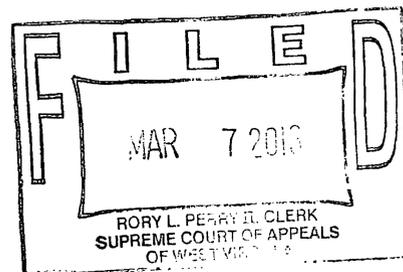


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 13-0086



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.

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

Petitioners,

v.

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

Respondent.

RESPONSE OF STATE OF WEST VIRGINIA
IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

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QUESTIONS PRESENTED

1. Whether Petitioners have standing to challenge the identity of opposing counsel appointed by the Office of the Attorney General of West Virginia.

2. Whether the circuit court exceeded its authority by refusing to disqualify counsel appointed by the Office of the Attorney General on the basis of counsel's fee arrangement.

a. Whether the Ethics Act prohibits the type of fee arrangement entered into in this case by counsel appearing on behalf of the Office of the Attorney General.

b. Whether Rule 1.7 of the West Virginia Rules of Professional Conduct prohibits the type of fee arrangement entered into in this case by counsel appearing on behalf of the Office of the Attorney General.

c. Whether Section 5-3-3 or 5-3-5 of the West Virginia Code prohibits the type of fee arrangement entered into in this case by counsel appearing on behalf of the Office of the Attorney General.

STATEMENT OF THE CASE

This Petition amounts to nothing more than an improper attempt to put before this Court a policy question that properly rests with the Legislature. By their own admission, Petitioners are asking this Court to wade into a policy debate among “academics and the media” over the wisdom of using private counsel in government consumer-protection actions under certain non-hourly fee arrangements. Furthermore, in doing so, they seek to have this Court interfere with the Attorney General's prosecution of consumer-protection cases, and choose winners and losers among the lawyers who seek to assist the Office of the Attorney General in representing the State in such cases.

Although Petitioners claim to seek only the disqualification of opposing counsel in this case on clear legal grounds, those arguments are quite plainly pretextual. They have no basis to seek disqualification, as there is no evidence of any impropriety, conflict of interest, or undue influence by those attorneys that Petitioners have moved to disqualify. Moreover, none of the laws or rules relied upon by Petitioners have any applicability to the fee arrangement in question. This Court should deny the writ.

I. Background

Petitioners are major credit card issuers named as defendants in seven consumer protection cases filed on August 16, 2011, by the Attorney General on behalf of the State. The State alleges that Petitioners have violated the West Virginia Consumer Credit and Protection Act (“WVCCPA”) by employing unfair, deceptive, and unconscionable practices to deceive West Virginia consumers into paying for illusory credit card service plans for which they did not sign up or were deceived into signing up. *See* App. 207. Petitioners, the State alleges, have targeted the most vulnerable consumers and unlawfully amassed many millions of dollars. *Id.*

More than eight months later, after removing the cases to federal court and suffering remand to state court, Petitioners determined to file a motion to disqualify opposing counsel. Petitioners asserted that the Office of Attorney General had appointed the private attorneys under a contingent-fee arrangement and that the alleged arrangement is barred by both the West Virginia Governmental Ethics Act, W. Va. Code § 6B-1-1 *et seq.*, and West Virginia Rule of Professional Conduct 1.7(b). Petitioners further asserted that the Attorney General lacked the statutory authority to appoint private counsel as Special Assistant Attorneys General to appear on behalf of the Office of Attorney General.

II. The Decision Below

On August 30, 2012, the circuit court denied the motion, making numerous findings of fact and conclusions of law against Petitioners. Factually, the court found that the Attorney General's office "is apprised of any and all action taken in the cases, that the Attorney General's office controls tactics and strategy, and that no case could be settled without the oversight and approval of the Attorney General's office." App. 4 ¶5. In short, "the Attorney General retains ultimate control over the representation and [] private counsel's appointments do not in any way impair the fulfillment of the Attorney General's duties as chief legal officer." *Id.* at 8 ¶11.

The court also found as a factual matter that private counsel "do not have 'contingency fee' contracts," but rather an arrangement to earn a "fee approved by the Court." *Id.* at 6 ¶6. The court found "no showing on th[e] record that the terms of appointment are unethical or that a conflict of interest exists." *Id.* And even if private counsel did have contingency fee contracts, Petitioners "failed to demonstrate any ethical lapse incident to contingency fee payments or that contingency fee agreements constitute a conflict of interest." *Id.* at 6 ¶7.

Finally, the court found as a matter of fact that "[t]he Attorney General's authority to appoint Special Assistant Attorneys General has long been recognized in West Virginia." *Id.* at 7. The court cited several cases over the past ten years that have upheld the West Virginia Attorney General's authority to appoint Special Assistant Attorneys General. *Id.* at 7-8 ¶10. It made special note of the fact that this Court recently denied a petition seeking an extraordinary writ regarding that very issue. *Id.* at 7 ¶9.

As a matter of law, the court rejected Petitioners' claims under both the Ethics Act and Rule of Professional Conduct 1.7. According to the circuit court, Petitioners had entirely misread both the statute and the rule. Petitioners' "interpretation of the [Ethics Act's] statutory

language is overbroad and unsupported by any relevant jurisprudence.” App. 9 ¶4. Similarly, the court found Petitioners’ view of Rule of Professional Conduct 1.7 to “demand[] an extension of the Rule beyond both its text and its historic application.” *Id.* at 11 ¶10.

The circuit court also rejected Petitioners’ legal argument that the Attorney General’s Office lacks authority to appoint private counsel. The court found the argument to be “irreconcilable with the long-standing practice and interpretation of the Attorney General’s powers.” App. 12 ¶12. “[T]he use of outside counsel,” the court concluded, “is constitutionally and statutorily permissible.” *Id.* at 13 ¶14.

Lastly, the court concluded as a matter of law that Petitioners “lack[ed] standing to object to the Attorney General’s selection of counsel.” *Id.* at 14 ¶18. The court explained that “divesting the Attorney General of his authority to direct the State’s legal representation could not redress any concrete, particularized, actual, and non-conjectural injury of [Petitioners].” *Id.* at 14 ¶20.

III. The Petition for Writ of Prohibition

Following another lengthy delay—five months during which they continued to actively participate in the underlying cases—Petitioners renewed their quixotic quest against the Office of Attorney General and its appointed outside counsel by filing the instant Petition. The Petition takes aim at the circuit court’s denial of the motion to disqualify, but it significantly mischaracterizes the court’s order. In their Statement of the Case, Petitioners nowhere acknowledge the court’s extensive factual findings about the control retained by the Attorney General over appointed outside counsel—findings that undermine their central assertion regarding the *appearance* of impropriety. Petitioners also make the sweeping claim that the

circuit court failed even to “mention ... the applicable Ethics Act and Ethics Rules provisions,” Dfs. Pet. 7-8, but that is demonstrably false, as shown above.

