

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0086

STATE OF WEST VIRGINIA ex rel.

DISCOVER FINANCIAL SERVICES, INC.,
DISCOVER BANK, DFS SERVICES, L.L.C.,
and AMERICAN BANKERS
MANAGEMENT COMPANY, INC.,

BANK OF AMERICA CORPORATION and
FIA CARD SERVICES, N.A.,

CITIGROUP INC. and CITIBANK, N.A.,

GE MONEY BANK,

WORLD FINANCIAL NETWORK
NATIONAL BANK, CSI PROCESSING,
LLC, and CPP NORTH AMERICA LLC

HSBC BANK NEVADA, N.A. and HSBC
CARD SERVICES, INC.,

JPMORGAN CHASE & CO. and CHASE
BANK USA, N.A.,

Petitioners,

v.

HONORABLE DAVID W. NIBERT, JUDGE
OF THE CIRCUIT COURT OF MASON
COUNTY, WEST VIRGINIA

Respondent.

Case Nos. 11-C-086-N
 11-C-087-N
 11-C-089-N
 11-C-091-N
 11-C-092-N
 11-C-093-N
 11-C-094-N

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QUESTION PRESENTED

The question presented here arises out of the practice by the former West Virginia Attorney General (the “AG”) of appointing private counsel as “special assistant attorneys general” to prosecute government civil penalty actions on a contingent-fee basis. In the past two decades, supreme courts in other states have written multiple opinions addressing the legality of similar arrangements;¹ academics and the media have widely criticized the practice;² and the Auditor of the West Virginia Legislature has seriously questioned its propriety.³ This Court, however, has never addressed whether these arrangements are legal.

This Court should take up the question now, and make clear that the use of outside counsel on these terms is not permitted. Lower courts in this State have reached conflicting decisions on the issue—including Judge Berger in Kanawha County, who rejected the practice—and are in need of this Court’s guidance. Businesses, too, need clarity, as emphasized in the accompanying *amicus* brief from the West Virginia Chamber of Commerce.⁴ Until this Court

¹ See, e.g., *County of Santa Clara v. Superior Court*, 50 Cal. 4th 35, 57-60, 235 P.3d 21, 35-37 (2010) (analyzing propriety of contingent-fee agreement between the state and private lawyer); *Rhode Island v. Lead Indus. Ass’n*, 951 A.2d 428, 469, 470, 475 n.50 (R.I. 2008) (same); *Meredith v. Ieyoub*, 700 So. 2d 478, 484 (La. 1997) (same).

² To see academic articles criticizing the practice, see, e.g., Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 S. Ct. Econ. Rev. 77 (2010) (criticizing use of contingent fees in government civil actions); David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DePaul L. Rev. 315, 323 (2001) (same). For articles in the popular press, see, e.g., Editorial, *AGs Gone Wild*, Wall St. J., Nov. 13, 2007, available at <http://www.lexis.com> (criticizing the West Virginia AG’s use of contingent-fee outside counsel); Editorial, *Sunshine for Hoods*, Wall St. J., Feb. 20, 2007, available at <http://www.lexis.com> (same).

³ The Auditor of the West Virginia Legislature wrote a report critical of the former AG’s use of contingent-fee counsel in 2002. See App. 126-70 (Office of Legislative Auditor, Special Report: Attorney General’s Office (Jan. 2002) (hereinafter, “Auditor’s Report”).

⁴ See *Amicus Curiae* Brief of the West Virginia Chamber of Commerce in Supp. of Pet. for Writ of Prohibition (filed January 24, 2013).

resolves the matter, defendants statewide will be subject to civil prosecutions by the AG that are tainted by at least three violations of West Virginia law.

First, the West Virginia Government Ethics Act (the “Ethics Act”) prohibits a full- or part-time “public employee” from “knowingly and intentionally using his or her office . . . for his or her own private gain.” W. Va. Code § 6B-2-5(b)(1). Because the special assistants are part-time “public employees” as defined in the Ethics Act, their engagement pursuant to a contingent-fee arrangement violates this most basic command, among other provisions. As lawyers for the State, the special assistants simply cannot use their government role and the State’s exclusive prerogative to pursue civil penalties in order to maximize their own private fee.

Second, Rule 1.7 of the West Virginia Rules of Professional Conduct (the “Ethics Rules”) bars lawyers from representing clients when the “lawyer’s own interests” may conflict with the client’s interest. Here, the special assistants’ incentive to maximize civil penalties to increase their own fee, in lieu of other possible results, conflicts with the State’s interest in the neutral application of its law-enforcement powers. The special assistants must advise the AG unclouded by the possibility of private financial gain when assessing such issues as whether conduct violates the law, or the best balance between different forms of relief in protecting the public interest. The engagement here on a contingent-fee basis makes it impossible for the special assistants to make these judgments in a neutral manner, which renders the contingent-fee engagements illegal under the Ethics Rules.

Third, in addition to violating ethical duties, the AG’s practice exceeds his statutory authority. The Legislature has expressly limited the AG to paying assistants exclusively from legislative appropriations, providing that “[t]he total compensation of all [assistant attorneys general] shall be within the limits of the amounts appropriated by the Legislature for personal

services.” W. Va. Code § 5-3-3. That directive prohibits the fee arrangements here, which envision that the special assistants will be compensated directly by the defendants under a court order, without legislative authorization or oversight.

This thicket of legal violations creates both a reality and an appearance of impropriety that require the special assistants’ disqualification. Petitioners (various financial institutions) accordingly moved to disqualify counsel at the outset of substantive litigation below.⁵ Notwithstanding the plain language of the Ethics Act, the Ethics Rules, and the AG’s enabling statute, the Circuit Court denied the motion in an order dated August 15, 2012 (the “Order”).

The Order, which the Circuit Court adopted verbatim in the form proposed by opposing counsel, contains several legal errors. Among other things, it does not address this Court’s “appearance of impropriety” standard for disqualification; it does not address the plain language of either the Ethics Act or the Ethics Rules; and it never even mentions the statutory directive barring the AG from compensating his assistants in excess of the amounts appropriated by the Legislature.

Cases like these are why the writ of prohibition exists. The Court’s guidance cannot wait until a final judgment, as the special assistants’ continued involvement would irrevocably taint the proceedings below. Petitioners thus urge this Court to address the following question, find that the AG’s practices are inconsistent with West Virginia law, and disqualify the special assistants:

⁵ The movants in the court below were Bank of America Corp. and FIA Card Services, N.A.; Citibank, N.A. and Citigroup Inc.; Discover Financial Services, Inc., Discover Bank, DFS Services, LLC, and American Bankers Management Company, Inc.; GE Money Bank; HSBC Bank Nevada, N.A. and HSBC Card Services, Inc.; JPMorgan Chase & Co. and Chase Bank USA, N.A.; and World Financial Network National Bank (now known as World Financial Network Bank) and CPP North America LLC.

Did the Mason County Circuit Court exceed its legitimate authority in refusing to disqualify the AG's outside counsel, when counsel's contingent-fee arrangement violates the Ethics Act, the Ethics Rules, and the AG's enabling statute?

STATEMENT OF THE CASE

The Underlying Actions

The complaints were filed in August 2011. They assert claims under the West Virginia Consumer Credit and Protection Act (the "WVCCPA"), W. Va. Code § 46A-1-101 *et seq.*, based on the sale of credit card "payment protection plans." These plans allow purchasers to avoid or defer credit card debt when confronted with life events such as unemployment or disability.⁶

Among other things, the complaints seek civil penalties of up to \$5,000 per alleged violation under Section 46A-7-111(2),⁷ a remedy available only to the State.⁸

⁶ See App. 645-46 (Compl. ¶¶ 47-48, *State ex rel. McGraw v. Bank of America Corp., et al.*, No. 11-C-087-N ("BOA Compl.")); App. 671 (Compl. ¶¶ 45-46, *State ex rel. McGraw v. Citigroup Inc., et al.*, No. 11-C-089-N ("Citi Compl.")); App. 618-19 (Compl. ¶¶ 51-52, *State ex rel. McGraw v. Discover Fin. Servs., Inc., et al.*, No. 11-C-086-N ("Discover Compl.")); App. 614-15 (Compl. ¶¶ 45-46, *State ex rel. McGraw v. GE Money Bank*, No. 11-C-091-N ("GE Compl.")); App. 747-48 (Compl. ¶¶ 46-47, *State ex rel. McGraw v. HSBC Bank Nevada, N.A., et al.*, No. 11-C-093-N ("HSBC Compl.")); App. 772-73 (Compl. ¶¶ 47-48, *State ex rel. McGraw v. JPMorgan Chase & Co., et al.*, No. 11-C-094-N ("JP Morgan Compl.")); App. 722-23 (Compl. ¶¶ 47-48, *State ex rel. McGraw v. World Fin. Network Nat'l Bank, et al.*, No. 11-C-092-N ("World Financial Compl.")).

