

STATE OF WEST VIRGINIA

At a regular term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on January 31, 2013, the following order was made and entered:

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, Petitioners

vs.) No. 12-1209

Honorable James A. Matish, Judge of the Circuit Court of
Harrison County; 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, Respondents

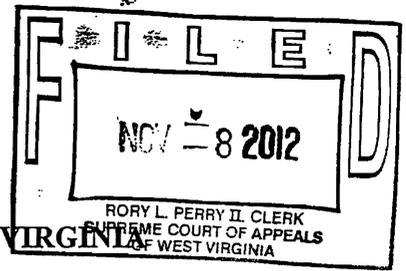
On a former day, to-wit, November 8, 2012, came the respondents, Stephanie Snow-McKisic, et al., by Larry J. Rector and Amy M. Smith, Steptoe & Johnson PLLC, their attorneys, and presented to the Court their motion to seal their Response, for the reasons set forth therein.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said motion to seal the Response. However, the portions of the appendix determined to be confidential by the lower tribunal shall remain confidential in the matter pending before this Court.

A True Copy

Attest: /s/ Rory L. Perry II, Clerk of Court





IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-1209

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,

Petitioners,

v.

HONORABLE JAMES A. MATISH, JUDGE OF THE CIRCUIT COURT
OF HARRISON COUNTY, RITA L. KNIGHT, DANNY KNIGHT SR.,
DAVID MICHAEL BROSIUS, DANNY KNIGHT JR., SARAH KNIGHT,
RYAN P. BARKER, LYNET WHITE, KIMBERLYA. RAY, JEFFREY L. RAY,
LISA M. THARP, TRAVIS N. THARP, AND CHARLES R. BYARD,

Respondents.

RESPONSE TO VERIFIED PETITION FOR WRIT OF PROHIBITION
SUBMITTED UNDER SEAL

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R. Byard*

¹ Ms. Snow-McKisic appears to have been inadvertently omitted from the Court's caption in the Scheduling Order entered on October 18, 2012.

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I. INTRODUCTION

Respondents 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, current clients of Steptoe & Johnson PLLC and Plaintiffs in the underlying actions, submit this response to the Verified Petition for Writ of Prohibition filed by Defendants Verizon West Virginia Inc., Andrea L. Custis, Victoria L. Boston, Robert Anderson, Judy Isner, Mary Frederick, Dawn Watson, Barbara Terwilliger and Jodi Dennis. Circuit Court Judge Matish properly exercised discretion to deny the Motion to Disqualify Plaintiff's Counsel and Law Firm based on its prior representation of two former clients in actions against Verizon and certain individual Petitioners because Steptoe's representation of Plaintiffs who have provided consents after consultation under West Virginia Rule of Professional Conduct 1.7(b) will not be materially limited or adversely affected, because Steptoe has also obtained the consents after consultation of the former clients pursuant to West Virginia Rule of Professional Conduct 1.9(a), because Steptoe has not used confidential information relating to its representation of the former clients to their disadvantage under Rule 1.9(b), because Steptoe has not violated any protective orders or settlement agreements. Giving credence to Defendants' arguments would violate West Virginia Rule of Professional Conduct 5.6o(b), which precludes settlement agreements that restrict counsel's right to practice. Judge Matish further properly exercised discretion to deny the Motion for Clarification and/or Reconsideration of the Court's Order Filing Consents and Permitting Steptoe & Johnson to Continue as Plaintiffs' Counsel. This Court should decline to exercise its discretion to issue a rule to show cause or a writ of prohibition because grant of any extraordinary relief under these circumstances would be both unwarranted and unprecedented.

II. QUESTIONS PRESENTED

1. Whether this Court should exercise its discretion to decline to issue a rule to show cause or writ of prohibition because Defendants have other adequate means, such as moving for a protective order or to quash any subpoena in the underlying actions, in the event that they need relief, because Defendants will not be damaged or prejudiced in a way that is not correctable on appeal, because the Circuit Court's orders are not clearly erroneous as a matter of law, and because none of the remaining factors weigh in favor of the requested extraordinary relief?

2. Whether the Circuit Court properly exercised its discretion to deny Defendants' motion to disqualify because Steptoe's representation of Plaintiffs who have provided consents after consultation under West Virginia Rule of Professional Conduct 1.7(b) will not be materially limited or adversely affected, because Steptoe has also obtained the consents after consultation of the former clients pursuant to West Virginia Rule of Professional Conduct 1.9(a), because Steptoe has not used confidential information relating to its representation of the former clients to their disadvantage under Rule 1.9(b), because Steptoe has not violated any protective orders or settlement agreements, and because giving credence to Defendants' arguments would violate West Virginia Rule of Professional Conduct 5.6(b), which precludes settlement agreements that restrict counsel's right to practice.?

3. Whether the Circuit Court properly exercised its discretion to deny Defendants' motion for clarification and/or reconsideration because the consents do not need to disclose additional information regarding the substance of Steptoe's consultation with the former clients since such disclosure would violate the attorney-client privilege?

III. STATEMENT OF THE CASE

Petitioners' quest to disqualify Steptoe has a long and tortured history, which is rooted in Steptoe's representation of two former clients in employment discrimination actions based upon disabilities or perceived disabilities against Verizon and certain individual Petitioners. Steptoe formerly represented Katherine A. Rowh in *Rowh v. Verizon West Virginia, Inc.*, No. 09-C-314-3 (Harrison Cty., W. Va.). The Circuit Court entered an Agreed Protective Order in *Rowh* on January 20, 2010. The *Rowh* Agreed Protective Order provides that documents containing confidential information produced by any party to that action may be marked "CONFIDENTIAL" and that such documents "shall be used solely for the purposes of [the *Rowh*] litigation." The *Rowh* Agreed Protective Order further provides that at the conclusion of the litigation any party may demand return of protected documents it produced, but that "[i]n the alternative to returning protected information . . . 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 case counsel shall be under a continuing duty to maintain the confidentiality and protect from further use and disclosure the protected information." Aff. of Larry J. Rector ¶ 3 & Ex. 1 (A149, A156-60).²

Steptoe also formerly represented Clista L. Radcliff in *Radcliff v. Verizon Communications, Inc.*, No. 10-C-240-3 (Harrison Cty., W. Va.). The Court entered a similar Agreed Protective Order in *Radcliff* on January 27, 2011. The Agreed Protective Order provides

² Defendants state several times in the petition that Steptoe drafted the *Rowh* Agreed Protective Order, although they concede that G. Thomas Smith, who was counsel for Defendants Verizon West Virginia Inc. and Ms. Frederick in *Rowh*, but represents only Mr. Miller in the underlying actions, requested the language that permits counsel to retain protected information, which is one of the provisions at issue. As a matter of fact, that was not the extent of Defendants' changes. By email dated December 18, 2009, Robert F. Holland, who was and is counsel for Defendants, circulated a revised Agreed Protective Order attached to an email to counsel, stating "I greatly thank you for your patience in getting back with you on the Protective Order. I have made some rather significant changes – in my opinion, to make things more clear. I don't think I have changed the intentions behind the order. Unfortunately, I did not keep the changes in a "Track Changes" format and apologize for that."

that “[t]o avoid the significant cost associated with reproducing such documents, the parties . . . stipulated that documents exchanged during discovery in [the *Rowh*] case . . . [were] to be included as part of discovery in [the *Radcliff*] case.” *Id.* at ¶ 4 & Ex. 2 (A149-50, A161-65).

Ms. Rowh and then later Ms. Radcliff entered into settlement agreements in their respective cases. The settlement agreements contain confidentiality provisions that specify that Ms. Rowh and Ms. Radcliff shall not disclose the amounts and terms of their settlements or settlement agreements or the negotiations leading up to the settlement agreements in writing, verbally or otherwise, except that the settlement agreements expressly provide that they may disclose such confidential information pursuant to subpoena, Court order or other law. *Id.* at ¶ 15 & Ex. 6 (A153, A214-15).³

Before Ms. Radcliff executed her settlement agreement on February 28, 2011, several Plaintiffs, including Mr. and Mrs. Ray, Mr. Byard, Ms. Snow-McKisic, Ms. White, Mr. and Mrs. Danny Knight, Sr., and Mr. Brosius, filed their Complaints for employment discrimination in the underlying actions, which include inter alia claims for negligent retention and supervision.

³ The excerpt from the settlement agreement that was submitted with Plaintiffs’ Response to Motions to Disqualify Plaintiff’s Counsel and Law Firm was redacted and filed under seal in accordance with the Court’s Order Granting Motion for Leave to File under Seal Plaintiffs’ Response to Defendants’ Motions to Disqualify Plaintiffs’ Counsel and Law Firm and Exhibits Thereto entered on November 7, 2011. (A6-11, A214-15). Defendants, on the other hand, did not redact the settlement agreements when they were submitted with the Sealed Reply in Support of Defendants’ Motion[s] to Disqualify Plaintiff[s] Counsel and Law Firm. Defendants state in footnote 1 of the petition that they redacted the settlement amounts from the copy submitted to this Court “in response to Steptoe’s position that Steptoe may share such information with [Plaintiffs] even if the Settlement Agreements are filed under seal.” This statement is misleading. In fact, Mr. Rector stated during the hearing on September 20, 2012, that after Defendants filed the entire documents he suggested that in order to protect confidentiality Defendants should substitute redacted versions. When it became apparent during the September 20 hearing that Defendants would file a petition with this Court, Plaintiffs’ counsel again suggested that Defendants should redact the settlement agreements even though they may be filed under seal to protect against inadvertent disclosure. Counsel for Defendants indicated that he appreciated the issue being raised. Plaintiffs’ counsel then indicated that filing the unredacted settlement agreements also gave him concerns in light of obligations to Plaintiffs, but he represented unequivocally: “I will represent to the Court I have not provided it because of that concern to my clients – my current clients. They do not have access to the settlement agreement.” The Court indicated that it appreciated counsel’s candor and representation. (A756-59).