Substantively, the Petition advances the same ethics arguments considered and rejected by the circuit court. Petitioners contend that private counsel’s “direct financial interest in the outcome of the[] [underlying] cases violates at least two parts of the Ethics Act.” *Id.* at 15. They also assert that the Rules of Professional Conduct “bar the conflict of interest created by the Special Assistants’ fee arrangement.” *Id.* at 19.

More notable is what the Petition does not say. Petitioners do not challenge any of the circuit court’s findings of fact, as is true of all petitions for writ of prohibition because the writ is appropriate only for clear *legal* errors. Petitioners have also abandoned their broad claim that the Attorney General lacks *any* statutory authority to appoint Special Assistant Attorneys General, and now argue only that the Legislature has barred the Attorney General from hiring Special Assistant Attorneys General with payment contingent on the recovery in the lawsuits. *Id.* at 26. They seek the writ only on that “more specific question” and expressly disavow all other issues. *See id.* at 10 n.13 (explaining, for example, that they are “not advanc[ing]” a due process claim). Thus, as *amicus curiae* the West Virginia Chamber of Commerce concedes, “the use of outside counsel on an *hourly* basis by state or local government” is not at issue and indeed “may be appropriate.” Chamber Amicus Br. 13; *id.* at 14 (“[T]he State could have contracted with lawyers on an hour-fee basis”).¹

¹ The West Virginia Chamber of Commerce does attempt to interject several new issues not raised in the Petition, including whether the State should use a competitive process to hire private counsel, Amicus Br. 10, and whether a contingent-fee arrangement violates due process, *id.* at 14-18. But as an *amicus*, the Chamber of Commerce lacks the power to introduce new issues into a case. *See, e.g., Delardas v. County Court of Monongalia County*, 155 W. Va. 776, 783, 186 S.E.2d 847, 852 (1972). The State therefore does not address these issues, but requests that the Court permit a response should the Court choose to consider them.

SUMMARY OF ARGUMENT

The Petition falls well short of meeting the high threshold for a writ of prohibition. Far from the extraordinary case that requires an extraordinary remedy, this case is little more than an effort by Petitioners to advance in the judicial system a policy issue that belongs before the Legislature. And by challenging only one particular fee arrangement for outside counsel, Petitioners essentially seek to have this Court advantage one group of attorneys over another when it comes to assisting the Office of the Attorney General in consumer protection cases. Importantly, there is not a single allegation of improper behavior by any of the targeted attorneys in this case. For all of the following reasons, this blatant abuse of process should be denied.

As a threshold matter, the circuit court correctly held that Petitioners lack standing to seek disqualification of opposing counsel in this case. Courts across the nation, including this Court, have repeatedly held that a party seeking to disqualify opposing counsel ordinarily must itself have a conflict of interest with opposing counsel in order to demonstrate sufficient injury to establish standing. Petitioners lack any such injury; there is no allegation that the private counsel appointed by the Attorney General previously represented any of the Petitioners or that there is, or has ever been, any relationship whatsoever between counsel and Petitioners. Additionally, because Petitioners challenge only one particular fee arrangement, any injury would not be redressed by the issuance of the writ. The Attorney General could simply rehire the same private counsel under a different fee arrangement and continue prosecuting the underlying cases.

Independent of standing, the circuit court was also right to deny Petitioners' motion on the merits. Petitioners' overly expansive readings of the Ethics Act and Rule of Professional Conduct 1.7 are at odds with the plain text and this Court's precedent. The Ethics Act subsections relied upon by Petitioners do not apply to compensation received by working for the

State. But even if they did apply, the circuit court was correct to find no violation of the statute in light of the undisputed facts in this case—in particular, the fact that the Attorney General maintains complete control over private counsel and all litigation decisions. Similarly, Rule of Professional Conduct 1.7 does not apply to the circumstances in this case, but even if it did, the circuit court was correct to find no violation of the rule in light of the undisputed facts in this case. Finally, Petitioners are wrong in contending the Attorney General exceeded his statutory authority by entering into the challenged fee arrangements. The Attorney General has ample statutory discretion to employ whatever fee arrangement for outside counsel that he deems best under the circumstances.

STATEMENT REGARDING ORAL ARGUMENT

The State respectfully submits that the writ may be denied without oral argument. It is apparent from the face of the briefing and appendix that Petitioners have failed to meet the strict standard for the extraordinary writ of prohibition.

ARGUMENT

The Petition fails to present the sort of “extraordinary case[]” required for the “extraordinary remedy” of a writ of prohibition. *State ex rel. v. King*, 729 S.E.2d 200, 206 (W. Va. 2012) (quoting Syl. pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953)). Petitioners carry the burden of showing that “the extraordinary writ provides the only available and adequate remedy.” *State ex rel. Rose L. v. Pancake*, 209 W. Va. 188, 191, 544 S.E.2d 403, 406 (2001). The right to the writ must “clearly appear.” *State ex rel. Westbrook Health Servs. v. Hill*, 209 W. Va. 668, 672, 550 S.E.2d 646, 650 (2001).

It is not enough to identify “a simple abuse of discretion by a trial court.” *State ex rel. State v. Alsop*, 227 W. Va. 276, 280, 708 S.E.2d 470, 474 (2009) (citing W. Va. Code § 53-1-1;

further cit. & quote om.). “As early as 1873, this Court stated that ‘a mere error in the proceeding may be ground of appeal or review, but not of prohibition.’” *State ex rel. W. Va. Nat'l Auto Ins. Co. v. Bedell*, 223 W. Va. 222, 227, 672 S.E.2d 358, 363 (2008) (quoting Syl. pt. 3, in part, *Buskirk v. Judge of Circuit Court*, 7 W. Va. 91 (1873)). A writ of prohibition is appropriate “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.” *State ex rel. Charles Town Gen. Hosp. v. Sanders*, 210 W. Va. 118, 122-123, 556 S.E.2d 85, 89-90 (2001) (cit. & int. quote om.).

As discussed below, Petitioners have failed to show that the circuit court committed a “substantial” and “clear-cut” error in denying the motion for disqualification. The court correctly concluded that Petitioners lack standing to seek disqualification of opposing counsel in this case. The court was also right to deny the motion on the merits, as there was no factual or legal basis to disqualify counsel.

I. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT PETITIONERS LACK STANDING TO SEEK DISQUALIFICATION OF OPPOSING COUNSEL.

Petitioners contest the circuit court’s standing determination on two grounds. *First*, they claim that “[t]he issue of standing ... is not relevant to whether an attorney should be disqualified from representation.” Petr Br. 29. *Second*, Petitioners contend that even if standing is required, the circuit court incorrectly concluded that they failed to demonstrate the requisite injury-in-fact. *Id.* at 32-34. Both arguments lack merit.