⁷ See App. 655 (BOA Compl. at 22 ¶¶ 2, 6); App. 680 (Citi Compl. at 20 ¶¶ 2, 6); App. 628 (Discover Compl. at 22 ¶¶ 2, 6); App. 706 (GE Compl. at 21 ¶¶ 2, 6); App. 756 (HSBC Compl. at 20 ¶¶ 2, 6); App. 782 (JP Morgan Compl. at 21 ¶¶ 2, 6); App. 731-32 (World Financial Compl. at 20-21 ¶¶ 2, 6).

⁸ Compare, e.g., W. Va. Code § 46A-7-109 (authorizing the AG alone to seek injunctions); § 46A-7-111(2) (authorizing the AG to seek civil penalties of up to \$5,000 for each willful violation of the WVCCPA), with W. Va. Code § 46A-5-101(1) (limiting consumers' recovery to actual damages plus an additional amount between \$100 and \$1,000 in suits for recovery of excess charges); § 46A-5-101(4) (same); § 46A-6-106(a) (limiting consumers' recovery to the greater of actual damages or \$200 in suits by consumers who purchase a good or service as a result of an unfair or deceptive act or practice).

The Special Assistant Attorneys General

Six private lawyers from firms in West Virginia, Pennsylvania, and Texas appear on the pleadings as putative “special assistant attorneys general.”⁹ The AG appointed the special assistants via letters in 2011, each of which reads as follows:

You are hereby appointed Special Assistant Attorney General for the purpose of initiating and maintaining an action on behalf of the Attorney General’s office for violations of West Virginia’s consumer protection and antitrust laws against Discover, Chase and any other credit card companies which sell payment protection, credit card registry or other such ancillary product.

It is contemplated that you will advance all expenses associated with the maintenance of this action. Subject to the approval of the court, it is contemplated that you should earn a proper, reasonable and customary fee.

In keeping with the Attorney General’s policies and practices, it is anticipated that this office will be kept apprised of any and all actions taken in this case, and it is anticipated that we will have regular ongoing discussions regarding tactics and strategy.

See App. 272-77 (Letters from Chief Deputy Attorney General Frances A. Hughes to private counsel) (emphasis added).

Under these agreements, the private counsel will be paid only if the State is successful, the hallmark of a contingent-fee arrangement. As the Circuit Court found in its Order, the private counsel would not be paid “if they lost this case” and would be “compensated” only if they “obtain benefits” for the State. *See* App. 242-52 (Order ¶ 7(a) (quoting Letter Opinion, *State ex rel. McGraw v. VISA, U.S.A., Inc.*, CA No. 03-C-511 (W. Va. Cir. Ct. Ohio Cnty., Dec.

⁹ The outside lawyers identified in the complaint as special assistants are Guy Bucci, Timothy Bailey, and Lee Javins of Bucci Bailey & Javins LC in Charleston, West Virginia; William Druckman of the Law Offices of Druckman & Estep in Charleston, West Virginia; Richard M. Golomb of Golomb & Honik, P.C., in Philadelphia, Pennsylvania (who withdrew when this case was in federal court after removal); and Laura Baughman of Baron & Budd, P.C., in Dallas, Texas. *See* App. 656-57 (BOA Compl. at 23-24); App. 681-82 (Citi Compl. at 21-22); App. 629 (Discover Compl. at 23); App. 707-08 (GE Compl. at 22-23); App. 757-58 (HSBC Compl. at 21-22); App. 783-84 (JP Morgan Compl. at 22-23); App. 732-33 (World Financial Compl. at 21-22). Other private lawyers from these firms have also been involved in the proceedings below.

29, 2008)). Moreover, any payment would come from defendants, not from funds appropriated by the Legislature. That is exactly what happened in an analogous lawsuit in which private counsel's fees amounted to one-third of the settlement. *See* App. 106-13 (Final Order of Dismissal, *State ex rel. McGraw v. Capital One Bank (USA), N.A.*, No. 10-C-7-N (W. Va. Cir. Ct. Mason Cnty., Jan. 10, 2012)). In light of these aspects of the fee arrangements, the former AG had publicly characterized his practice as engaging private counsel under "contingency"-fee arrangements.¹⁰

The Order

Petitioners removed this case to federal court, but the case was remanded in February 2012. *See State ex rel. McGraw v. JPMorgan Chase & Co.*, 842 F. Supp. 2d 984 (S.D. W. Va. 2012). Shortly thereafter, on April 19, 2012, Petitioners moved to disqualify the special assistants. *See* App. 16-59 (Defs.' Joint Mot. to Disqualify Private Counsel Appointed by the Attorney General and Mem. of Law in Supp. ("DQ Motion")). The AG opposed the motion on June 29, 2012, *see* App. 200-41 (West Virginia's Resp. to Defs.' Joint Mot. to Disqualify ("AG Br.")); Petitioners replied on July 9, 2012, *see* App. 373-410 (Reply Mem. of Law in Further Supp. of Defs.' Joint Mot. to Disqualify ("DQ Reply")); and the Circuit Court heard oral argument on July 16, 2012, *see* App. 472-568 (Hr'g Tr.). At that hearing, the Circuit Court requested that the parties submit proposed findings of fact and orders by July 30, 2012. *See* App. 565-66 (Hr'g Tr. 94:21-95:9).

¹⁰ *See* App. 114-18 (Attorney General Darrell V. McGraw, Jr., *Letter to the Editor*, Charleston Gazette, June 21, 1995 (with regard to appointment, asking rhetorically "What serves the public interest better than a contingency-fee arrangement?"); App. 119-25 (*McGraw Has Taken Outside Counsel Idea to New Heights*, W. Va. Record (Charleston), Aug. 1, 2008 (admitting that "there is a 'contingent element . . .'" to the Attorney General's appointments of outside counsel under the same terms applicable here)).

On August 15, 2012, the Circuit Court adopted the “proposed order” submitted by the AG, without alteration.¹¹ Compare App. 569-83 (AG’s Proposed Order Denying Defendants’ Joint Motion to Disqualify), with App. 1-15 (Order). The Order concludes that:

- the AG’s counsel was not retained under a “contingency fee contract,” App. 6 (Order at 4 ¶ 6);
- other courts have permitted such arrangements, App. 6-8 (Order at 4-6 ¶¶ 7-11);
- the Ethics Act had not previously been applied in this context, App. 9 (Order at 6-7 ¶¶ 1-3);
- the Ethics Rules did not bar court-approved fees and did not apply absent a conflict between “two actual clients,” App. 9-12 (Order at 7-10 ¶¶ 4-11); and
- the AG’s constitutional authority “for providing legal counsel to State officials and State entities” permits these arrangements, App. 12-13 (Order at 10-11 ¶¶ 12-15).

In addition, the Order states in conclusory terms that Petitioners lacked “standing” to seek to disqualify opposing counsel. App. 14-15 (Order at 12-13 ¶¶ 18-22). Missing from the Order are:

- any mention or discussion of this Court’s “appearance of impropriety” standard for disqualification, the centerpiece of the motion below, see App. 39-40 (DQ Motion at 7-8); App. 383, 394-97 (DQ Reply at 3, 14-17);

¹¹ The final order thus still bears the word “Proposed.” Verbatim adoption of orders proposed by counsel is disfavored by this Court, and here, it had the added effect of effectively allowing the AG to regulate his own practices by writing his own rules of conduct. See *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 214, 470 S.E.2d 162, 168 (1996) (“Verbatim adoption of proposed findings and conclusions of law prepared by one party is not the preferred practice . . .”) (citing *South Side Lumber Co. v. Stone Constr. Co.*, 151 W. Va. 439, 152 S.E.2d 721 (1967)).

- any mention or discussion of the applicable Ethics Act and Ethics Rules provisions, again central to the motion below, *see* App. 388-96 (DQ Motion at 8-16); App. 564-71 (DQ Reply at 4-10);
- any mention or discussion of the limits in the AG’s enabling statute requiring assistants to be paid from legislative appropriations, also central to the motion below, *see* App. 229-35 (DQ Motion at 16-22); App. 390-94 (DQ Reply at 10-14).

Because the Circuit Court’s ruling exceeds its legitimate powers, Petitioners seek reversal through a writ of prohibition.¹²

SUMMARY OF ARGUMENT

Courts and litigants need this Court’s guidance on whether the AG may hire private counsel on a contingent-fee basis in civil penalty actions, and the issue cannot wait for post-judgment review without irrevocably tainting the proceedings below. The Order simply cannot withstand scrutiny. In failing to apply—or even mention—the plain language of the controlling statutes and rules, the Circuit Court effectively allowed the former AG to substitute his judgment for that of the West Virginia Legislature with respect to counsel’s fee arrangements. Neither courts nor the AG are permitted to bypass direct legislative commands in this manner. “[W]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” *Jones v. West Virginia State Bd. of Educ.*, 218 W. Va. 52, 57, 622 S.E.2d 289, 294

¹² Petitioners held off filing this petition pending the November 6, 2012, election for Attorney General, out of respect for allowing a new AG, if one were elected, to be heard on this important public policy question. These cases remain in the early stages of discovery, and no trial dates have been set. In addition, several Petitioners have consistently objected to producing any confidential information in discovery to the private attorneys working for the AG.