Nonetheless, Verizon did not demand return of protected documents it produced in *Rowh* and that subsequently were used in *Radcliff* under the terms of the Agreed Protective Orders.⁴

Believing in good faith that Defendants continued to agree that documents exchanged during discovery in *Rowh* would be included as part of discovery in the underlying actions subject to an Agreed Protective Order similar to the one entered in *Radcliff*, Mr. Rector referred to bates numbers of certain Verizon documents produced in *Rowh* in discovery requests served in certain of these actions on May 26, 2011. Confidential documents were not attached to or appended to these discovery requests.⁵ Defendants' Answers to Plaintiffs' First Set of Interrogatories to Defendants were served on July 21, 2011, without objecting to Mr. Rector's reference to bates numbers of Verizon documents produced in *Rowh*. For example, in certain of the underlying actions, Interrogatory No. 17 requested: "Identify the author of VZRO 4754 as produced in the *Rowh v. Verizon, et al. case.*" Defendants responded: "John Dukes composed the powerpoint presentation that includes page VZRO4754." Similarly, Interrogatory No. 18 requested:

Identify the author of VZRO1301-1303 (Verizon's "MRST Responsibilities and Info" dated January 6, 2006) and any subsequent revisions, amendments or modifications that were in use at the Clarksburg call center as well as any similar policy in use in the Charleston call center.

Defendants made this objection:

⁴ To date, Verizon has not demanded return of its protected documents; however, Steptoe has maintained there confidentiality as discussed below.

⁵ Defendants repeatedly state in the petition that Steptoe admitted to violating the Agreed Protective Orders, referring to an email from Mr. Rector to Defendants' counsel dated June 18, 2011. In context, Mr. Rector stated: "*With regard to the rulings in the Rowh case*, given that the discovery propounded in the subsequent cases is premised on the *Rowh* discovery I believe that each of the rulings contained within the transcript of that hearing should apply in these cases. At a minimum, you are now on notice with respect to how the Judges in Harrison County feel about the boilerplate general objections that were previously asserted in the *Rowh* case." (A298). The obvious import of this statement is that in light of the fact that many of the discovery requests in the underlying actions are similar to requests that were made and objected to by Defendants in *Rowh*, Mr. Rector was trying to get agreement that Defendants would not delay these actions by relitigating the same discovery disputes. No one could have predicted that Defendants would twist that statement beyond recognition to form an asserted basis for a motion to disqualify, which would have the effect of delaying these actions even longer than Defendants' discovery disputes in *Rowh*.

To the extent Plaintiff seek [sic] information related to policies in effect outside the time in which Plaintiff Ryan Barker was employed, Defendants object that Interrogatory No. 18 is overly broad, unduly burdensome and seeks information not likely to lead to the discovery of admissible evidence.

Following their objection, Defendants answered: "VZRO1301-1303 was compiled by Dawn Watson." Rector Aff. at ¶ 5 & Ex. 3 (A150, A167-79).

Indeed, Defendants' Responses to Plaintiffs' First Set of Requests for Production of Documents to Defendants also refer to the Verizon documents produced in *Rowh*. For example, in *Barker* Request for Production No. 3 requests:

Produce complete copies of the personnel files, including, without limitation, the working files and disciplinary records, of Mary Frederick, Barbara Phillips, Barbara Terwilliger, Victoria Boston, Andrea Custis, Sherry Crutchfield, Sandy Bowsman, Tammy Mason, Corby Miller, Bob Anerson, Jayme Lowther, Jodi Dennis, Dawn Watson, Denise Williams, Mary Ellen Payne, Kevin Seamon, Josh Ashcraft, Scott Means, Glen Williams, and Rick Skeens.

Defendants made this objection and response:

OBJECTION:

Defendants object to the production of the files of Barbara Phillips, Denise Williams, Kevin Seamon, Josh Ashcraft, Scott Means and Rick Skeens as overly broad, unduly burdensome and not likely to lead to the discovery of admissible evidence. There is no allegation or implication that any of these individuals had any involvement in the allegations raised in Plaintiff's complaint. With regard to the other individuals identified above, *Defendants understand Plaintiff intends to limit this request to the resolution reached in the Rowh matter*. In that regard, Defendants respond as follows:

RESPONSE:

The responsive discoverable documents will be made available for inspection at an agreeable time.

Id. at ¶ 6 & Ex. 4 (A150, A180-98) (emphasis added).

Defendants' acquiescence and tacit agreement to the use of Verizon's documents produced in discovery in *Rowh* and *Radcliff* in these actions was not objected to until August 5,

2011, when Verizon's counsel noted this changed position in an email. Consistent with his understanding and Defendants' practice in at least certain of the underlying actions, Mr. Rector had proposed an Agreed Protective Order in all of these actions similar to the one entered in *Radcliff*, but Defendants changed their position at that time and refused to stipulate that Verizon documents exchanged during discovery in *Rowh* may be included as part of discovery as they were in *Radcliff*. *Id.* at ¶ 8 (A150-51).

In an effort to either reach agreement or bring the issue before the Court prior to depositions scheduled to begin in September 2011, Mr. Rector indicated in an email response dated August 5 that he intended to use the Verizon documents produced in the prior cases in the scheduled depositions, and that any such use would be subject to the same terms and conditions of the Agreed Protective Orders previously entered in *Rowh* and *Radcliff* as well as the Agreed Protective Orders already proposed by Verizon's counsel in three of these actions. Mr. Rector invited Verizon to move for a protective order to resolve this issue. *Id.* at ¶ 9 (A151).⁶

Verizon did not file a motion for protective order, and the depositions in September 2011 were cancelled. Nonetheless, Mr. Rector has not used the Verizon documents exchanged during discovery in *Rowh*, except to the extent they have been produced in the underlying actions and to the extent that he has referred to bates numbers of certain Verizon documents produced in *Rowh* in discovery requests served in certain actions as discussed above, and in every communication on the subject has stated that any use of the Verizon documents would be in compliance with all Court orders. In fact, the dispute regarding Verizon documents was raised by counsel during a hearing in the underlying actions on August 19, 2011; however, since there was no motion

⁶ Indeed, to facilitate resolution of this issue that jeopardized two weeks that had been set aside for depositions in September 2011, Mr. Rector invited Defendants' counsel to set forth this position in any Court filing. This was done to expedite resolution of the issue as it appeared to be a hurdle to the depositions going forward. *Id.* (A151).

pending the Court did not rule on the issue of the Verizon documents produced in *Rowh*. *Id.* at ¶ 10 (A151-52).

Thereafter, in a further effort to either reach agreement or bring the issue before the Court, in an email dated August 26, 2011, Mr. Rector suggested the possibility of noticing the deposition of Ms. Rowh and including a subpoena *duces tecum* to produce all documents produced by Verizon in *Rowh* within her possession, custody and control. Verizon's counsel did not respond to this email and Mr. Rector did not subpoena the documents from Ms. Rowh, and because the issue of the documents had not been resolved the depositions were postponed indefinitely. *Id.* at ¶ 11 (A152).

Defendants filed the motion to disqualify on September 27, 2011. In that motion, Defendants argued that the settlements and orders in the *Rowh* and *Radcliff* cases effectively create a conflict of interest in the underlying actions, which cannot be ameliorated with client consent. The motion argued that a *per se* rule of disqualification is required under Rules 1.7(b) and 1.9(b). (A60-78).

Shortly thereafter, Mr. Rector served Plaintiffs' Requests for Production of Documents to Defendants. As the Circuit Court suggested during the August 19 hearing, Request No. 1 sought documents produced by Verizon in *Rowh*. Defendants' Responses to Plaintiffs' Request for Production of Documents to Defendant, which were served on November 3, 2011, contain the following general objection:

1. Plaintiffs' counsel is currently the subject of a pending Motion to Disqualify. In light of the irreparable conflict of interest and counsel's violation of two separate Protective Orders in propounding these requests, Plaintiffs' counsel should be disqualified and these requests stricken.

Defendants further objected to Request No. 1 as follows:

Defendants object that Request No. 1 is overly broad, unduly burdensome and seeks wholly irrelevant information that is not likely to lead to the discovery of admissible evidence. Requiring the production of documents which are the subject of a protective order creates an undue burden on the defendants for a number of reasons including that these Defendants would be in violation of a protective order which could result in sanctions or other adverse actions. Defendants further object that many of the documents requested were subject to a Protective Order entered in the Rowh matter and not appropriate [sic] for use in any of the current matters.

Rector Aff. at ¶ 12 & Ex. 5 (A152, A199-213).

