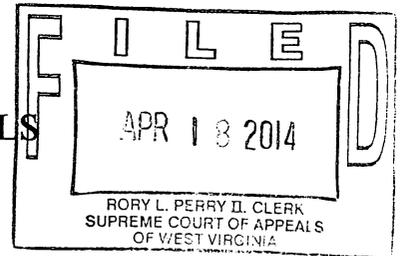


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BEFORE THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA



OFFICE OF LAWYER DISCIPLINARY COUNSEL,
Petitioner,

v.

Supreme Ct. No. 14-0348

MARK S. PLANTS, a member
of the West Virginia State Bar,
Respondent

RESPONSE TO PETITION SEEKING IMMEDIATE SUSPENSION OF
RESPONDENT AND/OR DISQUALIFICATION OF RESPONDENT AND THE
KANAWHA COUNTY PROSECUTING ATTORNEY'S OFFICE FROM
INSTITUTING AND PROSECUTING ALLEGATIONS OF DOMESTIC
VIOLENCE INVOLVING A PARENT OR GUARDIAN AND MINOR CHILD
PURSUANT TO RULE 3.27 OF THE RULES OF LAWYER DISCIPLINARY
PROCEDURE

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NOW COMES the Respondent, Mark S. Plants, Prosecuting Attorney of Kanawha
County (hereinafter "Respondent"), by his counsel, Robert H. Davis, Jr., Esq. and makes this
response to the Petition of the Office of Disciplinary Counsel (hereinafter "ODC").¹ Your

¹ Respondent was served at the close of business Friday, April 11, 2014, with the Petition. Counsel for the Respondent in the related criminal defense, James Cagle, Esq., was out of town for the week and unavailable over the weekend to draft any response, this same response being necessary due to the request of the ODC to "immediately" suspend Respondent's license or to disqualify Respondent and his Assistant Prosecuting Attorney's from prosecuting certain cases.

Respondent Responds that this proceeding, viewed calmly and objectively, clearly overreaches the goals and intent of Rule 3.27, W.V.R.L.D.E., alleges potential, unproven, criminal conduct, thus is premature, alleges conduct that does not constitute criminal conduct, much less “extreme misconduct” criminal or otherwise², invites Court action when normal and less disruptive alternatives are clearly available and have been utilized and that, as a consequence, Respondent has not committed a violation of the West Virginia Rules of Professional Conduct and there is no threat of harm, much less irreparable harm to the public pending the disposition of the criminal charges, thus no reason exists for action by this Court at this time.

In further support of this Response, Respondent states as follows:

1. Admitted. In further answer, the decisions of the voters of Kanawha County to elect and retain Respondent Plants as its prosecuting attorney ought to be given proper respect and weight as the Honorable Court weighs the Emergency Petition of the ODC.
2. Admitted that a criminal complaint (hereinafter “Complaint”) was filed in Kanawha County Magistrate Court, Case number 14M-2174, charging Domestic Battery. Exhibit A is a correct copy of that document. In further answer, the completeness and accuracy of the quotes and the context in which they are portrayed in the Complaint is here contested and it is noted that such is a mere allegation, not a conviction of any criminal act.
3. Admitted that the Criminal Complaint contains allegations of fact and violation of law which are denied by Respondent in this proceeding and in the criminal matter. The allegations in this paragraph and subsequent paragraphs of the Emergency Petition describe an admitted act of corporal punishment wherein the evidence will be that the

² This Rule is clearly to be used exclusively in only the most extreme cases of lawyer misconduct. ODC v. Battistelli, 193 W.Va. 629, 457 S.E.2d 652, 1994 W.Va. LEXIS 77 (1995)