A. Standing Is Required for a Motion to Disqualify.

“[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute *or of particular issues.*” *Warth v. Seldin*, 422 U.S. 490, 498 (1975)

(emphasis added). Standing “does not refer simply to a party’s capacity to appear in court” or to file a complaint. *Findley v. State Farm Mut. Auto Ins. Co.*, 213 W. Va. 80, 94, 576 S.E.2d 807, 821 (2002) (quoting *Int’l Primate Protection League v. Admin. of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991)). It can also refer to “whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue” in a case. *Id.* (quoting *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968)).

Contrary to Petitioners’ assertion, it thus is hardly a “novel theory” to challenge the standing of a party seeking disqualification of opposing counsel. Petr Br. 30. Disqualification of opposing counsel is a “particular issue” in a case, and the doctrine of standing plainly permits an inquiry into whether the movant is “a proper party” to request adjudication of that issue. *Findley*, 213 W. Va. at 95. Indeed, this Court recently affirmed a circuit court’s denial of a disqualification motion based on the movant’s lack of standing. *DeBlasio v. Stone*, No. 11-1152, -53, 2012 W. Va. LEXIS 976 (W. Va. Dec. 7, 2012) (memorandum decision). The plaintiff in *DeBlasio* had sought to disqualify opposing counsel, who represented one defendant, on the ground that counsel had a conflict of interest with another defendant. *Id.* at *6. The other defendant denied any conflict of interest, and the circuit court rejected the motion, explaining that the plaintiff “lack[ed] standing to make such an objection and that those who might assert it in the context of this litigation have not done so.” *Id.* at *7. Emphasizing that motions to disqualify counsel should be viewed with extreme caution because of the interference with the lawyer-client relationship, this Court affirmed the circuit court’s ruling. *Id.* at *12.

If there is any dispute amongst the courts, it is not over whether the standing doctrine applies to motions to disqualify opposing counsel, but rather over the injury that a movant must show to demonstrate standing. *See, e.g., Colyer v. Smith*, 50 F. Supp. 2d 966, 969 (C.D. Cal.

1999) (noting the split of authority over “[w]hen ... a party ha[s] standing to move to disqualify opposing counsel based on that counsel’s breach of its duties of loyalty and confidentiality owed to a third party”). On the latter question, the majority view is that “only a current or former client of an attorney has standing to complain of that attorney’s representation of interests adverse to that current or former client.” *Id.* But the threshold question is settled—a party seeking to disqualify opposing counsel must have standing of *some* kind.²

Petitioners cite a long list of cases to support their position, *see* Petr Br. 30 nn.26-27, but none hold that a party may disqualify opposing counsel without an injury sufficient to demonstrate standing. To the contrary, all of the cited cases that involved motions to disqualify are premised on the notion that a party seeking disqualification must have been harmed by an actual or apparent conflict of interest.³ And in each one of these cases, the movant was a former client of the opposing counsel sought to be disqualified,⁴ or had some other significant connection to the counsel.⁵ Petitioners contend that these cases do not expressly hold that the

² *People ex rel. Simpson v. Highland Irr. Co.*, 893 P.2d 122, 127 (Colo. 1995) (en banc), is not to the contrary. That case stands for the unremarkable proposition—inapplicable here—that a defendant need not have standing to assert an affirmative defense. *Id.* at 127.

³ *See Bluestone Coal Corp.*, 226 W. Va. at 157, 697 S.E.2d at 749 (“A circuit court, upon motion of a party, ... 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.” (emphasis added)); *State ex rel. Jefferson Cnty. Bd. of Zoning Appeals v. Wilkes*, 221 W. Va. 432, 440, 655 S.E.2d 178, 186 (2007) (same); *State ex rel. Humphries v. McBride*, 220 W. Va. 362, 369, 647 S.E.2d 498, 805 (2007) (same); *State ex rel. Cosenza v. Hill*, 216 W. Va. 482, 488, 607 S.E.2d 811, 817 (2004) (same); *Garlow v. Zakaib*, 186 W.Va. 457, 413 S.E.2d 112 (1991) (same).

⁴ *See Bluestone Coal Corp.*, 226 W. Va. at 158, 697 S.E.2d at 750 (attorney formerly represented movant); *Jefferson Cnty. Bd. of Zoning Appeals*, 221 W. Va. at 441, 655 S.E.2d at 187 (attorney formerly represented movant); *State ex rel. Cosenza v. Hill*, 216 W. Va. at 487, 607 S.E.2d at 816 (attorney was previously employed by law firm that formerly represented movant).

⁵ *See Humphries*, 220 W. Va. at 369, 647 S.E.2d at 805 (State moved to disqualify attorney representing criminal defendant charged with killing his girlfriend’s husband because attorney’s

standing doctrine applies to motions to disqualify, but that proves nothing. “When a potential jurisdictional defect is neither noted nor discussed in a ... decision, the decision does not stand for the proposition that no defect existed.” *Arizona Christian Sch. Tuition Organization v. Winn*, 131 S. Ct. 1436, 1448 (2011).

B. Petitioners Lack Standing.

Petitioners fail to meet the required elements for standing. *First*, the party attempting to establish standing must have suffered an “injury-in-fact.” *Findley*, 213 W. Va. at 94, 576 S.E.2d at 821 (quotations omitted). *Second*, there must be “a causal connection [between] the injury and the conduct forming the basis of the lawsuit.” *Id.* (quotations omitted). *Third*, it must be likely that “the injury will be redressed through a favorable decision of the court.” *Id.* (quotations omitted). Petitioners do not satisfy at least two of these three requirements.

1. Petitioners Have Not Suffered an Injury-in-Fact.

An “injury-in-fact” sufficient for standing requires “an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical.” *Id.* (quotations omitted). In short, the complaining party must have a personal interest in the issue.⁶ Thus, the Supreme Court of the United States has held that courts may not “entertain citizen suits to vindicate the public’s nonconcrete interest in the proper administration

father had previously represented the murdered husband in divorce proceedings from the girlfriend); *Garlow v. Zakaib*, 186 W.Va. 457, 413 S.E.2d 112 (attorney representing dismissed employees against employer was also former employee).

⁶ *See, e.g., Zsigray v. Gilmer County Pub. Serv. Dist.*, No. 11-0577, 2012 W. Va. LEXIS 393, at *5 (W. Va. May 29, 2012) (finding no standing where plaintiff’s wife was only signatory on contract); *Harper v. Smith*, No. 11-0490, 2012 W. Va. LEXIS 165, at *14 (W. Va. Mar. 26, 2012) (finding no standing to challenge validity of deed because “[t]he right to redeem in this instance belonged to the Bank of New York who is not a party in this case”) (fn. om.); *Belcher v. Greer*, 181 W. Va. 196, 382 S.E.2d 33 (1989) (finding no standing because plaintiff—a mineral estate owner—had not paid the property taxes on his mineral interests).

of the laws.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (quotations omitted). The party seeking to establish standing must “show that the action injures him in *a concrete and personal way*.” *Id.* (emphasis added).