A Motion for Leave to File under Seal Plaintiffs' Response to Defendants' Motions to Disqualify Plaintiffs' Counsel and Law Firm and Exhibits Thereto was filed on November 7, 2011. Obviously, the settlement agreements rather than the Agreed Protective Orders in *Rowh* and *Radcliff* were the focus of the motion because the Agreed Protective Orders were filed as a matter of public record. Thus, it was natural for Steptoe to represent in the motion 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 Plaintiffs without expressly referring to the fact that neither had confidential documents under the Agreed Protective Orders been divulged. (A107-19).⁷

On November 10, 2011, Plaintiffs' Response to Motions to Disqualify Plaintiff's Counsel and Law firm was filed. Mr. Rector's Affidavit is attached thereto as Exhibit A. In that affidavit, Mr. Rector affirmed that he has not disclosed any confidential documents produced by Verizon in *Rowh* or *Radcliff* except as permitted by the Agreed Protective Orders. Nor has he used any documents covered by the Agreed Protective Orders in *Rowh* and *Radcliff*, except to the extent that they have been produced by Defendants in discovery in the underlying actions and to

⁷ Defendants' suggestion on page 8 of the petition that Steptoe's failure to separately assert that the Agreed Protective Orders had not been breached in the motion has any significance whatsoever is specious. Moreover, as explained in footnote 2 above, Steptoe has done more to protect the confidentiality of these documents than Defendants.

the extent that he has referred to bates numbers of certain Verizon documents produced in *Rowh* in discovery requests served in certain actions on May 26, 2011, before Defendants changed their position and refused to enter an Agreed Protective Order similar to *Radcliff*. Mr. Rector will neither disclose nor use any confidential documents produced by Verizon in *Rowh* and *Radcliff* in the underlying actions unless and until such documents are produced in discovery in these actions or they become public information. If such confidential Verizon documents are produced in these actions, they will be subject to the Agreed Protective Order that has been entered similar to those entered by the Court in *Rowh* and *Radcliff*, and that Mr. Rector will comply with such order entered by the Court and counsel Plaintiffs to do the same. Rector Aff. at ¶¶ 13-14 (A153).

Mr. Rector further affirmed in his affidavit that he has not disclosed any confidential information, written, verbal or otherwise, regarding the amount and terms of the settlements or settlement agreements or the negotiations leading up to the settlement agreements in *Rowh* or *Radcliff*.⁸ Mr. Rector 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. If confidential information under the settlement agreements is disclosed pursuant to a subpoena, Court order or other law it may be subject to restrictions on further use, and Mr. Rector would comply with any such restrictions ordered by the Court and counsel Plaintiffs to do the same. *Id.* at ¶¶ 16-17 (A153-54).

Mr. Rector further affirmed that he reasonably believes that Steptoe's representation of each of the Plaintiffs will not be adversely affected or limited by its representation of the other Plaintiffs or its former representation of Ms. Rowh and Ms. Radcliff. Mr. Rector further

⁸ Mr. Rector has learned that some Plaintiffs were generally aware that *Rowh* was resolved because it was the subject of discussion by Verizon management at the Clarksburg call center. Others became aware that *Rowh* and *Radcliff* were resolved through Defendants' motion to disqualify. However, Mr. Rector has never discussed or disclosed any confidential information regarding the settlements with any Plaintiffs in these actions. *Id.* at ¶ 16 (A153-54).

reasonably believes that Plaintiffs' interests are not adverse to the interests of each other or Ms. Rowh and Ms. Radcliff. *Id.* at ¶ 18 (A154).

Mr. Rector further affirmed that he discussed the motion to disqualify with Plaintiffs, and informed them of the conflicts of interest asserted by Defendants. Mr. Rector advised Plaintiffs to consult with independent counsel if they wished to make sure that they desire to have Steptoe continue to represent them. Each Plaintiff submitted an affidavit waiving any potential conflicts of interest raised by Steptoe's representation. *Id.* at ¶¶ 19-20 & Ex. 7 (A154, A216-67).

Following a hearing on the motions to disqualify held on December 2, 2011, the Court entered its Order Holding in Abeyance the Court's Ruling on Defendants' Motion to Disqualify Plaintiffs' Counsel and Law Firm to Allow Katherine A. Rowh and Clista L. Radcliff to Decide Whether they wish to Execute Written Consents Following Consultation on February 24, 2012. The Court held that Steptoe was not in violation of Rule 1.7(b) because although its representation of Plaintiffs "may be materially limited by" its responsibilities to Ms. Rowh and Ms. Radcliff, the exception to Rule 1.7(b) is satisfied based on Mr. Rector's and Plaintiffs' Affidavits. Nonetheless, the Court raised an issue under Rule 1.9(a) that had not been briefed by Defendants. The Court held that in order to continue to represent Plaintiffs in the underlying actions Steptoe was required to obtain consents following consultation from Ms. Rowh and Ms. Radcliff in accordance with Rule 1.9(a). (A29-30).

Particularly because the parties had not briefed the issue under Rule 1.9(a), Plaintiffs' Motion to Reconsider was filed on February 29, 2012. In order to alleviate the Court's concerns and to clarify the issue in light of events that transpired since Mr. Rector executed his affidavit on November 10, 2011, and since the hearing on the motion to disqualify, the Supplemental Affidavit of Larry J. Rector was attached as Exhibit A to the motion to reconsider. In his

supplemental affidavit, Mr. Rector affirmed that subsequent to the Court's entry of the Agreed Protective Order dated November 14, 2011, Defendants in the underlying actions produced documents, many of which are the same documents previously produced under the Agreed Protective Order entered in *Rowh*. The documents were produced by Defendants on January 11, 2012, and February 11, 2012. Although Plaintiffs have filed motions to compel the production of additional documents, in a letter dated January 20, 2012, Mr. Holland represented that "[w]ithout waiver of any objection, no responsive document has been withheld based solely on the fact that the document was subject to the protective order in the *Rowh* case." Rector Supp. Aff. at ¶¶ 5-6 & Exs. 1-3 (A366-83).

Based on these changed circumstances, Mr. Rector further affirmed that he will not subpoena or otherwise seek documents from Ms. Rowh or Ms. Radcliff in connection with the underlying actions, including but not limited to documents that may be confidential or subject to protection under either the settlement agreements or Agreed Protective Orders entered in *Rowh* or *Radcliff*. Mr. Rector will not subpoena or otherwise seek deposition or trial testimony from Ms. Rowh or Ms. Radcliff in connection with these actions, including but not limited to testimony regarding documents or other information that may be confidential or subject to protection under either the settlement agreements or Agreed Protective Orders entered in *Rowh* or *Radcliff*. Moreover, Mr. Rector continued to believe that Steptoe's representation of each of the Plaintiffs will not be adversely affected or limited by its representation of the other Plaintiffs or its former representation of Ms. Rowh and Ms. Radcliff. Mr. Rector further reasonably believed that Plaintiffs' interests are not adverse to the interests of each other or Ms. Rowh and Ms. Radcliff. *Id.* at ¶¶ 7-9 (A354-55).⁹

⁹ Mr. Rector noted that the affidavits previously submitted by Plaintiffs expressly state that Plaintiffs choose to continue to be represented by Steptoe even if they are precluded from calling Ms. Rowh and Ms. Radcliff to testify.

On February 29, 2012, the Court held a status conference at which time Defendants raised questions regarding the sufficiency of Mr. Rector's affidavits. In order to supplement and clarify the record, Mr. Rector submitted a Second Supplemental Affidavit of Larry J. Rector on March 9, 2012. Mr. Rector affirmed that he will not seek to obtain any affidavits or other written testimony from Ms. Rowh or Ms. Radcliff in connection with the underlying actions. This representation includes but is not limited to affidavits or other written testimony regarding documents that may be confidential or subject to protection under either the settlement agreements or Agreed Protective Orders entered in *Rowh* or *Radcliff*. Mr. Rector will not subpoena (ad testificandum or duces tecum) or otherwise call Ms. Rowh or Ms. Radcliff to testify orally at deposition, trial or other proceeding in connection with these actions. If either Ms. Rowh or Ms. Radcliff is subpoenaed or otherwise called to testify orally at deposition, trial or other proceeding by Defendants, he will not examine either Ms. Rowh or Ms. Radcliff. This representation includes but is not limited to subpoenas or oral testimony regarding documents or other information that may be confidential or subject to protection under either the settlement agreements or Agreed Protective Orders entered in *Rowh* or *Radcliff*. Mr. Rector will not seek to introduce into evidence any deposition testimony taken from Ms. Rowh in connection with *Rowh* in these actions. (Ms. Radcliff was never deposed.) This representation includes but is not limited to deposition testimony regarding documents or other information that may be confidential or subject to protection under either the settlement agreements or Agreed Protective Orders entered in *Rowh* or *Radcliff*. Rector Second Supp. Aff. at ¶¶4-6 (A402-03).

Mr. Rector continues to reasonably believe based on these circumstances that Steptoe's representation of each of the Plaintiffs will not be adversely affected or limited by its

Id. at ¶10 (A355). See also Rector Aff. at Ex. 7 (A218, A222, A226, A230, A234, A238, A242, A246, A250, A254, A258, A262, A266).

representation of the other Plaintiffs or its former representation of Ms. Rowh and Ms. Radcliff. Mr. Rector further reasonably believes that Plaintiffs' interests are not adverse to the interests of each other or Ms. Rowh and Ms. Radcliff. *Id.* at ¶7 (A403).

Mr. Rector met with Plaintiffs to discuss the Circuit Court's February 24 Order. He affirmed that they choose to continue with Steptoe as counsel. They understand that Mr. Rector has agreed on their behalf that they will not call Ms. Rowh or Ms. Radcliff at the trial or involve Ms. Rowh in the underlying actions in any manner. In meeting with Plaintiffs, Mr. Rector advised them of the terms of the November 14 Agreed Protective Order, which governs the confidentiality of documents produced by Defendants in these actions. Each Plaintiff has also been provided a copy of the Order. Mr. Rector has impressed upon each Plaintiff the requirements of the Agreed Protective Order and obtained agreements to abide by its terms. Copies of certain documents that have been produced by Defendants have been reviewed by Plaintiffs. These documents support the conclusion that the involvement of Ms. Rowh or Ms. Radcliff -- in any way -- is not necessary given the actions taken by Defendants. The only "potential" involvement that Ms. Rowh or Ms. Radcliff would have had with regard to the Plaintiffs' claims related to the claims for negligent retention and supervision by the Verizon of certain of its corporate managers. Plaintiffs, having been fully informed of the legal basis for such claims and the discovery produced to date relating to such claims, agree that neither Ms. Rowh nor Ms. Radcliff need be involved in any way whatsoever in the discovery and trial of these actions. *Id.* at ¶¶ 8-9 (A404).¹⁰

¹⁰ Two such documents produced by Verizon were attached as Exhibits B and C to Plaintiffs' response to the motion to disqualify. These documents, which include a written warning dated August 24, 2009, addressed to manager Glenn Williams regarding his disparate treatment of an individual with a medical restriction, and a subsequent memorandum to Mr. Williams dated July 2, 2010, regarding discriminatory comments discovered during preparation for a Verizon legal matter. (A268-69). Those documents are discussed further below.