(2005). The express terms of the Ethics Act, the Ethics Rules, and the AG's enabling statute cannot be ignored.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Under Rule of Appellate Procedure 18(a), Petitioners respectfully request oral argument under Rules 20(a)(1), (2), (3) and (4). This Petition involves questions never before addressed by this Court; presents important policy and constitutional issues involving limits on the AG's constitutional and statutory powers; and seeks to resolve conflicts among lower-court decisions, including between the Order and an order by Judge Berger of the Circuit Court of Kanawha County. See App. 197-98 (*McGraw ex rel. State of West Virginia v. American Tobacco Co.*, No. 94-C-1707, slip op. at 5-6 (W. Va. Cir. Ct. Kanawha Cnty., Nov. 29, 1995)). Accordingly, under Rule 18(a), this Petition meets all of the criteria for cases in which oral argument is appropriate.

ARGUMENT

I. A WRIT OF PROHIBITION SHOULD ISSUE BECAUSE THE CIRCUIT COURT EXCEEDED ITS POWERS IN DENYING PETITIONERS' DISQUALIFICATION MOTION

“[A] party aggrieved by a lower court's decision on a motion to disqualify an attorney may properly challenge the lower court's decision by way of a petition for a writ of prohibition.” *State ex rel. Bluestone Coal Corp. v. Mazzone*, 226 W. Va. 148, 154, 697 S.E.2d 740, 746 (2010) (citing numerous examples reflecting “this Court's long history of acknowledging the propriety of using a petition for writ of prohibition to challenge a lower court's ruling on a motion to disqualify”).

To assess whether to issue a writ, the Court examines whether the lower court has exceeded its “legitimate powers,” weighing 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.

Id. at 155, 697 S.E.2d at 747. "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."

Id. Here, all five factors weigh in favor of issuing the writ.

With respect to the first two factors, Petitioners have no other adequate means to obtain the relief requested, and they will be irreparably harmed by the Circuit Court's decision. *See State ex rel. Ogden Newspapers, Inc. v. Wilkes*, 198 W. Va. 587, 589-90, 482 S.E.2d 204, 206-207 (1996) (per curiam) (citations omitted) (holding that requiring counsel to wait to challenge denial of a motion to disqualify counsel on appeal would cause "irreparable harm" and "would effectively emasculate any other remedy"). There is no direct appeal of a disqualification motion, and the prejudice from a prosecution by public lawyers improperly influenced by a private profit motive could taint the entire case. It is thus an ongoing injury. *See Esso Standard Oil Co. (P.R.) v. Freytes*, 467 F. Supp. 2d 156, 162 (D.P.R. 2006), *aff'd*, 522 F.3d 136 (1st Cir. 2008); App. 194 (*Am. Tobacco*, No. 94-C-1707, slip op. at 2). This injury cannot be corrected on a post-judgment appeal, because the process will already have been thoroughly compromised.¹³

The fourth and fifth factors—whether the error below is "oft repeated" and raises "new and important" problems—also weigh heavily in favor of the writ. The former AG regularly

¹³ Petitioners are not aware of any case in which defendants sought a writ of prohibition in this Court to challenge the AG's use of special assistants on a contingent-fee basis. In *Capital One*, the case relied on most heavily on by the AG below, the issue raised by petitioners was whether the AG had *any* authority to appoint "special assistants," not the more specific question of whether such employment on a contingent-fee basis violated any applicable law or rule. *See* App. 60-103 (Petition for Writ of Prohibition, *State ex rel. Capital One Bank (USA), N.A., et al. v. Nibert*, No. 10-C-7-N (W. Va. Oct. 12, 2011)). One other petition that defendants are aware of opposing the appointment of private counsel as special assistants also is not relevant to this matter. *See* App. 371-72 (Writ denial, *State ex rel. McGraw v. Johnson & Johnson*, No. 062154 (W. Va. Kanawha Cnty., Jan. 10, 2007) (denying petition for appeal of challenge to appointments as violation of defendant's due process rights, an argument not advanced in this case)).

used private contingent-fee counsel to pursue civil penalty law-enforcement cases. This Court has never addressed the legality of this practice or established rules to guide lower courts and state agencies on the appropriate use of these fee arrangements. As a result, lower courts have reached conflicting decisions on the legality of this practice. *See, e.g.*, cases cited *supra* note 1; *accord* App. 352-70 (Mem. Order, *State v. Steptoe & Johnson, PLLC*, No. 02-C-47M (W. Va. Cir. Ct. Marshall Cnty., Apr. 3, 2003) (denying motion to dismiss for unlawful appointment of private counsel because the Attorney General was not a party to the lawsuit)).

In addition, no court in this State has ever considered the propriety of the AG's contingent-fee arrangements under the Ethics Act and the Ethics Rules, as the Circuit Court acknowledged below. *See* App. 9, 11 (Order at 7, 9). The AG's use of contingent-fee counsel is an issue of public importance. That is why numerous courts in other states—including multiple state supreme courts—have addressed the issue; why academics and the press have criticized it; and why the West Virginia Chamber of Commerce seeks to intervene as *amicus* on behalf of 3,000 West Virginia businesses.¹⁴

Finally, there is the critical third factor—whether the lower court's order is clearly erroneous as a matter of law. As described in detail, *infra*, the Order here is clearly erroneous in multiple respects.

¹⁴ *See, e.g., supra* notes 1, 2, 4; *see also* *Lender Processing Servs., Inc. v. Masto*, No. 61387 (Nev.) (petition for writ of mandamus filed Aug. 1, 2012); *GlaxoSmithKline LLC v. Caldwell ex rel. State of Louisiana*, No. 612562 (La. Dist. Ct.) (petition for declaratory and injunctive relief filed May 31, 2012); *Merck Sharp & Dohme Corp. v. Conway*, 861 F. Supp. 2d 802, 809 (E.D. Ky. 2012) (denying Kentucky Attorney General's motion to dismiss); *AstraZeneca Pharms. v. Wilson*, No. 2011-CP-42-1213 (S.C. Ct. Common Pleas Dec. 20, 2011) (denying South Carolina Attorney General's motion to dismiss) (now moot due to settlement, *see* Nate Raymond, *AstraZeneca Pays \$26 Million to Settle South Carolina Lawsuit*, Aug. 24, 2012, available at <http://www.reuters.com/article/2012/08/24/us-astrazeneca-settlement-idUSBRE87N11O20120824>).

II. THE CIRCUIT COURT ERRED IN FAILING TO ADDRESS THE CONTROLLING STANDARDS AND STATUTORY LANGUAGE REQUIRING DISQUALIFICATION

A. The Circuit Court Failed to Apply the “Appearance of Impropriety” Standard for a Motion to Disqualify Counsel

As a threshold matter, the Circuit Court, following the former AG’s lead, erred because it never even mentioned this Court’s standard for the disqualification of counsel: whether counsel’s retention creates either the fact or appearance of “impropriety.” *Garlow v. Zakaib*, 186 W. Va. 457, 460-61, 413 S.E.2d 112, 115-16 (1991). The Circuit Court’s failure to apply the correct standard is, by itself, reversible error. *See, e.g., J.S. ex rel. S.N. v. Hardy*, 229 W. Va. 251, 728 S.E.2d 135, 139 (2012) (“[T]he circuit court’s use of the wrong standard of review constitutes reversible error.”); *see also State ex rel. Brison v. Kaufman*, 213 W. Va. 624, 633, 584 S.E.2d 480, 489 (2003) (granting writ of prohibition where the lower court failed to apply the correct legal standards in reviewing attorney-client privilege issues).

Under the correct legal standard, the special assistants should be disqualified. Impropriety or its appearance exists if counsel’s retention “will result in the violation of the Rules of Professional Conduct or other law.” *Roberts & Schaefer Co. v. San-Con, Inc.*, 898 F. Supp. 356, 359 (S.D. W. Va. 1995); *see also* W. Va. R. Prof. Conduct 1.16(a)(1) (“[A] lawyer . . . shall withdraw from the representation of a client if . . . the representation will result in violation of the rules of professional conduct or other law . . .”). “Actual impropriety” need not exist. “To preserve the integrity of and public confidence in the legal system,” only an “appearance of impropriety” is required for disqualification. *Bluestone Coal Corp.*, 226 W. Va. at 157-58, 697 S.E.2d at 749-50; *see also State ex rel. Cosenza v. Hill*, 216 W. Va. 482, 488-89, 607 S.E.2d 811, 817-18 (2004) (disqualification appropriate where a “representation . . . may create an ‘appearance of impropriety’ although there is no evidence of actual impropriety”).