As noted above, the majority of courts have determined that a party has standing to disqualify opposing counsel only if it is a “current or former client ... complain[ing] of that attorney’s representation of interests adverse to that current or former client.” *Colyer*, 50 F. Supp. 2d at 969. The leading case is *In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83 (5th Cir. 1976). There, the Fifth Circuit explained that “[a]s a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification.” *Id.* at 88. The court refused to permit anyone else to seek disqualification because that would place “in the hands of [an] unauthorized surrogate powerful presumptions which are inappropriate in his hands.” *Id.* at 90. Importantly, the surrogate could “use the conflict rules for his own purposes *where a genuine conflict might not really exist*.” *Id.* (emphasis added). The court did contemplate a possible exception in the limited circumstances where an ethical violation was “manifest and glaring” or “open and obvious and confronted the court with a plain duty to act.” *Id.* at 89.

West Virginia law and ethics rules are consistent with this majority view. The Rules of Professional Conduct expressly state that the Rules “do[] not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.” W. Va. R. Prof. Conduct, Preamble, Scope. Indeed, “the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.” *Id.* Moreover, as discussed above, the movant in every disqualification case cited by Petitioners from this Court had some significant connection to the counsel sought to be disqualified. *See supra* notes 4-5.

Petitioners do not even attempt to meet this standard. There is no allegation that private counsel previously represented any of the Petitioners or that there is, or has ever been, any relationship whatsoever between private counsel and Petitioners. Nothing in the record suggests any conflict of interest, actual or apparent, between Petitioners and private counsel. See *Commonwealth v. Janssen Pharmaceutica, Inc.*, 8 A.3d 267, 277 (Pa. 2010) (“[A]s a general matter, it is difficult to see how a party-opponent in active litigation with the Commonwealth could be said to have a substantial, direct and immediate interest in the authority or identity of the legal representation the Commonwealth has chosen.”). In fact, that Petitioners delayed eight months before filing their motion to disqualify and then another five months before filing this Petition should be proof enough that there is no “actual or imminent” harm. *Findley*, 213 W. Va. at 94, 576 S.E.2d at 821 (quotations omitted).

Instead, Petitioners claim that they are injured by a “potentially tainted judicial proceeding” in which they must “negotiat[e] with counsel biased in favor of their private fee over the public interest.” Petr Br. 33. But this alleged injury is undermined by the unchallenged factual finding that the Attorney General’s office “is apprised of any and all action taken in the cases, that the Attorney General’s office controls tactics and strategy, and that no case could be settled without the oversight and approval of the Attorney General’s office.” App. 4 ¶5. As explained in a decision cited by Petitioners themselves, “[t]here is a critical distinction between a private attorney who supplants the public entity’s duly authorized counsel and a private attorney who serves only in a subordinate role as co-counsel to the public entity.” *Merck Sharp & Dohm Corp. v. Conway*, 861 F. Supp. 2d 802, 814 (E.D. Ky. 2012). Where the Attorney General’s Office maintains substantial control and active oversight, as here, there is no basis for concern about neutrality and the public interest. *Id.* at 814-15; see also App. 269 (*Johnson & Johnson*

Order, p. 13) (“[T]he ‘neutrality’ at issue is that of the attorney general and staff attorneys assigned to the litigation, because they, not private counsel, decide how the case is handled.”), *petition denied*, App. 372. This is hardly the rare exception of a “manifest and glaring” ethical violation that demands court action. *In re Yarn Processing Patent Validity Litig.*, 530 F.2d at 89.

Petitioners also claim injury based on the attorneys’ fees that the circuit court could ultimately require Petitioners to pay under the challenged fee arrangement. Close analysis reveals, however, that this alleged injury is entirely speculative. The critical fact is that Petitioners are not challenging *all* fee arrangements for outside counsel that could result in an award of fees from the court, but only the alleged contingent-fee arrangement in this case. Petitioners cannot claim, therefore, that they are injured merely by the potential for court-awarded attorneys’ fees. Rather, Petitioners’ injury is limited to those *additional* fees, if any, caused specifically by the alleged contingent-fee arrangement in this case. The existence of those fees is pure conjecture—Petitioners may or may not lose the underlying cases, the court may or may not award attorneys’ fees, and those fees may or may not be above any fees that might otherwise have been awarded under a different fee arrangement. Such hypothetical injury is not enough to establish standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

2. Petitioners’ Alleged Injury Will Not Be Redressed By a Favorable Decision.

Even if Petitioners had an adequate injury, it would fail the third standing requirement because their injury would not be redressed by the disqualification of private counsel. The decision in *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2008 U.S. Dist. LEXIS 118674 (E.D. La. Aug. 13, 2008), is instructive. There, the court found that the defendants lacked standing to disqualify seven private law firms hired to represent the State of Louisiana. *Id.* at *116. Addressing the issue of redressability, the court explained: “[E]ven if this Court

were to invalidate the contract [for outside counsel], the Insurers would not necessarily be relieved from suit because the Attorney General would still be a viable plaintiff. Indeed, any adverse ruling by this Court would simply prompt the Attorney General to either properly hire these private attorneys, or carry out the litigation through his own appointed assistants.” *Id.* at *118.

Here, too, a favorable ruling for Petitioners would not “relieve[]” them from suit. *Id.* The Attorney General would be barred only from hiring private counsel under the particular fee arrangement at issue in this case. The Attorney General could rehire these private attorneys under a different fee arrangement, or carry out the litigation through State-employed attorneys.

Perhaps more important, a favorable ruling for Petitioners also would not redress any of the specific harms that Petitioners and their amicus allege result from the challenged fee arrangement. They claim that the alleged contingent-fee arrangement takes money away from other government uses. *See* Chamber Br. 9-12. But an hourly-fee arrangement with outside counsel would be no different; any time that outside counsel is used, there will be an expenditure of public money that otherwise would not have been spent. Petitioners also claim that the alleged contingent-fee arrangement creates negative incentives for outside counsel that salaried state employees do not have. *See* Petr Br. 33. But again, an hourly-fee arrangement would be no different; outside counsel billing by the hour have an incentive to run the clock that salaried state employees do not have. *See Priceline.com, Inc. v. City of Anaheim*, 180 Cal. App. 4th 1130, 1149 (2010) (“[I]t is just as easily argued that a contingency fee lawyer is less likely to pursue meritless litigation, whereas an hourly fee lawyer may have a financial motivation to continue prosecuting litigation discovered to lack merit.”) (emphasis omitted).