The Circuit Court entered its Order Granting Defendants' Motion to Disqualify Plaintiffs' Counsel and Law Firm on August 14, 2012. The Order held that Steptoe would be disqualified unless it obtained consents from Ms. Rowh and Ms. Radcliff under Rule 1.9(a) within ten days. (A48).

Thereafter on August 20, 2012, Plaintiffs submitted consents executed by Ms. Rowh and Ms. Radcliff. (A521-24). The Circuit Court entered its Order Filing Consents and Permitting Steptoe & Johnson to Continue as Plaintiffs' Counsel on August 24, 2012. The Court found that the consents were timely and in accordance with the August 14 Order.

Defendants filed their motion for clarification and/or reconsideration on September 11, 2012. Defendants requested the Circuit Court to clarify its August 24 Order by requiring Steptoe to state affirmatively that it will not use confidential information acquired in *Rowh* and *Radcliff*. Alternatively, Defendants requested that the Circuit Court reconsider its Order and disqualify Steptoe on the ground that the Rowh and Radcliff consents are inadequate on their face. (A536).

Following a hearing on September 20, 2012, the Circuit Court entered its Order Denying Defendants' Motion for Clarification and/or Reconsideration of the Court's Order Filing Consents and Permitting Steptoe & Johnson to Continue as Plaintiffs' Counsel on October 1, 2012. The Order incorporated by reference previous findings of fact and conclusions of law. The Order further specifically found that the additional information that Defendants requested that Plaintiffs include within the consents would violate the attorney-client privilege. (A57-58).

On October 17, 2012, Defendants filed their petition to this Court seeking a writ of prohibition against Circuit Court Judge Matish. This Court entered a Scheduling Order, setting a date for the response to the petition of November 8, 2012.

IV. SUMMARY OF ARGUMENT

This Court should decline to exercise its discretion to issue a rule to show cause or a writ of prohibition because grant of any extraordinary relief under these circumstances would be both unwarranted and unprecedented. As threshold matters, Petitioners have other available remedies, none of which they have pursued to date. Moreover, Petitioners will not be damaged or prejudiced in a way that is not correctible on appeal.

The Circuit Court properly exercised its discretion to deny the motion to disqualify because Steptoe's representation of Plaintiffs, who have provided consents after consultation under West Virginia Rule of Professional Conduct 1.7(b), will not be materially limited or adversely affected, because Steptoe has also obtained the consents after consultation of the former clients Ms. Rowh and Ms. Radcliff pursuant to West Virginia Rule of Professional Conduct 1.9(a), because Steptoe has not used confidential information relating to its representation of Ms. Rowh and Ms. Radcliff to their disadvantage under Rule 1.9(b), because Steptoe has not violated any protective orders or settlement agreements, and because giving credence to Petitioners' arguments would violate West Virginia Rule of Professional Conduct 5.6(b), which precludes settlement agreements that restrict counsel's right to practice.

The Circuit Court further properly exercised its discretion to deny the motion for clarification and/or reconsideration for the reasons incorporated in its October 1 Order, including its specific finding that the additional information that Defendants requested be included in the Rowh and Radcliff consents would violate the attorney-client privilege.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the facts and legal arguments are adequately presented in the briefs and record on appeal, oral argument is not necessary, and the petition may be disposed of by order.

VI. ARGUMENT

A. This Court Should Exercise Its Discretion To Deny Any Extraordinary Relief Because It Would Be Both Unwarranted And Unprecedented.

This Court should exercise its discretion to deny the petition because under the circumstances any extraordinary relief would be both unwarranted and unprecedented. West Virginia Rule of Appellate Procedure 16 provides that the “[i]ssuance by the Court of an extraordinary writ is not a matter of right, but of discretion sparingly exercised.” In *State ex rel. Blackhawk Enterprises, Inc. v. Bloom*, 219 W. Va. 333, 633 S.E.2d 278 (2006) (per curiam), this Court applied the following five-factor test in declining to exercise its discretion to issue a writ of prohibition in an action where the Circuit Court had denied a motion to disqualify counsel:

“In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this court will examine 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.” Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

Id. at Syl. Pt. 1 (2006).

The Court in *State ex rel. Blackhawk Enterprises* emphasized the first two factors in Syllabus Points 2 and 3 as follows:

“Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner’s rights as to

make a remedy by appeal inadequate, will a writ of prohibition issue.” Syllabus Point 2, *Woodall v. Laurita*, 156 E. Bs. 707, 195 S.E.2d 717 (1973).

“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).

Id. at Syl. Pts. 2-3. See also *State ex rel. Ogden Newspapers, Inc. v. Wilkes*, 211 W. Va. 423, 566 S.E.2d 560, Syl. Pt. 1 (2002) (per curiam) (denying writ to prohibit enforcement of order denying motion to disqualify counsel, quoting *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744, Syl. Pt. 1 (1979)).

The Court should not issue a rule to show cause because Defendants have other available remedies, none of which they have pursued to date. Defendants complain that Steptoe has violated the terms of the *Rowh* and *Radcliff* Agreed Protective Orders and settlement agreements, but Steptoe vehemently denies any such violations. Moreover, Defendants did not file a motion for a protective order when invited by Mr. Rector in order to resolve the parties’ discovery dispute. When Mr. Rector suggested that he might notice Ms. Rowh’s deposition and include a subpoena *duces tecum* for the documents produced by Verizon in *Rowh*, Defendants did not even respond to Mr. Rector. Rector Aff. at ¶¶ 10-11 (A151-52).

The Circuit Court recognized that Defendants are really concerned with the confidentiality of Verizon’s own documents produced in *Rowh* when it emphasized in its February 24 Order: “It is important to note that the Court is of the opinion that ‘confidential information’ refers to confidential information and knowledge gained by Mr. Rector and Steptoe

& Johnson from Ms. Rowh and Ms. Radcliff, not information that was produced or discovered by Verizon in the prior cases.” (A22). To this extent, the issue should have been joined as a discovery dispute, not in a motion to disqualify as an asserted conflict of interest. Defendants have the full panoply of discovery motions available to remedy any discovery violations.

In addition, Defendants will not be damaged or prejudiced in a way that is not correctable on appeal. To the extent discussed above that the petition really raises an issue regarding a discovery dispute, this Court has recognized that a writ of prohibition is rarely granted as a means to resolve discovery disputes: *State ex rel. Arrow Concrete Co. v. Hill*, 194 W. Va. 239, 460 S.E2d 54, 59 (1995). In *State ex rel. Arrow Concrete*, the petitioner attempted to categorize its petition as seeking to preclude enforcement of an order compelling its production of business secrets, but in fact it was indirectly asking the Court to address an order denying the petitioner’s motion to dismiss. *Id.*, 460 S.E.2d at 59-60. The Court denied the petition.

Moreover, as discussed below to the extent that the petition raises issues regarding conflicts of interest the Circuit Court’s orders are not clearly erroneous as a matter of law, and none of the remaining factors in *Bloom* weigh in favor of the requested extraordinary relief.

B. The Circuit Court Properly Exercised its Discretion to Deny Defendants’ Motion to Disqualify and Their Motion for Clarification and/or Reconsideration.

This Circuit Court properly denied Defendants’ motion to disqualify and their motion for clarification and/or reconsideration because the motions are not supported by law or fact. In *Garlow v. Zakaib*, 186 W. Va. 457, 413 S.E.2d 112 (1991), this Court held as follows:

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.*

Id. at Syl. Pt. 1 (emphasis added). See also, e.g., *State ex rel. Bluestone Coal Corp. v. Mazzone*, 226 W. Va. 148, 697 S.E.2d 740, Syl. Pt. 2 (2010) (same); *State ex rel. Blackhawk Enters., Inc. v. Bloom*, 219 W. Va. 333, 633 S.E.2d 278, Syl. Pt. 4 (2006) (same).

In explaining this holding, the Court in *Garlow* quoted from *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721-22 (7th Cir. 1982), as follows:

“[D]isqualification, as a prophylactic device for protecting the attorney-client relationship, is a drastic measure which courts should hesitate to impose except when absolutely necessary. A disqualification of counsel, while protecting the attorney-client relationship, also serves to destroy a relationship by depriving a party of representation of their own choosing. . . . [Such] motions should be viewed with extreme caution for they can be misused as techniques of harassment.”

Garlow, 413 S.E.2d at 116 (emphasis added).¹¹

This statement in *Garlow*, is similar to the Fourth Circuit’s admonition in *Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142 (4th Cir. 1992):

The drastic nature of disqualification requires that courts avoid overly-mechanical adherence to disciplinary canons at the expense of litigants’ rights freely to choose their counsel; and that they always remain mindful of the opposing possibility of misuse of disqualification motions for strategic reasons.

Id. at 146 (emphasis added).

