Respondents, directing the circuit court to disqualify Steptoe; and that this Court award Petitioners such other and further relief as the Court deems appropriate.

Respectfully submitted this 16th day of October, 2012,

VERIZON WEST VIRGINIA INC., ANDREA L. CUSTIS, VICTORIA L. BOSTON, ROBERT ANDERSON, JUDY ISNER, MARY FREDERICK, DAWN WATSON, BARBARA TERWILLIGER, and JODI DENNIS

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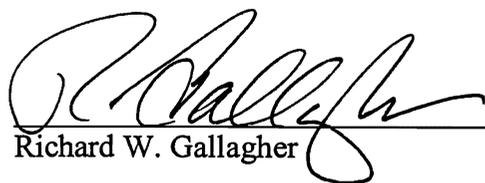
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VERIFICATION

I, Richard W. Gallagher, counsel for the Petitioners, Verizon West Virginia Inc., Andrea L. Custis, Victoria L. Boston, Robert Anderson, Judy Isner, Mary Frederick, Dawn Watson, Barbara Terwilliger, and Jodi Dennis, hereby certify that the facts and allegations contained in this Verified Petition for Writ of Prohibition and the Appendix filed simultaneously herewith are true and correct to the best of my knowledge and belief.


Richard W. Gallagher

CERTIFICATE OF SERVICE

I, Richard W. Gallagher, counsel for the Petitioners, Verizon West Virginia Inc., Andrea L. Custis, Victoria L. Boston, Robert Anderson, Judy Isner, Mary Frederick, Dawn Watson, Barbara Terwilliger, and Jodi Dennis, hereby certify that I caused to be served a true copy of the foregoing Verified Petition for Writ of Prohibition and the Appendix filed simultaneously herewith upon the following individuals by regular United States mail, postage prepaid, on this the 16th day of October, 2012:

The Honorable James A. Matish
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Counsel for Co-defendant Corby Miller

Any rule to show cause issued in this matter should be served upon Judge Matish and Larry J. Rector, as counsel for the Individual Respondents, with a copy to G. Thomas Smith, separate counsel for one of the defendants in some of the pending litigation.


Richard W. Gallagher