C. Prudential Concerns Additionally Weigh Against Petitioners' Standing.

When evaluating standing, courts also consider a number of prudential concerns beyond the traditional requirements of injury, causation, and redressability. *State ex rel. Abraham Linc. Corp. v. Bedell*, 216 W. Va. 99, 112 n.3, 602 S.E.2d 542, 555 n.3 (2004). These concerns include “the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.” *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004). Relatedly, courts have required as a matter of prudence that litigants “assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one shared in substantially equal measure by all or a large class of citizens.” *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quotations omitted).

Petitioners’ challenge in this case falls squarely within these prudential limitations and should, for this additional reason, be turned aside. Petitioners have brought to this Court a “generalized grievance” about the Attorney General’s hiring and staffing practices that is “more appropriately addressed in the representative branches.” *Newdow*, 542 U.S. at 12. When faced with a similar challenge to Maryland’s fee contracts with private lawyers, the Supreme Court of Maryland held the challenge non-justiciable. The high court explained: “[W]e will not review and, therefore, not disturb the Attorney General’s and the Governor’s determination ... [which] was a decision within their discretionary authority.” *Philip Morris Inc. v. Glendening*, 349 Md. 660, 678 (1998).

As in *Glendening*, a challenge to the hiring and staffing practices of the West Virginia Attorney General is not justiciable. Without even exploring his inherent constitutional powers as “the State’s chief legal officer,” see *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 31, 569

S.E.2d 99, 107 (2002), it is clear that the Attorney General has broad statutory discretion to staff his cases as he sees fit. Generally, he has statutory authority to “appoint such assistant attorneys general as may be necessary to properly perform the duties of his office.” W. Va. Code § 5-3-3. And when he is specifically enforcing the WVCCPA on behalf of the State, he has the additional authority to “[d]elegate his powers and duties ... 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(1)(f). Even if Petitioners could articulate a redressable injury-in-fact, this is not an issue for a court to decide. As the Maryland Supreme Court explained, “[w]hen a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is [a] sound rule of construction that, the statute constitutes him *sole and exclusive judge* of the existence of those facts.” *Glendening*, 349 Md. at 678 (emphasis added).

II. THE CIRCUIT COURT DID NOT ERR IN DENYING PETITIONERS’ MOTION ON THE MERITS.

Petitioners fail not only to show that they have standing, but also to carry their burden on the merits. Petitioners contend that disqualification is appropriate if “counsel’s retention creates either the fact or appearance of ‘impropriety.’” Petr. Br. 12 (quoting *Garlow*, 186 W. Va. at 460-61, 413 S.E.2d at 115-16). And according to Petitioners, “[i]mpropriety or its appearance exists if counsel’s retention ‘will result in the violation of the Rules of Professional Conduct or other law.’” *Id.* (quoting *Roberts & Schaefer Co. v. San-Con, Inc.*, 898 F. Supp. 356, 359 (S.D. W. Va. 1995)); *see also id.* at 25 (“Regardless of whether the special assistants have engaged or will engage in actual impropriety ... th[e] violation [of the Ethics Rules] gives rise to an appearance of impropriety[, which] requires disqualification under West Virginia law.”).

Even applying Petitioners' standard for disqualification, however, it is clear that the circuit court did not err. As discussed further below, there is no "violation of the Rules of Professional Conduct or other law." *Id.* at 12.⁷ *First*, the Ethics Act does not apply to compensation earned while working for the State. But even if the Act did apply, there is no violation under the undisputed findings of fact. *Second*, Rule of Professional Conduct 1.7 does not apply to the circumstances in this case. But again, even if it did apply, there is no violation under the undisputed findings of fact. *Third*, the Attorney General did not exceed his statutory authority by entering into the challenged fee arrangements.

A. There Is No Violation of the West Virginia Government Ethics Act.

1. The Ethics Act Does Not Apply to Compensation Earned By Working for the State.

When considered as a whole, it is clear that the Ethics Act is not intended to apply to compensation lawfully earned by working for the State. As this Court has explained, the law is aimed at "state government employees and officials who 'exercise the powers of their office or employment for *personal gain beyond the lawful emoluments of their position* or who seek to benefit narrow economic or political interests at the expense of the public at large.'" *State ex rel. McGraw v. West Virginia Ethics Comm'n*, 200 W. Va. 723, 726-727, 490 S.E.2d 812, 815-16 (1997) (quoting W.Va. Code, 6B-1-2 [1989]) (emphasis added). Thus, the statute focuses on

⁷ Although Petitioners stress that the circuit court applied the wrong standard for disqualification, Petr. Br. 12, this Court need not reach that question. Because *Petitioners* carry the burden of showing a clear right to the writ, the inquiry necessarily ends if the circuit court did not err even under *Petitioners'* own proffered standard for disqualification. If the circuit court applied the wrong standard, that error was harmless. And contrary to Petitioners' suggestion, the two cases they cite do *not* hold that an incorrect legal standard is automatically grounds for issuing the writ. The first case—*J.S. ex rel. S.N. v. Hardy*, 229 W. Va. 251, 728 S.E.2d 135 (2012)—was an appeal, not a petition for a writ. And in the second case—*State ex rel. Brison v. Kaufman*, 213 W. Va. 624, 584 S.E.2d 480 (2003)—this Court issued the writ because, unlike this case, there was a chance that the circuit court would reach a different result.

such issues as receipt of valuable gifts for the performance of official duties, § 6B-2-5(c); personal or family interests in public contracts, § 6B-2-5(d); confidential information, § 6B-2-5(e); and prohibited representation, § 6B-2-5(f). None of this suggests that the Ethics Act has any bearing on the fees paid to counsel appointed by the Attorney General.

Petitioners isolate a few sentences in Section 6B-2-5 of the Ethics Act, which they claim place restrictions on the ways that outside counsel may be paid. They first point to Section 6B-2-5(b)(1), which provides that “[a] public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person.” Petitioners focus specifically on the phrase “private gain,” arguing that it “covers any type of action that would be of personal benefit,” including a contingent fee for legal services. Petr. Br. 16 (bracket om.). They next point to Section 6B-2-5(d)(3), which provides that “[i]f a public official or employee 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.” Petitioners argue that the phrase “profits or benefits of a contract” include the fee arrangements at issue in this case. Petr. Br. 17.