In *Capacchione v. Charlotte-Mecklenburg Board of Education*, 9 F. Supp. 2d 572 (W.D.N.C. 1998), the court denied a motion to disqualify defense counsel McGuire Woods’

¹¹ Defendants’ reliance on *Burgess-Lester v. Ford Motor Co.*, 643 F. Supp. 2d 811 (N.D.W. Va. 2008), on page 19 of the petition is misplaced. *Burgess-Lester* involved safeguarding by the lawyer of the client’s confidences. In these actions, the Motions to Disqualify are premised upon safeguarding confidential documents and information protected by Agreed Protective Orders and settlement agreements. As explained in *TradeWinds Airlines, Inc. v. Soros*, No. 08 Civ. 5901, 2009 WL 1321695, *8 (S.D.N.Y. May 12, 2009), which is discussed below, an analogy between the two situations is inapt because privileged information is not subject to discovery. An attorney’s prior access to relevant but non-discoverable information gives him an unfair advantage in litigation against a former client; however, any attorney representing Plaintiffs in these actions would have access to the information at issue through discovery. Moreover, the former client’s interests are not adverse.

predecessor, McGuire Woods, Battle & Boothe, L.L.P., as counsel for the plaintiff. Relying in part on the above quotation from *Shaffer*, the court reasoned as follows:

It is true that in a close case the trial court should not engage in “hair-splitting” niceties and resolve doubts in favor of disqualification. Nevertheless, this Court is mindful of the Court of Appeals for the Fourth Circuit’s clear statement that courts should not mechanically apply ethical cannons; rather, they should only decide disqualification issues on a case-by-case basis[.]

Id. at 579.

1. Steptoe’s representation of Plaintiffs who have provided consents after consultation under Rule 1.7(b) will not be materially limited or adversely affected.

Defendants’ argument that Steptoe’s representation of Plaintiffs in the underlying actions violates West Virginia Rule of Professional Conduct 1.7 and requires disqualification is meritless. Rule 1.7 provides:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) 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, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

In these actions, Defendants do not argue that Rule 1.7(a) is implicated by Steptoe’s representation of Plaintiffs because obviously the representation of none of these clients is

adverse to the others – each Plaintiff is a former Verizon employee who is claiming employment discrimination based upon a disability or perceived disability. See Rule 1.7 Comment (explaining “[p]aragraph (a) applies only when the representation of one client would be directly adverse to the other”). Defendants’ reliance on Rule 1.7(b) is specious. As discussed below, Steptoe’s representation of Plaintiffs will not be materially limited by the Agreed Protective Orders or settlement agreements in *Rowh* or *Radcliff* because the Verizon documents produced in discovery in *Rowh* and *Radcliff* may be requested by any counsel in discovery requests just as Steptoe has requested them in these actions. Thus, Mr. Rector reasonably believes that the representation will not be adversely affected. Moreover, although not at issue, the settlement agreements expressly provide that matters that are confidential are the amount and terms of the settlements or settlement agreements or the negotiations leading up to the settlement agreements. And even then, the settlement agreements provide that these matters may be disclosed pursuant to subpoena, Court order or other law. Again, Steptoe is in exactly the same shoes as any other counsel with respect to confidential information under the settlement agreements in *Rowh* and *Radcliff*. The discovery documents in *Rowh* and *Radcliff* that are also relevant in these actions are not even addressed in the settlement agreements. Moreover, Plaintiffs have consented and waived any potential conflicts after consultation. Therefore, the representation of Plaintiffs does not violate Rule 1.7.

In support of their petition, Defendants rely on *Gilbert v. National Corp. for Housing Partnerships*, 71 Cal. App. 4th 1240, 84 Cal. Rptr. 2d 204 (1st Dist. 1999), but that reliance is misplaced. In *Gilbert*, the court applied an abuse of discretion standard to affirm the disqualification of the plaintiff’s attorney on the eve of trial because the attorney was attempting to advance the plaintiff’s interests by calling one or more of his other current clients, who had

settled with the defendant, as witnesses in the plaintiff's case. In the trial court's view, calling the other clients as witnesses risked harming their interests by putting them at risk of violating the terms of the confidential settlement agreement he had negotiated in the other case. *Id.*, 71 Cal. App. 4th at 1243.

The opinion in *Gilbert* does not explain why the clients who had already settled with the defendant were considered current clients of the plaintiff's counsel. In any event, *Gilbert* has been disagreed with, distinguished, and generally discredited.

In *McPhearson v. Michaels Co.*, 96 Cal. App. 4th 843, 117 Cal. Rptr. 2d 489 (3d Dist. 2002), the court began as follows:

In *Gilbert*, an attorney who successfully represented employees in a discrimination and harassment action brought against their employer was found to be disqualified from representing another employee in a similar case against the employer. *Gilbert* held that the settlement agreement reached in the first action, which required the parties "to keep the fact of the Settlement and this Agreement, and each of its terms, strictly confidential," and specified severe sanctions for breach of the confidentiality provision, created a conflict of interest that justified an order disqualifying the attorney from representing the other employee.

For reasons that follow, we believe *Gilbert* exaggerated the conflict of interest posed by such a confidentiality provision. Moreover, in this case, unlike in *Gilbert*, both plaintiff and the employee who entered into the settlement agreement waived the conflict of interest posed by Attorney Riestenberg's representing them. Finding no justification for the order under the circumstances of this case, we conclude the trial court abused its discretion in disqualifying Riestenberg from further representation of plaintiff in this action.

Id., 96 Cal. App. 4th at 845 (citations omitted).

The court reasoned in *McPhearson*:

We begin our analysis by observing what we perceive to be an exaggeration in *Gilbert* when it found there was a "very real danger to [the settling employees] posed by *any* testimony they might give in [that] case." This is not so because the confidentiality clause of the settlement agreement in *Gilbert* simply provided: "The parties agree to keep the fact of this Settlement and this Agreement, and each of its terms, strictly confidential. This provision does not apply to discussions between the Employee and his counsel" *In other words*,

nothing in the confidentiality clause precluded the settling employees from testifying as percipient witnesses to the events relating to Gilbert.

Id., 96 Cal. App. 4th at 847-48 (citations omitted) (emphasis added).

In *McPhearson*, the Court continued as follows:

Because the confidentiality clause did not, and could not, preclude Harris from testifying as a percipient witness to events concerning plaintiff, the perceived conflict of interest is more apparent than real.

Harris, a coworker with plaintiff, personally witnessed some of the facts and circumstances that gave rise to plaintiff's claim. Thus, Harris is perfectly free, without violating his settlement agreement, to appear in plaintiff's litigation and testify to the facts and circumstances he witnessed. Indeed, if subpoenaed, Harris is under an obligation to do so. Accordingly, Attorney Riestenberg's efforts, on behalf of plaintiff, to secure testimony from Harris about the facts and circumstances Harris witnessed with respect to plaintiff's claim does not conflict with his duties as Harris's attorney.

Id., 96 Cal. App. 4th at 848.

The Court identified several factors that weighed heavily against disqualification of the plaintiff's attorney in *McPhearson*:

First, "disqualification usually imposes a substantial hardship on the disqualified attorney's innocent client, who must bear the monetary and other costs of finding a replacement. A client deprived of the attorney of his choice suffers a particularly heavy penalty where, as appears to be the case here, his attorney is highly skilled in the relevant area of the law."

Second, where, as here, the persons who are personally concerned with the alleged conflict of interest are not objecting, and disqualification is sought by a litigation adversary who is not personally interested in the alleged conflict, courts must be skeptical. This is so because "motions to disqualify counsel often pose the very threat to the integrity of the judicial process that they purport to prevent." They can be used to harass opposing counsel, to delay the litigation, to intimidate an adversary into accepting settlement on otherwise unacceptable terms, or for other strategic purposes.

Third, with exceptions not applicable here, a conflict of interest generally may be waived by the persons who are personally interested in the matter. In this case, the persons who are interested in the conflict of interest, Harris and plaintiff, each filed written declarations waiving the conflict.

Id., 96 Cal. App. 4th at 849-50 (citations omitted).

The Court concluded in *McPhearson*:

In deciding to disqualify Attorney Riestenberg, the trial court followed the reasoning of *Gilbert*, which, in our view, exaggerates the conflict of interest involved. As we have explained, given what private parties can and cannot accomplish by adding confidentiality provisions to a settlement agreement, the alleged conflict here is more apparent than real. Additionally, the moving party on this disqualification motion is not personally concerned with the alleged conflict of interest. And the persons who are personally concerned with the conflict of interest are not adversarial with respect to each other and have each filed written waivers of the alleged conflict. Under the circumstances, we find insufficient reason to disqualify Attorney Riestenberg from further representation of plaintiff in this action against defendant. Accordingly, we conclude that the trial court abused its discretion in ordering the disqualification.

Id., 96 Cal. App. 4th at 851-52.