In assessing disqualification, “the trial court is not to weigh the circumstances ‘with hair-splitting nicety’ but, in the proper exercise of its supervisory power over the members of the bar and with a view of preventing ‘the appearance of impropriety,’ it is to resolve all doubts in favor of disqualification.” *Garlow*, 186 W. Va. at 460-61, 413 S.E.2d at 115-16 (quoting *United States v. Clarkson*, 567 F.2d 270, 273 n.3 (4th Cir. 1977)). The violations of the Ethics Act, the Ethics Rules, and the AG’s enabling statute here create both the fact and the appearance of impropriety that this Court’s disqualification precedents are designed to prevent. Any one of these violations would be sufficient on its own to require disqualification. Taken together, they make the case for disqualification overwhelming.

B. The Circuit Court Exceeded Its Legitimate Powers by Failing to Apply the Plain Language of the West Virginia Government Ethics Act

1. The Ethics Act Applies to the Special Assistants

The Legislature passed the Ethics Act in 1989 in the wake of serious political scandal. See Michael W. Carey, Larry R. Ellis & Joseph F. Savage, *Federal Prosecution of State and Local Public Officials: The Obstacles to Punishing Breaches of the Public Trust and a Proposal for Reform, Part One*, 94 W. Va. L. Rev. 301, 311-12 (1991-1992). The Act is intended to promote the integrity of all aspects of State government, because “[p]ublic officials . . . who exercise the powers of their office or employment for personal gain . . . undermine public confidence in the integrity of a democratic government.” W. Va. Code § 6B-1-2(a).

The AG agreed below that he and personnel in his office are subject to the Ethics Act.¹⁵ So, too, are the special assistants. As lawyers representing the State, they easily fit within the

¹⁵ See App. 224 (AG Br. at 18 (conceding that “there is no question” that Ethics Act definitions of “public employees” and “public officials” applied to the “Attorney General and his staff”)); see also *State ex rel. McGraw v. W. Va. Ethics Comm’n*, 200 W. Va. 723, 726, 490 S.E.2d 812, 815 (1997) (in assessing allegations against the AG, “[t]he [Ethics Commission] Investigative Panel assigned to evaluate the complaint has determined that the allegation . . . would, if taken as true, constitute a

definition of a “public employee” set forth in the Act: “any full-time or part-time employee of any state, county or municipal governmental body or any political subdivision thereof[. . .]” W. Va. Code § 6B-1-3(j).¹⁶ An employee under the Ethics Act is “any person in the service of another under any contract of hire, whether express or implied, oral or written,” where the employer “has the right or power to control and direct such person in the material details of how work is to be performed and who is not responsible for the making of policy nor for recommending official action.” *Id.* § 6B-1-3(d).

While the AG argued below that the special assistants’ have no “contract” with the AG, and the Order states that no “agreement” exists, that assertion is flatly inconsistent with the facts and this Court’s precedents. The retention letter set out above is a contract on its face. Moreover, in *State ex rel. DeFrances v. Bedell*, 191 W. Va. 513, 446 S.E.2d 906 (1994), this Court held that “[t]he relationship of attorney and client is a matter of contract, expressed or implied.” *Id.* at 517, 446 S.E.2d at 910. And, as the Circuit Court concluded, the AG retains control over the counsel. *See* App. 4-5 (Order at 2-3). The Act accordingly applies.

Indeed, if the special assistants were not employees “in” the AG’s office, then they would have no authority to prosecute an action under the WVCCPA. Under that statute, the AG may only prosecute an action by “[d]elegat[ing] his powers and duties under this chapter to qualified personnel *in his office*, who shall act under the direction and supervision of the attorney general and for whose acts he shall be responsible.” W. Va. Code § 46A-7-102(f) (emphasis added).

violation of the Ethics Act”); Adv. Op. No. 2007-04, W. Va. Ethics. Comm’n (2007) (applying Ethics Act to assistant attorney general).

¹⁶ The fact that the AG’s private counsel satisfy the Ethics Act’s definition of a “public employee” by virtue of their contractual relationship with the state has no bearing on whether they should be considered an arm of the state for other purposes. *See, e.g., Del Campo v. Kennedy*, 517 F.3d 1070, 1075-76 (9th Cir. 2008) (courts are “extremely hesitant to extend this fundamental and carefully limited [sovereign immunity] to private parties whose only relationship to the sovereign is by contract”).

The AG simply cannot have it both ways—either the special assistants are in his office and thus employees governed by the Act, or they are not in his office and have no authority to prosecute this action under the WVCCPA. The AG chose the former below, affirmatively arguing that the special assistants are “in his office.” App. 231-32 (AG Br. at 25-26).

In short, the special assistants are performing precisely the sort of public functions that demand regulation under the Ethics Act. Given that the AG admits that his personnel are subject to the Ethics Act as a general matter and that the special assistants are “in his office” for purposes of the WVCCPA, there can be no serious question that the special assistants are subject to the Ethics Act.

2. The Special Assistants’ Private Financial Interest in the Outcome of These Lawsuits Violates the Ethics Act and, Therefore, Creates Both the Fact and the Appearance of Impropriety

The special assistants’ direct financial interest in the outcome of these cases violates at least two parts of the Ethics Act: the general prohibition on using public office for private gain, and the public contracting rules.

(a) The Fee Arrangements Violate the Ethics Act’s Prohibition on Using Public Office for Private Gain

The special assistants’ fee arrangements violate the Ethics Act’s most basic command: “[A] public employee may not knowingly and intentionally use his or her office . . . for his or her own private gain” W. Va. Code § 6B-2-5(b)(1) (emphasis added). Using a public office to maximize a private fee is exactly what this section prohibits. In these cases, the special assistants are deliberately “using” the power of the State to extract a private fee from the Petitioners.

The Circuit Court’s Order does not mention or address the applicability of this language, except to assert that “court-approved compensation” cannot be “private gain.” App. 9 (Order at 7). That assertion is mistaken. The Ethics Act does not provide that judicial approval of a fee

arrangement can insulate a private fee from scrutiny under the Ethics Act. As explained in the leading treatise on the law, “[t]he term ‘private gain’ . . . cover[s] any type of action that would be of personal benefit.” See App. 185 (Robert T. Hall, *The West Virginia Governmental Ethics Act: Text and Commentary*, at 22 (1989)) (emphasis added).¹⁷ Whether or not approved by the court, a payment to a lawyer easily meets that test.

The Circuit Court also held that legislative intent demonstrates that the Ethics Act does not apply. See App. 9 (Order at 7). It is axiomatic, however, that courts must apply the plain language of a statute, and may only interpret a statute when its plain language is unclear. See *Jones*, 218 W. Va. at 57, 622 S.E.2d at 294. Neither the AG nor the Circuit Court has contended that the Ethics Act’s language is unclear, and it is not. Thus, the Court cannot rely on legislative purpose to come to a conclusion that runs directly counter to the text of the statute.

But even if the Act’s purposes were to be considered, the result would be the same. As the Order observes, the Ethics Act is intended to prevent “public employees” from exercising “the powers of their office or employment for personal gain” or from seeking “to benefit narrow economic or political interests at the expense of the public at large.” See App. 9 (Order at 7 (quoting *State ex rel. McGraw v. W. Va. Ethics Comm’n*, 200 W. Va. 723, 726-27, 490 S.E.2d 812, 815-816 (1997))). These are the very problems raised in the disqualification motion below. The special assistants have been authorized to exercise the AG’s sovereign power to impose civil penalties “for personal gain”—to increase the basis on which counsel’s fees are normally

¹⁷ In any event, it is unclear that the premise below—that the court has the authority to approve fees in these cases—is correct. West Virginia follows the “American rule” for attorneys’ fees. Absent express statutory authorization, each party bears its own fees. *Sally-Mike Props. v. Yokum*, 179 W. Va. 48, syl. pt. 2, 365 S.E.2d 246, syl. pt. 2 (1986) (“As a general rule each litigant bears his or her own attorney’s fees absent a contrary rule of court or express statutory or contractual authority for reimbursement.”). There is no such statutory authorization here. The WVCCPA permits awards of attorney’s fees only in *private* actions, not in actions by the State. See W. Va. Code § 46A-5-104 (attorney fees awardable “to the consumer” in some circumstances).

calculated. And, as shown below, the fee arrangement here creates a substantial risk that the special assistant would seek to maximize their private “economic interest” at “the expense of the public at large.” The legislative intent consequently confirms the illegality of the fee arrangements here.

(b) The Fee Arrangements Violate the Ethics Act’s
Public Contracting Rules

The special assistants’ role in these cases also violates the Ethics Act’s public contracting rules: “If a public official . . . has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest.” W. Va. Code § 6B-2-5(d)(3). Judge Robert C. Chambers, the former House Speaker who shepherded the Ethics Act’s passage, observed shortly after its passage that “we must be able to believe that government decisions are being made with our interests paramount to the personal interests of the decision makers.” App. 179 (Hall, *supra*, at iv). The public contracting rules in the Ethics Act ensure that those “personal interests” do not trump the public interest.

The special assistants necessarily use their role “to influence a government decision affecting” their own private financial interest. Trial counsel cannot avoid having “influence” over their contract with the State for fees in deciding (for example) how to pursue their case, what relief to prioritize, what witnesses to examine, and what settlement terms will be pursued. The special assistants can also exploit potential remedies that otherwise would not be available to a private plaintiff to maximize their fees. The illegality of this arrangement in the context of state law enforcement is self-evident.