But these interpretations do not make sense in context. There are other provisions in Section 6B-2-5 that refer to a public employee’s “compensation.” W. Va. Code § 6B-2-5(l). Those provisions, which must be read together, make clear that the phrases “private gain” and “profits or benefits of a contract” are not in fact references to an employee’s formal pay. *See, e.g., Dolan v. Postal Service*, 546 U.S. 481, 486 (2006) (“Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.”); *Durham v.*

Jenkins, 229 W. Va. 669, 735 S.E.2d 266, 269 (2012) (“Just as separate statutes of the same subject matter must be read in *pari materia* to give meaning to those statutes, portions of a single section of a statute must also be read together.”). Other statutory language confirms that conclusion. For example, Section 6B-2-5(b)(1) includes language suggesting that an employee’s “performance of usual and customary duties” cannot result in “private gain.” In addition, language in several provisions of Section 6B-2-5(d) suggests the phrase “profits or benefits of a contract” refers to *public* contracts between state agencies and private entities, not *employment* contracts. *See, e.g.*, W. Va. Code § 6B-2-5(d) (titled “[i]nterests in public contracts”).

Petitioners’ interpretations also lead to absurd results. As the circuit court explained, interpreting the words “private gain” and “the profits or benefits of a contract” as referring to the terms of compensation for work on behalf of the State would conceivably mean that a State employee negotiating the terms of his or her own compensation would violate the Ethics Act. App. 9 ¶3. In fact, any State employee being paid for doing his or her job could be considered to have “knowingly and intentionally use[d] his or her office ... for his or her own private gain.” Were that what the Ethics Act forbids, everyone in State government would have to be an unpaid volunteer.

Unsurprisingly, Petitioners cite no case law that supports their tortured reading of the statute. But in the 24 years since the statute’s enactment, the use of outside counsel has hardly been a secret. The Legislature is certainly aware of the substantial sums that the State of West Virginia has received as a result of its consumer protection efforts, including the tobacco litigation, in which the State was represented by outside counsel. App. 210-11. Most of the firms representing Petitioners have themselves received compensation for legal work on behalf

of the State and/or its agencies.⁸ Nevertheless, no court has applied the Ethics Act to disqualify outside counsel or render the acceptance of legal fees an ethics violation.

2. Under the Undisputed Findings of Fact, the Ethics Act Has Not Been Violated.

Even if this Court adopts Petitioners' interpretations of the Ethics Act, however, the circuit court was still correct to find no violation given the undisputed findings of fact. As already discussed above, it is unchallenged that the Attorney General's office "is apprised of any and all action taken in the cases, that the Attorney General's office controls tactics and strategy, and that no case could be settled without the oversight and approval of the Attorney General's office." App. 4 ¶5. The court found as a matter of fact that "private counsel's appointments do not in any way impair the fulfillment of the Attorney General's duties as chief legal officer." *Id.* at 8 ¶11. Separately, it is also unchallenged that the fee arrangement is not a percentage contingency, but rather allows a "reasonable" and "proper" fee to be determined and approved by the court in its discretion. *Id.* at 6 ¶6.

These facts compel the conclusion that there could not be an Ethics Act violation. Given the level of command being exercised by the Attorney General and the discretion entrusted to the court over the amount of the fee, private counsel has little to no control over any aspect of this

⁸ See, e.g., *Rum Creek Coal Sales v. Caperton*, 31 F.3d 169 (4th Cir. 1994) (Jan L. Fox, Special Assistant Attorney General, Steptoe & Johnson, Charleston, West Virginia, argued for State appellees); *State ex rel. W. Va. Reg'l Jail & Corr. Facility Auth. v. W. Va. Inv. Mgmt. Bd.*, 203 W. Va. 413, 508 S.E.2d 130 (1998) (Benjamin L. Bailey, Special Assistant Attorney General, and Kenneth E. Webb, Jr., Bowles Rice McDavid Graff & Love, Charleston, West Virginia, represented the West Virginia Regional Jail and Correctional Facility Authority); *West Va. Dep't of Health & Human Resources/Welch Emergency Hosp. v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993) (Jan L. Fox, Special Assistant Attorney General, Steptoe & Johnson, Charleston, West Virginia, represented the Division of Personnel). According to a FOIA request covering the preceding five and a half year period, the fees paid to Petitioners' firms are as follows: Steptoe & Johnson \$14,262,378.21; Bowles Rice McDavid Graff & Love \$1,440,712.65; Spilman Thomas & Battle \$1,643,047.11; Kay Casto & Chaney \$5,151.75; Flaherty Sensabaugh & Bonasso \$223,955.89. App. 286.

case. They can hardly be said to have the ability to use their offices for “private gain,” § 6B-2-5(b)(1), or to “affect[] [their] financial or limited financial interest[s],” § 6B-2-5(d)(3).

B. There Is No Violation of the Rules of Professional Conduct.

1. Rule of Professional Conduct 1.7 Does Not Apply To the Circumstances in this Case.

As the circuit court explained, this Court’s case law interpreting Rule of Professional Conduct 1.7 clearly limits the rule to circumstances involving “two actual clients.” *In re James*, 223 W. Va. 870, 876, 679 S.E.2d 702, 708 (2009). “Rule 1.7 was adopted to ensure an attorney’s loyalty to a client and *preclude the attorney from undertaking the simultaneous representation of another client* with interests that are actually or potentially adverse to the existing client without both clients’ knowledgeable consent.” *Barefield v. DPIC Cos.*, 215 W. Va. 544, 556-557, 600 S.E.2d 256, 268-69 (2004) (emphasis added). Put more simply, the rule “is aimed at conflicts of interest arising where the lawyer is simultaneously representing *two actual clients*.” *James*, 223 W. Va. at 876, 679 S.E.2d at 708 (emphasis added).

This Court has adhered to that interpretation even though the plain language of the rule suggests that it might also apply where there is a conflict between a client and “the lawyer’s own interests.” W. Va. Prof. Conduct, Rule 1.7(b). For example, in *Lawyer Disciplinary Board v. Artimez*, 208 W. Va. 288, 540 S.E.2d 156 (2000), this Court refused to hold that Rule 1.7 applied where the attorney was having an affair with his client’s spouse. The attorney’s own interests were plainly at odds with those of his client. But “[w]hile the relationship itself was condemned by this Court, there was no violation of this rule because the client’s wife was not an actual client, and therefore, there was no conflict of interest between two actual clients.” *James*, 223 W. Va. at 877, 679 S.E.2d at 709.

Here, there is only one client. The Special Assistant Attorneys General, acting on behalf of the Office of Attorney General, represent the State of West Virginia and no one else. Petitioners do not allege, much less offer any proof, that any of them has a lawyer-client relationship with any of the Special Assistant Attorneys General involved in this case. Under this Court's clear precedent, Rule 1.7 is inapplicable.