Defendants also rely on *Bassman v. Blackstone Associates*, 279 A.D.2d 280, 718 N.Y.S.2d 826 (App. Div., 1st Dept. 2001), but, like their reliance on *Gilbert*, that reliance is misplaced. The *Bassman* opinion is only four sentences long, and contains no citation to authority for its aberrational holding.¹²

The Southern District of New York disagreed with the holding in *Bassman* in a well-reasoned opinion in *TradeWinds Airlines, Inc. v. Soros*, No. 08 Civ. 5901, 2009 WL 1321695 (S.D.N.Y. May 12, 2009). In *TradeWinds Airlines*, the court held that disqualification of the plaintiff's attorney Violet Elizabeth Grayson was not warranted on the grounds that her participation in an action to pierce C-S Aviation's corporate veil and recover a default judgment from the company's alleged alter egos, Defendants George Soros and Purnendu Chatterjee violated a protective order and confidential settlement agreement, which were executed by all parties to a prior veil-piercing action. The protective order at issue provided that litigation

¹² Defendants also cite ABA Formal Opinion 95-395. This ethics opinion, which is titled *Obligations of a Lawyer Who Formerly Represented a Client in Connection With a Joint Defense Consortium*, is wholly inapposite and has no application to the underlying actions.

materials were to “be used by the parties solely for the prosecution and defense of [the prior veil-piercing action], and not for any other purpose.” Soros objected to Grayson re-using litigation materials that the defendants would have had to produce again in the subsequent case. The court, however, properly rejected that argument and held that Grayson should not be disqualified because any attorney representing the plaintiff in the subsequent case would have had access to the information at issue through discovery and that Grayson’s additional reliance on public information created no unfair advantage.¹³ The court in *TradeWinds Airlines* reasoned:

At least one court has rejected such a “strained reading of the word ‘use’ in [a] protective order” because it would “turn [] any protective order barring future use of confidential information that is independently relevant and discoverable in a subsequent action into a restriction on an attorney’s right to practice law.” *Hu-Friedy Mfg. Co., Inc. v. Gen. Elec. Co.*, No. 99 Civ. 0762, 1999 WL 528545, at *2 (N.D. Ill. July 19, 1999). The Protective Order does not restrict its signatories from engaging in future litigation that would involve overlapping discovery. . . .

Even assuming that Grayson’s re-discovery of information originally produced in *Jet Star II* would violate the Protective Order, such a violation would not warrant her disqualification from this case. Soros argues in his brief that her prior access to confidential information disclosed under the Protective Order necessarily gives TradeWinds an unfair advantage and taints this case. He compares the situation to that where an attorney is in a position to use privileged information against a former client in litigation related to the prior representation. This analogy is inapt because privileged information is not subject to discovery. An attorney’s prior access to relevant but non-discoverable information gives her an unfair advantage in litigation against a former client. *By contrast, any attorney representing plaintiff in this case would have access to the information at issue through discovery. See Hu-Friedy Mfg., 1999 WL 528545, at *2 (concluding that plaintiff’s counsel “has no unfair advantage in this action due to [her] previous exposure to the confidential information” because “the information [defendant] seeks to prevent [plaintiff’s counsel] from using is relevant to this case, and any reasonably competent attorney would routinely obtain it in discovery”)*

¹³ The defendants in *TradeWinds Airlines* had relied upon cases, which the court held did not support his argument, including *Cargill Inc. v. Budine*, No. CV-F-07-349, 2007 WL 1813762 (E.D. Cal. June 22, 2007), cited by Defendants in the petition at page 38, which the court correctly observed involved an employee of a party switching sides and taking with him privileged and/or non-discoverable confidential information. Although not cited by either the court in *TradeWinds Airlines* or Defendants in the petition, *Burford v. Cargill, Inc.*, No. 05-0283, 2009 WL 2381328 (W.D. La. July 30, 2009), involved the same set of facts as *Budine*, but the court denied the motion to disqualify counsel. *Id.* at *19.

At oral argument, Soros clarified that the real unfair advantage is the “head start” that Grayson’s prior access gives plaintiff in this case. However, the court filings in *Jet Star II* are a treasure trove of information concerning Soros’s alleged alter ego relationship with C-S Aviation. They would give any attorney for plaintiff a substantial and perfectly appropriate head start in this case. Grayson’s reliance on public information available to anyone else creates no unfair advantage. Soros points to no evidence produced in *Jet Star II* that remains secret and could be used by Grayson to the unfair benefit of plaintiff. “The bare assertion that [plaintiff’s attorney] has a tactical advantage in the litigation of the suit based on the knowledge gained in the prior suit is unconvincing.” *First Impressions Design & Mgmt., Inc. v. All That Style Interiors, Inc.*, 122 F. Supp. 2d 1352, 1354 (S.D.Fla. 2000). “While disqualification is clearly punitive insofar as [plaintiff] and its . . . counsel are concerned, its benefit to [defendant] is indeed questionable.”

Id., 2009 WL 1321695 at ** 7-8 (citations omitted) (emphasis added).

With respect to the issue regarding the settlement agreement, the court rejected the defendant’s reliance on *Bassman* as follows:

The Settlement Agreement requires that its “existence, provisions and substance” be kept confidential and prohibits the disclosure of this information “to any person or entity for any purpose.” The agreement does not restrict Grayson from representing other clients against Soros in future cases arising from the same facts at issue in *Jet Star II*. Relying on *Bassman v. Fleet Bank*, 279 A.D.2d 280, 718 N.Y.S.2d 826 (N.Y.App. Div. 2001), Soros urges that such a restriction be read into the agreement. The argument is that Grayson necessarily would use confidential information about the *Jet Star II* settlement in this action, and that such use is equivalent to disclosing the information to her new client. The Court declines to interpret a standard confidentiality provision as an implied restriction on counsel’s ability to represent other clients, especially as such a restrictive covenant would itself violate ethical rules. There is no reason why Grayson cannot represent TradeWinds without disclosing the terms of the *Jet Star II* settlement.

Id., 2009 WL 1321695 at *9.

In refusing to interpret the confidentiality provision as an implied restriction on counsel’s ability to represent other clients, the court in *TradeWinds Airlines* cited to ABA Model Rule of Professional Conduct 5.6 (b), which provides: “A lawyer shall not participate in offering or making an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a controversy between private parties.” The court also cited to ABA Formal

Opinion 00-417, which states that “Rule 5.6(b) does not proscribe a lawyer from agreeing not to reveal information about the facts of the particular matter or terms of its settlement,” but does proscribe prohibitions on the attorney’s future use of information learned during the settled case. *TradeWinds Airlines*, 2009 WL 1321695 at *9, n.5 (emphasis in original). See also *Hu-Friedy Mfg. Co., Inc. v. Gen. Elec. Co.*, No. 99 Civ. 0762, 1999 WL 528545, at *2 (N.D. Ill. July 19, 1999) (refusing to interpret cooperation agreement as restriction on future use of information because that would be “contrary to the policy of Rule 5.6(b)”¹⁴).

Other Courts have denied motions to disqualify counsel on similar grounds. For example, in *First Impressions Design & Management, Inc. v. All That Style Interiors, Inc.*, 122 F. Supp. 2d 1352 (S.D. Fla. 2000), the plaintiff moved to disqualify opposing counsel’s firm due to the alleged appearance of impropriety resulting from its role as defense counsel in a prior, similar case involving the plaintiff. The plaintiff claimed that the firm’s exposure to the confidential and trade secret information in the prior case made it impossible for opposing counsel to dissociate itself from its prior knowledge and extended a strategic and/or tactical advantage to opposing counsel in the subsequent case. The parties entered into an agreed protective order and confidential settlement agreement in the prior case whereby they agreed not to disclose the contents of trade secret and confidential documents obtained through discovery, or to disclose the parameters of the settlement agreement. Based on the firm’s participation in the prior case and its exposure to confidential documents, the plaintiff argued that the strategic advantage gained by the defendants would drive discovery sought by the defendants in the subsequent case, as well as their general litigation strategy and settlement efforts. The court held that, assuming that the mere appearance of impropriety still warranted disqualification under

¹⁴ West Virginia has adopted ABA Model Rule of Professional Conduct 5.6(b). See W. Va. R. Prof’l Conduct 5.6(b).

Florida law,¹⁵ the plaintiff had failed to meet its burden to show that there was a reasonable possibility that some specifically identifiable impropriety occurred and that the defendant's counsel's participation in the case would cause so much public suspicion that it would outweigh the social interests served by counsel's continued participation in the case. *Id.* at 1353-55. *See also Insignia Sys., Inc. v. News Am. Mktg. In-Store, Inc.*, No. 04-4213 (JRT/AJB), 2006 WL 1851137, *2 (D. Minn. June 30, 2006) (denying motion to disqualify plaintiff's counsel because it did not violate protective order or settlement agreement).

This Court should reject Defendants' argument based on *Gilbert* and *Bassman* and rely instead on the well-reasoned opinions in *McPhearson*, *TradeWinds Airlines*, and *First Impressions Design & Management* that have refused to interpret the confidentiality provisions in agreed protective orders and settlement agreements as creating an implied restriction on counsel's ability to represent other clients. Similar to *McPhearson*, nothing in the settlement agreements in *Rowh* and *Radcliff* precludes Ms. Rowh and Ms. Radcliff from being percipient witnesses to events concerning Plaintiffs in these actions although Mr. Rector has affirmed that he will not call them to testify.¹⁶ As in *McPhearson*, Plaintiffs have executed affidavits testifying that they have not violated any confidentiality provisions, that their interests are not adverse and that they waive any potential conflicts of interest.

Also, as the court reasoned in *TradeWinds Airlines*, a protective order cannot restrict its signatories from engaging in future litigation that involves overlapping discovery. Any attorney representing Plaintiffs could make the same discovery request for documents produced by

¹⁵ The court noted that Florida had adopted the Model Rules of Professional Responsibility, which – unlike the former Code of Professional Conduct – do not specifically admonish attorneys to avoid even the appearance of impropriety. West Virginia has also replaced the Code of Professional Conduct with the Rules of Professional Responsibility.

¹⁶ If subpoenaed by Defendants as they suggest on page 31 of the petition, Ms. Rowh and Ms. Radcliff would be under an obligation to testify, and in that case Defendants would bear the risk of eliciting protected information because they would have opened the door.