Here, too, the Circuit Court’s Order does not confront the plain language of the Act. Instead, the Order asserts, without any support, that court-approved compensation cannot be

“‘the profits or benefits of a contract’ as those terms are used in the Ethics Act.” App. 9 (Order at 7). The Order concludes that barring contingent-fee arrangements with private counsel would somehow make it “an ethics violation for a State employee to negotiate the terms of his or her own compensation.” *Id.* Not true. Negotiating *against* the State for compensation is not “using” state office for personal profit—it is the opposite, with the individual and the state on opposing sides of a negotiation. In this case, however, the special assistants are using State power to benefit themselves, including the exclusive State right to pursue civil penalties. Using State power in this way is exactly what the Ethics Act forbids.

The Order also tries to avoid the Ethics Act’s plain language by denying that the special assistants have been retained under a contingent commission agreement. *Id.* That assertion is mistaken. However these arrangements are labeled, they indisputably allow the special assistants to profit privately from the State’s exclusive right to bring an action for civil penalties, and, as the Circuit Court observed, the special assistants will be paid only if they are successful. The AG and the special assistants have never contended otherwise, such as by claiming that their fee arrangement is based on an hourly or flat fee. For that reason, the fee arrangements also easily fit the definition of a contingent commission agreement in West Virginia: “a contract under which an attorney may be compensated for work in progress, dependent on the occurrence of some future event which is not certain and absolute.” W. Va. Code § 48-1-215(a). The mere fact that the contract is not explicitly labeled “contingent” is empty semantics.

Indeed, not only is the *fact* of any payment contingent on the success of this case, but the *amount* is too. When setting a “reasonable” fee for counsel, courts are required to consider the amount of a recovery.¹⁸ Accordingly, the larger the recovery, the larger counsel’s fee—a classic

¹⁸ See *In re John T.*, 225 W. Va. 638, 645-46, 695 S.E.2d 868, 875-876 (2010) (citing *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 195, syl. pt. 4, 342 S.E.2d 156, 161, syl. pt. 4 (1986); *Fauble*

contingent-fee arrangement. This fact amplifies counsel's incentive to use the State's exclusive right to civil penalties to bludgeon as large a payment as possible out of any defendant—exactly the sort of misuse of public authority that the Ethics Act is intended to prevent.

Finally, the Order's statement that the Court was "aware of no case . . . in which the Ethics Act has been applied so as to disqualify counsel," App. 9 (Order at 7), is not a valid reason for denying the motion. Although important in determining whether to issue the writ requested here, the absence of controlling cases has no bearing on whether or not there is a violation of the Ethics Act. The Act's plain language controls.

C. The Ethics Rules Bar the Conflict of Interest Created by the Special Assistants' Fee Arrangement

The Ethics Act is only one barrier to counsel's fee arrangements here. The Rules of Professional Conduct are another. The Order's ruling to the contrary disregards the plain language of the relevant rule, as well as pertinent case law.

1. The Use of Contingent-Fee Arrangements in Law Enforcement Actions Violates the Ethics Rules

Under Rule 1.7(b), "[a] lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests." W. Va. R. Prof. Conduct 1.7(b). In evaluating a conflict, "[t]he critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably

v. Nationwide Mut. Fire Ins. Co., 222 W. Va. 365, 373, 664 S.E.2d 706, 714 (2008) (citing *Pitrolo* as requiring consideration of "the amount involved and the results obtained" and collecting additional cases for same presumption); *Horkulic v. Galloway*, 222 W. Va. 450, 465, 665 S.E.2d 284, 299 (2008) (also citing *Pitrolo*); W. Va. R. Prof. Conduct 1.5 (factors to consider in determining reasonableness of fee include "the amount involved and results obtained"); *accord Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 329-30, 352 S.E.2d 73, 80 (1986) (holding that in suits where insured prevails against insurer for property damage claim coverage, "[p]resumptively, reasonable attorneys' fees . . . are one-third of the face amount of the policy" because "[t]his follows from the contingent nature of most representation of this sort and the fact that the standard contingent fee is 33 percent").

should be pursued on behalf of the client.” *Id.* cmt. ¶ 4; *see also* 1 Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering* § 10.4, at 10-12 (3d ed. 2011) (observing that existence of a conflict depends upon a “substantial risk” of a conflict of interest); Restatement (Third) of Law Governing Lawyers § 125 (2000) (same).

In regards to the potential conflict of a public lawyer, the “client” is unique. As the United States Supreme Court wrote in *Berger v. United States*, 295 U.S. 78 (1935), a public lawyer “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all” *Id.* at 88. The client’s interest is “not that it shall win a case, but that justice shall be done.” *Id.* *Berger*’s rule applies in West Virginia.¹⁹ And while *Berger* was a criminal case, the principle that government lawyers should be impartial “appl[ies] with equal force to the government’s civil lawyers.” *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992).²⁰

¹⁹ “It is clearly the ethical duty of prosecuting attorneys to remove themselves from legal representation of any interests in conflict with their responsibilities as lawyers for the state.” *State ex rel. Bailey v. Facemire*, 186 W. Va. 528, 533, 413 S.E.2d 183, 188 (1991); *cf. Farber v. Douglas*, 178 W. Va. 491, 494, 361 S.E.2d 456, 459 (1985) (“[A] prosecutor is disqualified from acting in a criminal proceeding where he has a personal or pecuniary interest in the proceedings that conflicts with his duties as a public prosecutor.”); *accord Nicholas v. Sammons*, 178 W. Va. 631, 632, 363 S.E.2d 516, 518 (1987) (quoting *Berger*); *State ex rel. Moran v. Ziegler*, 161 W. Va. 609, 613, 244 S.E.2d 550, 552 (1978) (“It is the prosecutor’s duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State’s case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law.”); W. Va. R. Prof. Conduct 3.8 cmt. (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

²⁰ *See also Reid v. INS*, 949 F.2d 287, 288 (9th Cir. 1991) (stating that civil “[c]ounsel for the government has an interest only in the law being observed, not in victory or defeat in any particular litigation”); *United States v. Witmer*, 835 F. Supp. 208, 214-15 (M.D. Pa. 1993) (“[A] government attorney must be held to a higher standard than a private attorney. A government lawyer ‘in a civil action or administrative proceeding’ is held to a higher standard than a private lawyer, because ‘government lawyers have ‘the responsibility to seek justice,’ and ‘should refrain from instituting or continuing litigation that is obviously unfair.’” (quoting *Freeport-McMoRan*, 962 F.2d at 47), *aff’d*, 30 F.3d 1489 (3d Cir. 1994); *EEOC v New Enter. Stone & Lime Co.*, 74 F.R.D. 628, 632-33 (W.D. Pa. 1977) (holding that *Berger*’s reasoning “should . . . apply with equal force today to the actions of [government] attorneys representing the myriad governmental regulatory and administrative agencies”); *EEOC v Los Alamos Constructors, Inc.*, 382 F. Supp. 1373, 1383 (D.N.M. 1974).

Given these principles, “[w]hen a government attorney is said to be involved in a ‘conflict of interest,’ what is usually meant is that he has some financial interest that compromises the impartial and effective performance of his duties Real or apparent exploitation of public office for private gain is especially destructive to government integrity and public confidence.” *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1413, 1422-23 (1981). Courts in other states have applied this framework to the tension between a lawyer’s duty to the public and a contingent interest in a case. Those courts have found that different circumstances require different results.

At one end of the spectrum, contingent-fee arrangements are never appropriate in criminal prosecutions, where the public’s interest in the neutral administration of law is at its apogee. “[B]ecause giving a public prosecutor a direct pecuniary interest in the outcome of a case that he or she is prosecuting would render it unlikely that the defendant would receive a fair trial,” *County of Santa Clara v. Superior Court*, 50 Cal. 4th 35, 51, 235 P.3d 21, 31 (2010) (citations and internal quotation marks omitted), contingent-fee “‘contracts for criminal prosecutors have been recognized to be unethical and potentially unconstitutional,’” *id.* (quoting *People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740, 748, 705 P.2d 347, 351 (1985) (disqualifying counsel prosecuting public nuisance abatement on a contingent-fee basis for the public)).²¹

At the other end of the spectrum, contingent-fee arrangements may be appropriate in routine civil matters, in which the government merely acts like any other civil litigant. “[I]n

²¹ See also *Santa Clara*, 50 Cal. 4th at 51 n.7, 235 P.3d at 31 n.7 (“It also seems beyond dispute that due process would not allow for a criminal prosecutor to employ private cocounsel pursuant to a contingent-fee arrangement that conditioned the private attorney’s compensation on the outcome of the criminal prosecution.”); *Lead Indus. Ass’n*, 951 A.2d at 476 n.48 (noting that the court was “unable to envision a criminal case where contingent fees would ever be appropriate—even if they were not explicitly barred”).

ordinary civil cases, we do not require neutrality when the government acts as an ordinary party to a controversy, simply enforcing its own contract and property rights against individuals and entities that allegedly have infringed upon those interests.” *Id.* at 54, 235 P.3d at 33 (declining to disqualify counsel on contingency in public nuisance abatement).