Petitioners turn to *State ex rel. Bluestone Coal Corp. v. Mazzone*, 226 W. Va. 148, 697 S.E.2d 740 (2010), but that case says nothing different from *James* about the applicability of Rule 1.7. The *Bluestone* petitioners sought disqualification of opposing counsel on several grounds. They argued that they were current clients of opposing counsel such that continued representation would violate Rule 1.7; that they were former clients such that continued representation would violate Rule 1.9; and that, because certain individual attorneys had formerly represented the Bluestone companies, their disqualification should be imputed to the entire law firm in accordance with Rule 1.10. This Court decided the case on Rule 1.9 grounds only, choosing specifically not to address Rule 1.7 because the parties "vehemently dispute[d]" whether the Bluestone companies were actually current clients. 226 W. Va. at 158 n.6, 697 S.E.2d at 750 n.6. Thus, the limited discussion of Rule 1.7 in *Bluestone* is entirely consistent with the principle stated in *James*, i.e., Rule 1.7 applies where the lawyer is simultaneously representing two actual clients.

Petitioners also devote several pages to explaining the tension they see between private counsel's alleged profit-maximization interest under a contingent-fee arrangement and the Attorney General's alleged obligation to neutrally seek justice in WVCCPA cases. Petr Br. 19-24; *see id.* at 24 ("[Private counsel's] bias in favor of securing a financial windfall for themselves conflicts with the public interest."). All of this discussion is premised, however, on the

applicability of Rule 1.7. The tension that Petitioners labor for pages to identify is the conflict of interest that they believe is barred by Rule 1.7. *See* Petr Br. 19. But as they candidly acknowledge, their self-described “weighty questions” are irrelevant if Rule 1.7 does not apply to the circumstances in this case. *Id.* at 25 (noting that the circuit court “d[id] not address any of these weighty questions” because it found the rule “not applicable to the present circumstance at all”). As shown clearly above, it does not.

2. Under the Undisputed Facts, Rule 1.7 Has Not Been Violated.

Even if this Court concludes that Rule 1.7 does apply to this case, the circuit court’s finding of no violation was still correct given the undisputed findings of fact. Again, it is unchallenged that the Attorney General’s Office exercises complete and regular control over all aspects of this case, and it is undisputed that the fee arrangement is not a percentage contingency, but rather allows a “reasonable” and “proper” fee to be determined and approved by the court. These facts render moot Petitioners’ lengthy suppositions about the relationship between outside counsel and the Attorney General’s office and the financial interests that might influence outside counsel’s strategy.

Given these facts, there is no conflict under Rule 1.7(b), which provides that “[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. Prof. Conduct, Rule 1.7(b). To begin with, the financial motivations that Petitioners fear are not present. Private counsel’s fee is tied neither to the amount of settlement or judgment, nor even to whether they win or lose. The fee lies entirely within the discretion of the court. It is highly unlikely, therefore, that private counsel’s “own interests” will interfere in any way with their representation of the State of West Virginia.

Perhaps even more important, however, is the control and veto power exercised by the Attorney General’s Office over private counsel. That control ensures that even if private counsel

have some conflicting financial interests, they are not in a position to allow those interests to dictate how the cases are run. As the California Supreme Court has explained, “there is a critical distinction between an employment arrangement that fully delegates governmental authority to a private party possessing a personal interest in the case, and an arrangement specifying that private counsel remain subject to the supervision and control of government attorneys.” *County of Santa Clara v. Superior Court*, 50 Cal. 4th 35, 59, 235 P.3d 21, 36 (2010). That important distinction follows from the fact that “[p]rivate counsel serving in a subordinate role do not supplant a public entity’s government attorneys, who have no personal or pecuniary interest in a case and therefore remain free of a conflict of interest that might require disqualification.” *Id.*

There also has been no violation of Rule 1.7(b) because the Attorney General hired private counsel knowing full well the terms of the fee arrangement. Even where there is a potential conflict between a lawyer’s own interests and his representation of a client, Rule 1.7(b) does not outright prohibit a lawyer-client relationship. Rather, “a lawyer may represent a client even though there appears to be a conflict between the interests of the client and the lawyer him/herself if the lawyer reasonably believes that his/her representation will not be affected thereby and if the client, who has been informed of the conflict, agrees to continued representation.” *Artinez*, 208 W.Va. at 300, 540 S.E.2d at 168. By hiring outside counsel and agreeing to the fee arrangement, the Attorney General knowingly accepted whatever conflict the fee arrangement might have created.

C. **The Attorney General Did Not Exceed His Statutory Authority By Entering Into the Challenged Fee Arrangements.**

As noted earlier, Petitioners have wisely abandoned their broad claim that the Attorney General lacks *any* statutory authority to appoint Special Assistant Attorneys General,⁹ and now take the narrower (though still meritless) position that the Legislature has barred the Attorney General from hiring Special Assistants with payment contingent on the recovery in the lawsuits. Petitioners assert that two statutory provisions—Sections 5-3-3 and 5-3-5 of the West Virginia Code—limit the ways in which Special Assistant Attorneys General may be paid. They are wrong.

The Attorney General has ample statutory discretion to employ whatever fee arrangement for outside counsel that he deems best under the circumstances.¹⁰ As already discussed, he has statutory authority to “appoint such assistant attorneys general as may be necessary to properly perform the duties of his office.” W. Va. Code § 5-3-3. This provision has been interpreted as

⁹ The retention of outside counsel to represent the State has long received the imprimatur of the judiciary. See *Burton*, at 40 n.25, 569 S.E.2d at 116 n.25; *State of West Virginia ex rel. McGraw v. Minnesota Mining and Manufacturing Company*, 354 F. Supp. 2d 660, 666 n. 6 (S.D. W. Va. 2005); *State ex rel. McGraw v. Johnson & Johnson*, No. 04-C-156 (W. Va. Cir. Ct. Brooke Cty., March 15, 2006), petition denied, No. 062154 (W. Va. Jan. 10, 2007) (filed at App. 256-70, 372); *State of West Virginia v. Steptoe & Johnson, PLLC*, No. 02-C-47M (W. Va. Cir. Ct. Marshall Cty., April 3, 2003) (App. 352-70); *State ex rel. McGraw v. Bear Stearns & Co.*, No. 03-C-133M (W. Va. Cir. Ct. Marshall Cty., May 6, 2004) (App. 278-83); *State ex rel. McGraw v. Capital One Bank*, Nos. 05-C-71 and 05-C-72 (W. Va. Cir. Ct. Lincoln Cty., Sept. 22, 2005) (App. 292-99); *State ex rel. McGraw v. Visa U.S.A., Inc.*, No. 03-C551 (W. Va. Cir. Ct. Ohio Cty., Dec. 29, 2008) (App. 242-52). Indeed, this Court has repeatedly denied writs attempting to challenge the Attorney General’s retention of outside counsel. See App. 301, 372.

¹⁰ The State therefore need not address Petitioners’ sweeping and unsupported assertion that the powers of the West Virginia Attorney General are “only those provided by statute.” Petr. Br. 26. It suffices to say that no case stands for that proposition. To the contrary, this Court has clearly held that the West Virginia constitution vests the Attorney General with “certain core functions ... of which the Office of Attorney General may not be deprived” and has squarely repudiated any suggestion that “the legislature possesses unfettered discretion to define, delineate, and limit the duties of the Attorney General.” *Burton*, 212 W. Va. at 31, 569 S.E.2d at 107.