Defendants in *Rowh*. Indeed, based upon documents that Verizon has already produced, the documents which underlie the motion to disqualify would have inevitably been the subject of a discovery request. For example, as discussed in footnote 10 above two such documents produced by Verizon in the underlying actions were attached as Exhibits B and C to Plaintiffs' response to the motion to disqualify. Exhibit B reflects a reprimand of Mr. Williams who is manager of the Potomac Attendance and Support Group who reported to defendant Victoria Boston. (A268). Given Plaintiffs' claims of negligent retention and supervision against Victoria Boston, and others, with regard to the negligent retention and supervision of her subordinate managers, the document that reflects discipline administered to Mr. Williams would have inevitably led to subsequent discovery requests seeking the underlying documents relating to Verizon's discrimination of Ms. Rowh and others. Exhibit C shows that nearly a year earlier Mr. Williams was also specifically disciplined because of his, as Verizon put it, "disparate treatment against an individual with a medical restriction." (A269). Mr. Williams's documented pattern of discrimination and Verizon's failure to take any action is at the core of the allegations in the Complaints involving Plaintiffs who are alleging that they were discriminated against because of disabilities or perceived disabilities. Moreover, the negligent retention and supervision claims and Verizon's production of these two documents only highlights that inevitably any counsel would have made the request for the underlying documents with regard to these disciplinary actions. Thus, these documents would clearly be discoverable in these actions regardless of the existence or non-existence of any Agreed Protective Order.

Moreover, as discussed above, believing in good faith that Defendants continued to agree that documents exchanged during discovery in *Rowh* would be included as part of discovery in these actions subject to an Agreed Protective Order similar to the one entered in *Radcliff*, Mr.

Rector referred to bates numbers of certain Verizon documents produced in *Rowh* in discovery requests served in certain of these actions on May 26, 2011. Defendants' Answers to Plaintiffs' First Set of Interrogatories to Defendants were served on July 21, 2011, without objecting to Mr. Rector's reference to bates numbers of Verizon documents produced in *Rowh*. In addition, Defendants' Responses to Plaintiffs' First Set of Requests for Production of Documents to Defendants also refer to the Verizon documents produced in *Rowh*. Defendants have waived this issue by responding to these discovery requests without objecting on this ground and in fact acquiescing or agreeing to the use of the Verizon documents produced in *Rowh*. Cf. *State ex rel. McCormick v. Zakaib*, 189 W. Va. 258, 430 S.E. 316, Syl. Pt. 2 (1993) (holding that if party turns over material as result of discovery and makes no claim of attorney-client privilege, then privilege is deemed waived).

Furthermore, the general objection in Defendants' Responses to Plaintiffs' Requests for Production of Documents to Defendants that Steptoe should be disqualified for simply propounding the discovery requests is bizarre. Any competent attorney would request the documents Verizon produced in *Rowh*, particularly in light of the negligent retention claims in these actions. Moreover, as discussed above, the Circuit Court suggested that the documents be request by counsel at the August 19 hearing.

Nor can the confidentiality provisions in the settlement agreements in *Rowh* and *Radcliff* act as implied restrictions on Steptoe's ability to represent other clients. Any such restriction would violate West Virginia Rule of Professional Conduct 5.6(b), which provides that "a lawyer shall not participate in offering or making" . . . "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties." The Comment to that provision explains "[p]aragraph (b) prohibits a lawyer from agreeing not to

represent other persons in connection with settling a claim on behalf of a client.” That is effectively what Defendants are seeking in these actions.

2. Steptoe has also obtained the consents after consultation of Rowh and Radcliff pursuant to Rule 1.9(a), and Steptoe has not used confidential information relating to its representation of the former clients to their disadvantage under Rule 1.9(b).

Defendants’ reliance on West Virginia Rule of Professional Conduct 1.9 is also misplaced. Rule 1.9 provides:

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 interest are materially adverse to the interests of the former client unless the former client consents after consultation; or

(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.

Again, Defendants did not argue in their motion to disqualify or reply in support thereof that Rule 1.9(a) is implicated by Steptoe’s representation of Plaintiffs 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. *See* Rule 1.9 Comment (explaining “[t]he underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question”).

The Circuit Court erroneously concluded in the February 24 Order that Steptoe’s representation of Plaintiffs and their former representation of Ms. Rowh and Ms. is materially adverse under *State ex rel. McClanahan v. Hamilton*, 189 W. Va. 290, 430 S.E.2d 569 (1993), and *West Virginia Canine College, Inc. v. Rexroad*, 191 W. Va. 209, 444 S.E.2d 566 (1994),

although this error is harmless in light of the consents after consultation ultimately submitted by Rowh and Radcliff. In *State ex rel. McClanahan*, the Court held that a prosecutor's representation of a woman in a divorce action based on cruel and inhumane treatment disqualified him from prosecuting her for malicious assault of her husband. In connection with the holding expressed in Syllabus Point 3 to the effect 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[,]” the Court in *State ex rel. McClanahan* adopted the Comment to Rule 1.9 as follows:

“The scope of a ‘matter’ for purposes of paragraph (a) may depend on the facts of a particular situation or transaction. . . . *The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.*”

State ex rel. McClanahan, 430 S.E.2d at 572 n.3 (emphasis added).

In *West Virginia Canine College, Inc.*, the Court reached the opposite result. In Syllabus Point 3 of *State ex rel. McClanahan* and Syllabus Point 5 of *West Virginia Canine College, Inc.*, the Court held:

Under Rule 1.9(a) . . . , 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.

State ex rel. MaClanahan, 430 S.E.2d 569 at Syl. Pt. 3; *West Virginia Canine College, Inc.*, 444 S.E.2d 566 at Syl. Pt. 5.

Under the holdings of either *State ex rel. McClanahan* or *West Virginia Canine College, Inc.*, the interests between Plaintiffs in these consolidated actions and Ms. Rowh and Ms. Radcliff are not materially adverse.

In any event, subsequent to *State ex rel. McClanahan* and *West Virginia Canine College, Inc.*, the West Virginia Supreme Court of Appeals adopted five factors each of which must be established in order to disqualify an attorney pursuant to Rule 1.9(a) in *State ex rel. Bluestone Coal Corp. v. Mazzone*, 226 W. Va. 148, 697 S.E.2d 740, Syl. Pt. 5 (2010). In *State ex rel. Bluestone Coal Corp.*, the Court held:

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.

Id. at Syl. Pt. 5 (emphasis added).

In discussing the fourth factor, the Court in *State ex rel. Bluestone Coal Corp.* adopted the Comment to Rule 1.9 as follows:

The fourth element of a Rule 1.9(a) analysis requires the subsequent client's representation to be materially adverse to the interests of the former client. *In explaining this requirement, the Comment to Rule 1.9 states that "[t]he underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question."* It goes without saying that Buchanan Ingersoll's subsequent representation of Mountain State in the instant proceedings necessitated "a changing of sides," *id.*, from the stance it assumed in its former representation of Bluestone Coal. In the former litigation, Bluestone Coal was named as a defendant to the case; in the subsequent litigation, Mountain State is named as the plaintiff in the case. As such it is evident that the parties' interests are materially adverse insofar as they are on opposing sides of the litigation.

Id., 697 S.E.2d at 754 (emphasis added).

The Circuit Court's finding of material adversity is in error for the additional reason that it is based on concerns that no longer have any basis in fact, if they ever did. The Circuit Court held on page 11 of the February 24 Order that it was concerned that Mr. Rector's individual

loyalty to Plaintiffs in these consolidated actions *might* harm Ms. Rowh and Ms. Radcliff because it was unclear whether and to what extent he might use Ms. Rowh and Ms. Radcliff in these actions. The Court concluded:

Because it is *unclear* at this point whether and in what capacity Ms. Rowh and Ms. Radcliff *may* be used in this matter, the Court is of the opinion that Ms. Rowh and Ms. Radcliff *might* be harmed by Plaintiffs' Counsel's loyalty to the current plaintiffs. Therefore, the current and former clients' interests are adverse and, *in order to avoid the appearance of impropriety, that Court [sic] is of the opinion that it would be best for Ms. Rowh and Ms. Radcliff to be given an opportunity to consult with counsel regarding their potential risks if they are used in the current litigation.*

Order at 11-12.¹⁷

In order to alleviate the Circuit Courts' concerns and to clarify the issue in light of events that transpired following the execution of Mr. Rector's affidavit, including the entry of the November 14 Agreed Protective Order and subsequent production of documents, many of which are the same documents previously produced under the Agreed Protective Order in *Rowh*, Mr. Rector submitted his supplemental affidavit. This affidavit along with the second supplemental affidavit, which was filed after Defendants' raised questions regarding the sufficiency of Mr. Rector's prior two affidavits, unequivocally affirm that Steptoe will not Ms. Rowh and Ms. Radcliff in the underlying actions in any way. (A353-83, A402-06).¹⁸

Ultimately, the Circuit Court's concerns were alleviated when Plaintiffs submitted the consents after consultation of Ms. Rowh and Ms. Radcliff and they were filed pursuant to the August 24 Order. Manifestly, the consents meet the requirements of Rule 1.9 as construed in *State ex rel. McClanahan v. Hamilton*, 430 S.E.2d 569 at Syl. Pt. 3, , and its progeny *State ex rel. Bluestone Coal Corp.*, 697 S.E.2d 740 at Syl. Pt. 7. In *State ex rel. Bluestone Coal Corp.*, the

¹⁷ As noted above, the Code of Professional Conduct admonished attorneys to avoid even the appearance of impropriety, but that admonishment is not in the Rules of Professional Conduct currently adopted in West Virginia.

¹⁸ Again, as noted above if Ms. Rowh and Ms. Radcliff are subpoenaed by Defendants, they would bear the risk of eliciting protected information because Defendants would have opened the door.