Within that range of cases, the AG’s claims are closely analogous to criminal matters, an area where contingent-fee arrangements have historically been prohibited.²² This is not merely a suit for the recovery of the State’s own damages arising out of a contract or tort. Rather, the AG seeks statutory penalties and injunctions as *parens patriae* on behalf of the State and State residents. The potential statutory penalties dramatically exceed any actual harm to the State or its citizens. For ethics purposes, these cases are thus similar to criminal matters.

Counsel for the State in these cases must accordingly make judgments and tradeoffs virtually identical to those a prosecutor would have to make. Yet the special assistants’ private financial arrangements create the appearance if not the reality that they will recommend that the AG pursue penalties based on their own financial interests, rather than based on an impartial sense of justice or the public interest. Private counsel with a direct financial stake in extracting maximum penalties cannot realistically be expected to ignore that interest when balancing the

²² See, e.g., *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998) (“[T]he awarding of civil penalties to the Government could be viewed as analogous to sentencing in a criminal proceeding.”) (citation omitted); *United States v. La Franca*, 282 U.S. 568, 575 (1931) (“[A]n action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it take the form of a civil action; and the word ‘prosecution’ is not inapt to describe such an action.”); *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 972 (2d Cir. 1985) (recognizing that there are “civil cases where the civil disabilities disguise criminal penalties”); *First Am. Bank of Va. v. Dole*, 763 F.2d 644, 651 n.6 (4th Cir. 1985) (“Civil penalties may be considered ‘quasi-criminal’ in nature.”); *United States v. Glidden Co.*, 119 F.2d 235, 245 (6th Cir. 1941) (explaining that an “action, although civil in form, is quasi criminal in its nature” if it seeks to “recover penalties or declare forfeitures”; the purpose of a “civil action is compensation and not punishment”); *United States v. Sanchez*, 520 F. Supp. 1038, 1040 (S.D. Fla. 1981) (“[T]he Court would note that while technically these cases are civil actions, the imposition of a fine as a penalty for violation of the law can be considered ‘quasi-criminal’ in nature.”), *aff’d*, 703 F.2d 580 (11th Cir. 1983).

costs and benefits of the defendants' business practices, the propriety and extent of state versus federal regulation in this area, and the balance between compensatory, injunctive, and punitive goals.

For exactly that reason, AGs in many other states refuse to hire private counsel on a contingent-fee basis. For instance, a former Delaware AG has stated that “[i]n reference to outside counsel, I had a real aversion to a contingency fee arrangement. . . . I know, from experience, that the motivation on the part of government attorneys is very different than the motivation of private counsel.” See Manhattan Institute, Center for Legal Policy, *Regulation By Litigation: The New Wave of Government-Sponsored Litigation*, Conference Proceedings, at 37 (Wash., D.C., June 22, 1999) (transcript of remarks of then-Delaware Attorney General Jane Brady). Accordingly, “[t]he motivation of public attorneys is, or should be, to serve the best interests of the people they represent and to pursue equity, justice, and fairness. *Contingency fee arrangements are not consistent with these motivations.*” *Id.* (emphasis added).

Even more recently, the Director and Deputy Director of the Enforcement Division of the Securities and Exchange Commission rejected a suggestion that the SEC “engage private lawyers compensated based on a percentage of the monies they collect.” See Robert S. Khuzami & George S. Canellos, *Unfair Claims, Untenable Solution*, Nat’l L.J., Jan. 14, 2013, available at <http://www.lexis.com>. As they explained, such a “solution assumes that the SEC’s general goal is to sue as many deep-pocketed parties, and collect as much in penalties, as possible,” instead of “to uphold the law and serve the interests of justice.” *Id.* Serving the interest of justice requires “evaluating each case fairly, suing only those whom the evidence shows violated the law, assessing relative culpability of different participants, and assessing a penalty that is appropriate for the particular violation.” *Id.* The issue is the same here: by employing private counsel on a

contingent basis, the AG involves attorneys whose interest is in “collect[ing] as much in penalties, as possible” instead of upholding the law and serving the interests of justice.

Academics have elaborated on the nature of this conflict. “Sometimes public interest considerations dictate dropping litigation altogether or focusing on nonmonetary relief more than monetary relief. But contingency fee lawyers . . . arguably can be expected to pursue the maximum monetary relief for the state without adequately considering whether that relief advances the public interest and/or whether the public interest would be better served by foregoing monetary claims, or some fraction of them, in return for nonmonetary concessions.” David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DePaul L. Rev. 315, 323 (2001). Counsel cannot make these assessments with the disinterested detachment required of a government servant when counsel’s financial interests are directly affected by the outcome.

In assessing the right mix of possible remedies in these cases, private counsel’s financial stake unavoidably colors their view of appropriate balance between injunctive relief and monetary penalties. Their bias in favor of securing a financial windfall for themselves conflicts with the public interest. The California Supreme Court cited concerns like these in disqualifying contingent-fee counsel from representing the State in a public nuisance abatement action in *Clancy*. That court emphasized that the action in question called for a “balancing of interests” between the defendant’s property interests, his constitutional rights, and the public’s interest in being free of the alleged nuisance. *Clancy*, 39 Cal. 3d at 749, 705 P.2d at 352. Counsel was unable to balance these interests in the “sober” manner required of government civil lawyers due to the contingency arrangement. *Id.* For that reason, counsel was disqualified.

2. The Circuit Court Erred by Concluding that the Ethics Rules Do Not Apply Here

The Order does not address any of these weighty questions, which are ones of first impression in this State. Instead, the Order adopted and entered by the Circuit Court incorrectly holds that Rule 1.7(b) is not applicable to the present circumstance at all. That conclusion is clearly erroneous in several respects.

First, it was error to hold that disqualification under the Ethics Rules is unnecessary because Petitioners “made no showing that any counsel to appear in these cases on behalf of the State has breached the Code of Professionalism” App. 10 (Order at 8). The special assistants violated the Ethics Rules by virtue of their undertaking to represent the State in violation of Rule 1.7(b). Regardless of whether the special assistants have engaged or will engage in actual impropriety—such as actually seeking penalties more advantageous to counsel than to the State—this violation gives rise to an appearance of impropriety concerning counsel’s ability to abide by their duty of neutrality as public lawyers. Such an appearance of impropriety requires disqualification under West Virginia law. *See, e.g., Bluestone Coal Corp.*, 226 W. Va. at 157-58, 697 S.E.2d at 749-750.

Second, the Order errs in stating that Rule 1.7(b) does not apply in these circumstances because the Rule only covers conflicts involving two clients. App. 11 (Order at 9). That assertion is flatly inconsistent with the text of Rule 1.7(b). In addition to conflicts of interest arising out of the representation of two clients, the Rule prohibits representations in conflict with the “lawyer’s own interests.” W. Va. R. Prof. Conduct 1.7(b). The one case cited in support of the Order’s conclusion is inapposite because it involved an alleged conflict of interest between a client and a *non-client*. *See In re James*, 223 W. Va. 870, 877, 679 S.E.2d 702, 709 (2009) (“Absent this relationship, Rule 1.7 of the Rules of Professional Conduct does not apply to this

situation involving one actual client . . . and one potential client . . .”). The case did not address the application of the Rule to a conflict between a client’s interest and a “lawyer’s own interests” and therefore has no relevance to the present matter.

Third, the Order’s reliance on the Preamble to the Ethics Rules was also in error. The Preamble only states, in relevant part, that a violation of the Rules “should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached,” and that the Rules are “not designed for civil liability.” Petitioners, however, have moved only to disqualify. They have not asserted a cause of action nor sought civil liability against private counsel based on the Ethics Rules.

Accordingly, in addition to the clear violation of the Ethics Act, the conflict arising under the Ethics Rules raised an appearance of impropriety requiring disqualification.

D. The Legislature Has Expressly Barred the AG from Hiring “Special” Assistants with Payment Contingent on the Recovery in the Lawsuits

Finally, disqualification is appropriate because the AG lacks the authority to appoint the special assistants to prosecute these cases.

The West Virginia Constitution establishes the office of the AG and provides that it “shall perform such duties *as may be prescribed by law*.” W. Va. Const. Art. VII, § 1 (emphasis added). This Court has made clear that this means the West Virginia AG has no common-law powers, only those provided by statute. *Manchin v. Browning*, 170 W. Va. 779, 785, 296 S.E.2d 909, 915 (1982) (McGraw, J.) (“The people of West Virginia specifically expressed their intent that the [AG] should not exercise [common law] powers by providing that he ‘shall perform such duties as may be prescribed by law.’ . . . The phrases ‘prescribed by law’ and ‘provided by law’ mean prescribed or provided by statutes.”) (citations omitted); *see also State ex rel. Fahlgren Martin, Inc. v. McGraw*, 190 W. Va. 306, 312, 438 S.E.2d 338, 344 (1993) (holding that the

AG's "power is limited to what is conferred by law through statute and the Constitution"). Courts have thus repeatedly prohibited the AG from proceeding when he has attempted to assume powers not granted his office.²³

The Order does not address these basic principles. Instead, the Order asserts that such an argument was "irreconcilable with the long-standing practice and interpretation of the Attorney General's powers." App. 12 (Order at 10). According to the Order, as drafted by the AG, "long-standing practice and interpretation" meant that "if the Attorney General consents to the representation . . . the use of outside counsel is constitutionally and statutorily permissible." App. 13 (Order at 11 (citing *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 569 S.E.2d 99 (2004))).