“giv[ing] the Attorney General unfettered control over the hiring and firing of assistant attorneys general.” *Williams v. Brown*, 190 W. Va. 202, 205, 437 S.E.2d 775, 778 (1993). In the specific context of WVCCPA cases on behalf of the State, he has the additional authority to “[d]elegate his powers and duties ... 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(1)(f). Like the rest of the WVCCPA, this provision “is to be construed broadly.” *Barr v. NCB Mgmt. Servs.*, 227 W. Va. 507, 514, 711 S.E.2d 577, 584 (2011) (quote & cit. om.); *see also* W.Va. Code § 46A-6-101(1) (“this article shall be liberally construed so that its beneficial purposes may be served”). The Special Assistant Attorneys General in this case are “qualified personnel in [the Attorney General’s] office” within the meaning of W. Va. Code § 46A-7-102(1)(f) because they act for and at the direction of the Attorney General.

Petitioners argue that the remainder of Section 5-3-3—which 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”—imposes a statutory cap that makes the challenged fee arrangement unlawful. Petitioners, however, read the statute far too narrowly and fail to acknowledge a decision of this Court that interprets that precise language. In *Hechler v. Casey*, this Court explained that the statutory cap in Section 5-3-3 applies only to compensation paid by the Attorney General from the State treasury. 175 W. Va. 434, 451, 333 S.E.2d 799, 816 (1985) (“Under W. Va. Code, 5-3-3 [1961], assistant attorneys general may receive compensation *from the State treasury* for services performed for the State only ‘within the limits of the amounts appropriated by the legislature for personal services.’” (emphasis added)). Assistant Attorneys General are “not expressly prohibited ... from supplementing their salaries

from sources other than the State treasury.” *Id.* In this case, the compensation would be ordered by the court and paid by Petitioners.

Petitioners also fail to recognize that the Attorney General has separate statutory authority under W. Va. Code § 46A-7-102(1)(f) to appoint Special Assistant Attorneys General for WVCCPA cases. Nothing in that Subsection suggests that attorneys hired pursuant to that provision for WVCCPA cases are subject to the restrictions of Section 5-3-3. Nor is there language imposing any limitation on the source or amount of compensation for attorneys hired specifically for WVCCPA work.

As a final fallback, Petitioners argue that attorneys’ fees cannot be paid directly to private lawyers because Section 5-3-5 requires that any attorneys’ fees collected by the Attorney General “shall be paid into the state treasury and placed to the credit of the state fund.” Again, Petitioners vastly overread the statutory provision. On its face, Section 5-3-5 applies only to a certain group of cases, which does not include WVCCPA cases. In full, the provision states:

On the final determination of any cause in any of the courts mentioned in the second section of this article, in which the attorney general appeared for the state, the clerk thereof shall certify to the auditor the fee of the attorney general which was taxed in the bill of costs against the defendant, and when such fee shall be collected it shall be paid into the state treasury and placed to the credit of the state fund.

W. Va. Code § 5-3-5 (emphasis added). The italicized text refers to Section 5-3-2, which, among other things, provides the Attorney General statutory authority to “appear as counsel for the state in all causes pending in the supreme court of appeals, or in any federal court, in which the state is interested.” *Id.* § 5-3-2. Section 5-3-2 is *not* the provision that authorizes the Attorney General to represent the State in WVCCPA cases, and therefore Section 5-3-5 does not apply to fees collected by the Attorney General in WVCCPA cases.

What is more, the fee awarded to private counsel pursuant to counsel's contract with the Attorney General does not constitute a "fee[] of the Attorney General." It is simply a part of the judgment, subject to the terms of the Attorney General's contract with private counsel. As the Maryland Supreme Court held in the tobacco litigation, "the gross recovery ... is not 'State' or 'public' money subject to legislative appropriation until the State has fulfilled its obligation under the Contract, collected the recovery, net of the contingency fee and litigation expenses, and deposited the [remaining] funds into the State Treasury." *Philip Morris Inc. v. Glendening*, 349 Md. 660, 682, 709 A.2d 1230, 1241 (1998).

If the West Virginia Legislature wanted to restrict the fee arrangements under which outside counsel can be hired, it could do so far more clearly.¹¹ In Mississippi, for example, a statute specifically authorizes the Attorney General "to appoint and employ outside counsel, on a fee or salary basis not to exceed recognized bar rates for similar services, to assist the Attorney General in the preparation for, prosecution, or defense of any litigation in the state or federal courts or before any federal commission or agency in which the state is a party or has an interest." Miss. Code Ann. § 7-5-7(2)(a). If the compensation is on a contingent-fee basis, the "contract must conform with the requirements of Section 7-5-8." *Id.* § 7-5-7(2)(b). Furthermore, "[t]he compensation of appointees and employees ... shall be paid out of the Attorney General's contingent fund, or out of any other funds appropriated to the Attorney General's office." *Id.* § 7-5-7(5). No such express limitations exist under West Virginia law.

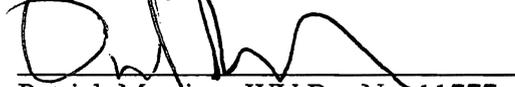
CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny the Petition for Writ of Prohibition. Petitioners clearly lack standing to seek disqualification of opposing

¹¹ The State does not concede that such legislation would be constitutional. *See Burton*, 212 W. Va. at 31, 569 S.E.2d at 107.

counsel, and there is in any event no merit to their arguments for disqualification. The circuit court correctly denied standing and, independently, correctly denied Petitioners' motion on the merits.

Respectfully submitted,



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THE STATE OF WEST VIRGINIA

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, DES SERVICES, L.L.C.,
and AMERICAN BANKERS
MANAGEMENT COMPANY, INC.,

Case No. 11-C-086-N

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

Case No. 11-C-087-N

CITIGROUP INC. and CITIBANK, N.A.,

Case No. 11-C-089-N

GE MONEY BANK,

Case No. 11-C-091-N

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

Case No. 11-C-092-N

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

Case No. 11-C-093-N

JPMORGAN CHASE & CO. and CHASE
BANK USA, NA.,

Case No. 11-C-094-N

Petitioners,

v.

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

Respondent.

CERTIFICATE OF SERVICE

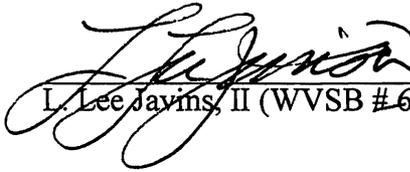
I, L. Lee Javins, II, hereby certify that service of the foregoing *Response of State of West Virginia in Opposition to Petition for Writ of Prohibition* has been made via U.S. Mail on this 7th

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