Court held that Buchanan Ingersoll & Rooney LLP, the same law firm involved in *Celgene Corp. v. KV Pharmaceutical Co.*, No. 07-4819, 2008 WL 2937415 (D.N.J. July 29, 2008), which is cited by Defendants and discussed below, was disqualified from representing Mountain State Carbon, LLC, adverse to the interests of Bluestone Coal Corporation or Bluestone Coal Sales Corporation in underlying litigation. In that case, the Court applied Rule 1.9 and reasoned that it could not find any evidence of a consultation between Buchanan Ingersoll and Bluestone Coal, much less Bluestone Coal's consent to Buchanan Ingersoll's subsequent representation of Mountain State. The Court continued:

Despite this lack of consultation and explicit consent by Bluestone Coal, Mountain State nevertheless contends that such a waiver was set forth in a specific waiver letter and, thus, by virtue of acquiescence to those terms, Bluestone Coal has waived any objection it may have regarding Buchanan Ingersoll's subsequent representation of clients as contemplated by Rule 1.9. This argument would be compelling were it not for one simple, fatal flaw: Bluestone Coal *never signed* any such waiver letter!

State ex rel. Bluestone Coal Corp., 697 S.E.2d at 754 (emphasis in original).¹⁹

The underlying actions are clearly distinguishable from *State ex rel. Bluestone Coal Corp.* In these actions, Rowh and Radcliff have signed consents that expressly allow Steptoe to

¹⁹ The Court further noted:

The waiver letter upon which Buchanan Ingersoll relies to establish Bluestone Coal's waiver of its objection to subsequent representations was signed on January 17, 2008, and references the representation of Bluestone Industries, Inc., not Bluestone Coal Corporation. Moreover, the letter does not discuss the potential, future representation of Mountain State Carbon, LLC; rather, the focus of this letter is to obtain a limited waiver with respect to cases involving Wheeling Pittsburgh Steel Corporation. Therefore, even if Bluestone Coal had, itself, signed this letter and waived its objection to Buchanan Ingersoll's future representation of adverse parties, the scope of such waiver is limited to Buchanan Ingersoll's representation of Wheeling Pitt and does not contemplate or extend to the party Buchanan Ingersoll represents in the case *sub judice*, namely Mountain State. Finally, even if Bluestone Coal had signed a document to waive its objections and even if the waiver applied to Mountain State, such waivers procured by Buchanan Ingersoll have been held to be unenforceable. *See, e.g., Celgene Corp. v. KV Pharm. Co.*, No. 07-4819 (SDW), 2008 WL 2937415 (D.N.J. July 29, 2008) (disqualifying Buchanan Ingersoll from representing subsequent client).

Id., 697 S.E.2d at 755 n.8.

represent Plaintiffs in these actions. They have stated that they are aware of the motion to disqualify. They have stated that they understand the issues with respect to Steptoe's representation of Plaintiffs in these actions. They have stated that they were given the opportunity to consult other counsel. They unequivocally expressly waived any potential conflict of interest raised by Steptoe's representation of Plaintiffs in these actions. Accordingly, the consents of Rowh and Radcliff were in accordance with the August 15 Order and with the law in West Virginia, particularly in light of the fact that the motion has been brought by an adversary rather than a former client.

In any event, contrary to Defendants' argument Mr. Rector has affirmed that he has not disclosed any confidential documents produced by Verizon in *Rowh* or *Radcliff*, except as permitted by the Agreed Protective Orders entered in those cases. Nor has Mr. Rector used any documents covered by the Agreed Protective Orders entered in *Rowh* and *Radcliff*, except to the extent that they have been produced by Defendants in discovery in these actions and to the extent that he has referred to Bates numbers of certain Verizon documents produced in *Rowh* in discovery requests served in certain actions on May 26, 2011, before Defendants changed their position and refused to enter an Agreed Protective Order similar to *Radcliff* in these actions. Moreover, Mr. Rector 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. Mr. Rector understands that if such confidential Verizon documents are produced in these actions, they will be subject to the Agreed Protective Order entered by the Court in these actions, and that he will comply with such order entered in these actions and counsel Plaintiffs to do the same.²⁰

²⁰ Because the Circuit Court has entered the November 14 Agreed Protective Order and because many of the documents that Verizon now has produced in these actions are the same documents previously produced in *Rowh*,

Although Defendants argue that the Rowh and Radcliff consents are inadequate, they rely on inapposite cases from other jurisdictions, relying on different rules. For example, *Unified Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339 (9th Cir. 1981), involved a situation in which the attorney undertook representation adverse to a present, not a former, client. The Ninth Circuit analyzed the disqualification issue, which was raised by the present client, not an adversary, under the Oregon Code of Professional Responsibility Canon 5. The court had no doubt that the client consented to the representation after full disclosure was made. *Unified Sewerage Agency*, 646 F.2d at 1344-46. The motion to disqualify counsel was denied.

Celgene Corp., which is noted above, also involved two current clients of Buchanan Ingersoll & Rooney PC. Accordingly, the district court analyzed the disqualification issue, which again was raised by a current client, not an adversary, under New Jersey Rule of Professional Conduct 1.7, not Rule 1.9. The court held that engagement or retention letters with general waiver provisions regarding future conflicts that were signed by the client in 2003 and 2006, more than a year before the litigation in question was initiated, were insufficient to consent to the concurrent conflict of interest in the case at issue. The court reasoned that in that case, unlike these actions, neither waiver provision specified a particular client or a particular matter. *Celgene Corp.*, 2008 WL 2937415 at **8-10. Nor was there any discussion with the present client of the engagement or retention letters, let alone the waiver provisions. *Id.* at *12.²¹

Defendants' argument is overbroad. Of course, Verizon documents produced in these actions may be used in accordance with the Agreed Protective Order regardless of whether they were previously produced in *Rowh*.

²¹ In *Acheson v. White*, 195 Conn. 211, 487 A.2d 197 (1985), which is the third case cited by Defendants, the sole issue on appeal was whether a stipulated judgment should be opened because one of the parties thereto, who was the wife of another party, claimed that she did not consent to its terms. *Id.* at 211. Supreme Court of Connecticut made it clear that the wife *did not argue that her attorney acted without informed consent on her part to his joint representation of herself and her husband.* *Id.* at 213-14. The court held that the wife failed to establish her lack of consent to the stipulated judgment at issue.

Defendants' reliance on Rule 1.9(b) likewise does not support disqualification. In the underlying actions as noted above, the confidential information at issue is not client confidences, which are protected by Rule 1.9(b), but rather Verizon documents and information protected by Agreed Protective Orders and settlement agreements. In any event, Mr. Rector has not disclosed any confidential documents or information produced by Verizon in *Rowh* or *Radcliff* except as permitted by the Agreed Protective Orders. Nor has he used any documents covered by the Agreed Protective Orders in *Rowh* and *Radcliff*, except to the extent that they have been produced by Defendants in discovery in these actions. Mr. Rector has 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. In addition, Mr. Rector has not disclosed any confidential information, written, verbal or otherwise, that is deemed confidential under the settlement agreements in *Rowh* or *Radcliff*. Mr. Rector has affirmed that he will never disclose confidential information under the settlement agreements unless and until it may be disclosed pursuant to a subpoena, Court order or other law or it becomes public information – all of which is expressly permitted under the settlement agreements. Mr. Rector has further affirmed that he understands that if confidential information under the Agreed Protective Orders or settlement agreements is produced in discovery or disclosed pursuant to subpoena, Court order or other law in these actions, it will be covered by an Agreed Protective Order or Protective Order or otherwise subject to restrictions on further use, and that he would comply with any such restrictions ordered by the Court and counsel Plaintiffs to do the same. Therefore, Steptoe's representation of Plaintiffs does not violate Rule 1.9.²²

²² Defendants did not make their final argument beginning on page 37 of the petition, which appears to be independent of the West Virginia Rules of Professional Conduct in the Circuit Court. This argument is waived. *See*

Courts have warned that motions to disqualify filed by opposing counsel should be viewed with extreme caution because they interfere with the lawyer-client relationship. This admonition is especially true here because Defendants base the motions to disqualify on speculation and supposition about the future course of these actions even though in every email attached to the motions to disqualify, Mr. Rector stated that he intends to comply with all confidentiality orders and to “ethically use the documents consistent with Judge Matish’s Orders and all Rules of Civil Procedure.” (A74-87).

The West Virginia Supreme Court of Appeals’ admonition in *Garlow* bears repeating

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.*

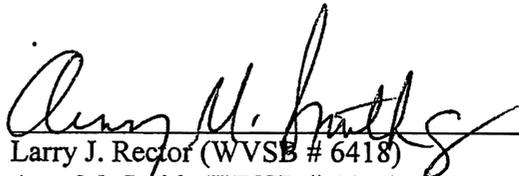
Garlow, 413 S.E.2d 112. at Syl. Pt. 1 (emphasis added).

VII. CONCLUSION

For all of the foregoing reasons, this Court should decline to issue a rule to show cause and/or a writ of prohibition.

Respectfully submitted this 8th day of November, 2012.

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Mayhew v. Mayhew, 205 W. Va. 490, 519 S.E.2d 188, 204 (1999). In any event, the argument is meritless, and the cases cited by Defendants, several of which are discussed above, are inapposite.

CERTIFICATE OF SERVICE

I, Amy M. Smith, hereby certify that I caused to be served a true copy of the foregoing Response to Verified Petition for Writ of Prohibition Submitted under Seal upon the following individuals by regular United States mail, postage prepaid, on this the 8th day of November, 2012.

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