This conclusion is circular. The rule that the AG can hire outside counsel whenever he wants, and on whatever terms he wants, so long as the same AG consents to such hiring or has done so in the past, is effectively no rule at all. *Burton*, the case cited by the Circuit Court in support of this proposition, supports Petitioner's position. The *Burton* court reaffirmed the basic principles of *Manchin* and upheld the use of private counsel only after noting that the Legislature had provided "express authority" by statute. *Burton*, 212 W. Va. at 38, 569 S.E.2d at 114.

²³ See, e.g., *In re Allen*, 106 F.3d 582, 596 (4th Cir. 1997) ("No West Virginia law expressly grants the Attorney General the right to establish a corporation, let alone a 'government agency' corporation under the auspices of the Attorney General's office, and no West Virginia Attorney General has ever done so."); *State ex rel. McGraw v. Bear, Stearns & Co.*, 217 W. Va. 573, 579, 618 S.E.2d 582, 588 (2005) (holding that "the Attorney General of West Virginia does not have the authority pursuant to . . . the Consumer Credit and Protection Act to bring an action based upon conduct that is ancillary to the general business of buying and selling securities"); *McGraw v. Caperton*, 191 W. Va. 528, 533, 446 S.E.2d 921, 926 (1994) ("[W]e hold that the Attorney General, acting in his official capacity, does not come within the parameters of the definition of 'person' set forth in [the West Virginia Code] and is not entitled to bring a declaratory judgment action pursuant to [the Code]."); *Fahlgren Martin*, 190 W. Va. at 315, 438 S.E.2d at 347 ("[W]e conclude that the West Virginia Constitution and the statute grants the Attorney General the duty to approve a contract as to form only. He has no authority to withhold approval if the contract as presented to him on its face-within the boundaries of the contract document-does not violate the Constitution or the laws of this State.").

The question, which the Circuit Court did not ask or answer, is whether a West Virginia statute expressly provides the AG with the authority to appoint private counsel as “special assistant attorneys general” in this type of action. The answer is no.

The AG and the Circuit Court relied on Section 5-3-3 of the West Virginia Code as the source of the AG’s authority to appoint the special assistants. App. 13 (Order at 11); App. 231 (AG Br. at 25). While there is a serious question as to whether that provision authorizes the appointment of “special” assistants,²⁴ assuming that it does means that the AG must also be bound by the other parts of Section 5-3-3 governing the employment of those assistants.

The remainder of Section 5-3-3 provides that “[t]he total compensation of all [assistant attorneys general] shall be within the limits of the amounts appropriated by the Legislature for personal services.” W. Va. Code § 5-3-3. Put differently, the assistants hired by the AG can receive compensation only up to the level established by the Legislature. Under the plain language of the statute (which the Order ignores), even if the special assistants are paid by the defendants directly, rather than by the AG, their compensation is still subject to this statutory cap.²⁵

The courts are not free to ignore this legislative command. *See Fountain Place Cinema 8, LLC v. Morris*, 227 W. Va. 249, 254, 707 S.E.2d 859, 864 (2011) (“[T]he power of the purse

²⁴ Language authorizing “special assistants” existed in the 1937 and 1951 versions of this statute, but the Legislature removed it in 1953. *Compare* W. Va. Code § 5-3-3 (1937) (“[U]pon finding of the necessity therefore by the governor and attorney general, the attorney general may appoint not more than one special assistant to serve at his pleasure . . .”) *and* W. Va. Code § 5-3-3 (1949 & Supp. 1951) (same) *with* W. Va. Code § 5-3-3 (Supp. 1953) (omitting any reference to “special assistants”). In other words, the Legislature arguably *revoked* the AG’s general authority to appoint such special assistants.

²⁵ The former AG’s staff all but admitted that his office retained private counsel on a contingent-fee basis in order to avoid the limitations imposed by Section 5-3-3. *See* App. 122 (*McGraw Has Taken Outside Counsel Idea to New Heights, supra* (quoting Deputy AG Frances A. Hughes as saying “Attorney General McGraw’s office uses outside counsel because . . . [t]he Legislature is unwilling to provide the attorney general’s office with money to try significant cases”)).

lies solely with the Legislature, and so too does the power to alter . . . statutes.”). As the State’s own Legislative Auditor has made clear, paying counsel a contingency fee “directly removes from the Legislature its constitutional authority to be the appropriating agency of the State” and “may subvert the West Virginia Constitution[.]” App. 143-44 (Office of Legislative Auditor, Special Report: Attorney General’s Office at 13-14 (Jan. 2002), *available at* http://www.legis.state.wv.us/Joint/PERD/perdrep/PE01_28_227.pdf (“Auditor’s Report”)).

The AG enabling statute also requires that any attorneys’ fees collected by the AG “shall be paid into the state treasury and placed to the credit of the state fund.” W. Va. Code § 5-3-5. Thus, attorneys’ fees cannot be paid directly to private lawyers. This requirement, which the Order also does not address, precludes any arrangement that envisions attorneys’ fee payments being made directly by defendants to counsel. Mainly for this reason, Judge Berger of the Circuit Court in Kanawha County rejected a contingent-fee agreement in *American Tobacco*. See App. 197-99 (No. 94-C-1707, slip op. at 5-7). The Legislative Auditor likewise found that “[n]o code section,” including Section 5-3-3, “authorizes the attorney general to hire counsel on a contingent fee basis.” App. 140 (Auditor’s Report, *supra*, at 10).

III. THE LOWER COURT’S “STANDING” ANALYSIS IS INAPPOSITE

A. “Standing” Rules Have No Application in a Disqualification Motion

The Order erroneously concludes that, because Petitioners supposedly failed to demonstrate any injury-in-fact, they lacked standing to move to disqualify private counsel. See App. 14-15 (Order at 12-13). The issue of standing, however, is not relevant to whether an attorney should be disqualified from representation. Rather, the Court has inherent authority, *sua sponte* or upon motion, to disqualify counsel if their representation violates the law, creates a conflict of interest or impacts the integrity of the judicial system. See, e.g., *Garlow*, 186 W. Va.

at 461-62, 413 S.E.2d at 116-17.²⁶ Disqualification is not dependent on the existence of an injury to the movant, but rather, it is intended “[t]o preserve the integrity of and public confidence in the legal system,” and to avoid even the potential for injury. *Bluestone Coal Corp.*, 226 W. Va. at 157-58, 697 S.E.2d at 749-50. Courts regularly disqualify counsel without delving into actual injury or prejudice to the movant at all.²⁷

As far as Petitioners are aware, no West Virginia decision other than the decision below has ever held that standing is required before a party may prevail on a motion to disqualify. Although the Order cites several cases for its novel theory of standing, none of those cases

²⁶ · See also *Bluestone Coal Corp.*, 226 W. Va. at 157, 697 S.E.2d at 749 (noting that “[t]his Court previously has established that a court has the inherent authority to disqualify an attorney from participating in a particular case,” and determining that the circuit court should have disqualified counsel for a conflict of interest arising out of a prior representation); *State ex rel. Jefferson Cnty. Bd. of Zoning Appeals v. Wilkes*, 221 W. Va. 432, 440, 655 S.E.2d 178, 186 (2007) (“As the repository of public trust and confidence in the judicial system, courts are given broad discretion to disqualify counsel when their continued representation of a client threatens the integrity of the legal profession”) (internal quotations and citations omitted); *State ex rel. Humphries v. McBride*, 220 W. Va. 362, 369, 647 S.E.2d 798, 805 (2007) (“Detch was obligated by the Rules of Professional Conduct to step aside and let Humphries find counsel elsewhere. When he didn’t, the trial court abused its discretion when it failed to disqualify him.”); *Cosenza*, 216 W. Va. at 488-89, 607 S.E.2d at 817-818 (upholding disqualification of attorneys and law firm where “representation . . . may create an ‘appearance of impropriety’ although there is no evidence of actual impropriety”).

²⁷ See, e.g., *Jefferson Cnty. Bd. of Zoning Appeals*, 221 W. Va. at 440-42, 655 S.E.2d at 186-188 (disqualifying counsel under “appearance of impropriety” standard and denying that movant needed to show injury by showing disclosure of confidential information); *Cosenza*, 216 W. Va. at 488-89, 607 S.E.2d at 817-818 (disqualification upheld where “representation . . . may create an ‘appearance of impropriety’ although there is no evidence of actual impropriety”); *Bailey*, 186 W. Va. at 533, 413 S.E.2d at 188 (disqualifying counsel due to the “potential” of a future conflict); *Moran*, 161 W. Va. at 615, 244 S.E.2d at 553 (disqualifying “private prosecuting attorney” who had a prior communication with defendant, even though that “[t]here is no evidence that he was ever retained, or even that the relator cooperated with Mr. Jones’ attempts to help him” and that the “opinion in no way finds impropriety on the part of Mr. Jones, but rather an appearance of impropriety in the nature of a conflict of interest which has a potential capacity to taint the record in the event of conviction”); see also *Garlow*, 186 W. Va. at 461-62, 413 S.E.2d at 116-117 (upholding disqualification due to “appearance of impropriety” and “the likelihood of a potential conflict of interest in the future”); *Bluestone Coal Corp.*, 226 W. Va. at 164, 697 S.E.2d at 756 (disqualifying counsel based on “apparent conflict of interest or appearance of impropriety” standard); *accord Clancy*, 39 Cal. 3d at 747-50, 705 P.2d at 351-53 (ordering counsel disqualified from nuisance abatement action due to conflict with “standard of neutrality” for prosecuting attorney but without showing of injury to movant).

involves disqualification. Instead, those cases concern whether the plaintiffs had suffered injuries-in-fact necessary to support *independent causes of action*.²⁸ Here, however, a case or controversy indisputably exists, and defendants—haled into court against their will—are entitled to challenge the propriety of the AG’s financial arrangements with private counsel. As one court explained, “[t]he difficulty with extending the traditional notion of plaintiff standing to defendants is that defendants ordinarily are simply attempting to defend against suit . . . and are not seeking independent affirmative relief. In other words, the defendants are only in court because the State, as plaintiff, put them there.” *People ex rel. Simpson v. Highland Irr. Co.*, 893 P.2d 122, 127 (Colo. 1995) (en banc).

The one disqualification case cited in the Order on the standing issue, *Commonwealth v. Janssen Pharmaceutical, Inc.*, 607 Pa. 406, 8 A.3d 267 (2010), is inapposite. *See* App. 15 (Order at 13). That Pennsylvania case concerns a *statutory* standing question—namely, whether a particular passage in a Pennsylvania statute precluded the defendant in that case from moving to disqualify. *Id.* at 421, 8 A.3d at 276. There is no similar statute in West Virginia. The Order cites additional dicta from *Janssen*, App. 15 (Order at 13), but that dicta is flatly contrary to the governing “appearance of impropriety” standard employed in West Virginia, and is thus likewise irrelevant.

²⁸ *See Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 95, 576 S.E.2d 807, 822 (2002) (standing inquiry is “to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted”) (emphasis in original); *State ex rel. McGraw v. Johnson & Johnson*, CA No. 04-C-156 (W. Va. Cir. Ct. Brooke Cnty., Mar. 15, 2006) (assessing defendant’s counterclaim for standing); *see also Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982) (standing “focuses on the party seeking to get his complaint before a . . . court and not on the issues he wishes to have adjudicated”) (internal quotations omitted; emphasis added).

Simply put, by relying on the AG's standing argument, the Order does not apply the appropriate standard of review for a motion to disqualify. That failure is clear error, and supports the issuance of writ of prohibition.

B. Even if Standing Were Required, the Court Incorrectly Concluded that Petitioners Would Not Suffer an Injury-in-Fact

Even if Petitioners did need to demonstrate standing, the Order is mistaken in concluding that Petitioners failed to demonstrate injury-in-fact. Standing requires an actual or threatened injury, a causal connection between the injury and the conduct challenged, and a likelihood that the injury will be redressed through a favorable decision of the court. *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 94, 576 S.E.2d 807, 821 (2002). The AG's retention of contingent-fee counsel creates two types of actual or threatened injury, either of which alone is sufficient to confer standing.

First, the financial arrangements with the State seek to extract attorneys' fees *from the defendants* based on the recovery in the lawsuits. Indeed, one of the advantages the AG has touted for the retention agreements, as the Order notes, is that they supposedly "do not cost the taxpayers [of West Virginia] 'one cent.'" App. 6 (Order at 4); App. 211 (AG Br. at 5 (quoting *State ex rel. McGraw v. Visa, U.S.A., Inc.*, No. 03-C-511 (W. Va. Cir. Ct. Ohio Cnty., Dec. 29, 2008))). The pursuit of those fees obviously creates a risk of economic loss for the defendants, and an economic loss is a legally cognizable injury sufficient to confer standing. *See, e.g., Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286, 293 (3d Cir. 2005) ("Monetary harm is a classic form of injury-in-fact.") (citing *Adams v. Watson*, 10 F.3d 915, 920-25 & n.13 (1st Cir. 1993) (collecting cases)).

While that economic loss has not yet occurred, the AG conceded in the briefing below that a risk of future loss is enough for standing purposes. App. 215 (AG Br. at 9 (conceding that

“[c]oncrete injury, whether actual *or threatened*,” satisfies standing requirements) (emphasis added); *see also McMahon v. Advanced Title Servs. Co.*, 216 W. Va. 413, 414 syl. pt. 1, 607 S.E.2d 519, 520 syl. pt. 1 (2004) (holding that standing exists when “[a] party . . . may likely suffer a legally cognizable injury, wrong, or other actionable violation of his or her personal legal rights,” and when the relief sought is “appropriate to . . . *threatened* injury, wrong, or violation”) (emphasis added).) This potential injury is in fact illustrated in the *Capital One* case, in which the defendants there were forced to pay the private lawyers representing the state \$4.5 million to settle the case. If regular, salaried assistant attorneys general prosecuted the case, no such payment would have been necessary or proper.

Second, Petitioners have amply demonstrated an additional injury in that they must defend themselves in a potentially tainted judicial proceeding. “Merely being forced to defend oneself in a [tainted] proceeding . . . is enough to constitute an ongoing injury.” *Esso Standard Oil Co.*, 467 F. Supp. 2d at 162; *see also Meredith*, 700 So. 2d at 484 (holding that plaintiffs had standing to bring declaratory judgment action to challenge appointment of private counsel by the Louisiana Attorney General). This is a harm specific to Petitioners who confront private counsel acting as “special assistant attorneys general” in these cases. Among other things, the harm will include the production of confidential information to people—the AG’s outside counsel—who have no legal right to see it; negotiations with counsel biased in favor of their private fee over the public interest; and a public trial against counsel appearing to act as authorized agents of the State, when in fact they are not. As Judge Berger ruled in the *American Tobacco* case, defendants challenging the AG’s use of private counsel “possess a special interest in the . . . appointment of the private counsel that is substantially and practically no different than a criminal defendant’s right to object to the appointment of a special prosecutor.” App. 196 (No.

94-C-1707, slip op. at 4); *see also Merck*, 861 F. Supp. 2d at 809 (“Merck has suffered an injury in fact; namely, that it is being forced to ‘defend itself in an inherently biased quasi-criminal enforcement proceeding.’ . . . This is sufficient to constitute a concrete and ongoing injury in fact. . . . Merck clearly has standing.”).

The Order does not address this injury, much less explain why the Petitioner’s showing was insufficient. Instead, the Order refers to *State ex rel. McGraw v. Johnson & Johnson*, CA No. 04-C-156 (W. Va. Cir. Ct. Brooke Cnty., Mar. 15, 2006) (App. 371-72), which is not controlling on this Court. In that case, defendants challenged the AG’s retention of outside contingent-fee counsel as violating defendants’ due process rights, an argument the defendants do not raise here. While *Johnson & Johnson* framed its discussion in terms of standing, the actual analysis it performed was not a standing analysis. The court did not hold that the defendants had no right to make such a challenge on standing grounds. Rather, it held that the AG retained sufficient control over the case to survive a due process attack. The court’s references to standing were not germane to its analysis. Because the Circuit Court’s reliance on *Johnson & Johnson* is misplaced, and because it failed to otherwise consider the injury caused by a tainted judicial proceeding, it was incorrect as a matter of law to conclude that Petitioners do not have standing to move to disqualify private counsel.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully move this Honorable Court to grant their Verified Petition for Writ of Prohibition, and issue a writ finding that the Circuit Court exceeded its legitimate powers in denying the Disqualification Motion, and ordering the Circuit Court to reverse the Order and grant the Disqualification Motion.

DATED: January 24, 2013

Respectfully submitted,



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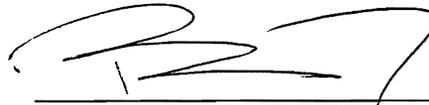
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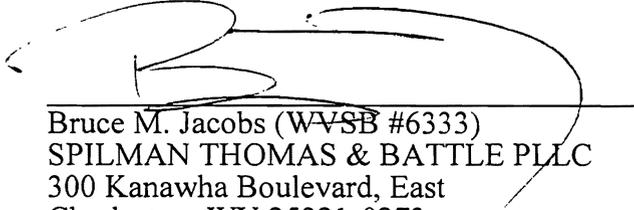
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