Respondent spanked his child after he admitted to Respondent that he had punched and embarrassed his much smaller and younger step brother in front of neighborhood children. Respondent admits he spanked the offending son with a belt. Respondent then escorted the offending son to the step-brother and made him apologize for his actions. At that time, the Respondent's son's face was red but he was not crying. After the apology, the Respondent asked the step-son if the punishment given was fair. Respondent advised the investigating officer that the entire incident of the spanking and apology required, in total, no more than 20 seconds. Respondent explained to his son that he would not allow him to be a bully and asked how he would feel if, in school, another, larger child punched him in the back as he had done. Respondent's son is nearly fifty pounds heavier and a foot taller than the step-son. After about five minutes, Respondent returned to his son's room, told him he loved him but "as your Dad, I can't let you hit people." This discipline process is the same Respondent's Father used to discipline Respondent and is also the method of discipline agreed upon with Respondent's former spouse, who also spansks their children with a belt. Respondent further asserts that after the discipline, the Respondent and the child spent the rest of the afternoon together. Both children then spent approximately four hours with their mother the night of the incident at the "Duck Dynasty" event in Charleston. The child in question never complained or mentioned the spanking. When returning home, the child laid down and told the Respondent about the "Duck Dynasty" event. Again, no complaints were voiced and no mention made of the spanking

4. Admitted that the Complaint makes allegations as stated, some of which, particularly that

characterization of the result of the discipline as a “significant injury”, are denied in the related criminal proceeding. Denied further that the allegations are factually complete, or fair or accurate in the context stated, as explained by paragraph 3, above. Further answered that the allegations do not state a criminal act, as defined in current West Virginia law.

5. Admitted that the Complaint also makes the statements alleged in paragraph 5 of the Emergency Petition. Denied that the allegations undercut the position of Respondent here and in his defense of the criminal charges that his actions were those of parental discipline of a child not amounting to criminal conduct.
6. Admitted that the Complaint makes the statements alleged in paragraph 6 of the Emergency Petition. Denied specifically that the hearsay statement of the disciplined child’s recollection that he was struck “more than ten times with a belt” is true and accurate or that such allegation or all allegations related in paragraph 6 constitute statements of a criminal act under West Virginia law.
7. Admitted that paragraph 7 of the Emergency Petition records the actions and statements of Sgt. Adams found in the Criminal Complaint. It is denied that there was an injury or serious injury or there was any inappropriate result of proper parental discipline. In further answer it is stated that according to the report by Child Protective Services, the bruise was seen by the child’s brother only four days after the discipline incident while changing clothes in his presence and but for that incident the child would not have known of his bruise. The investigating officer has expressed the belief that the bruise was ***“not intentional”***, and that the Respondent ***“did not intend to harm (his child)”***. The

investigating officer has made this statement to other people, including Paul Saluja, Esq., Respondent's counsel in the civil protective order proceeding.

8. Admitted that the contents of the Complaint, as related in paragraph 8 of the Emergency Petition, were allegedly made to the investigating officer, Sgt. Adams, but, in further answer, are misleading as related as the statement falsely suggests Respondent changed his story about the incident of proper parental discipline of his child.
9. Admitted. In further answer, issuance of a warrant was inappropriate under law, as demonstrated by Exhibit E Respondent's Motion to Dismiss filed by his criminal counsel, James Cagle, Esq., in the criminal proceeding and by the Memorandum in Support of Motion to Dismiss, Exhibit F to the Emergency Petition.
10. Admitted. In further answer, the small amount of bail and release on recognizance, as recorded in Exhibit D indicate the relative lack of seriousness of the charges.
11. Assumed the ODC is aware of its dockets, thus admitted. It is denied that the docketing should have resulted in the filing of the present ill-advised Emergency Petition for the reasons stated in this response.
12. Admitted. In further answer, such Motion and supporting Memorandum serve to underline that there is substantial doubt that the criminal complaint against Respondent has stated any crime against Respondent, much less a serious crime justifying court review of the possible ethics charges at this early date.
13. Admitted. In further answer, if the staff of the ODC do not agree with the clearly-supported allegations of law or the method of discipline used by Respondent, their proper resort is to their legislators, not this Honorable Court.

14. Admitted that Rule 1.7 is correctly quoted. In further answer Rule 1.7(b) of the West Virginia Rules of Professional Conduct provides in pertinent part: “A lawyer shall not represent a client if the representation of that client may be materially limited by...the lawyer’s own interests...” It is denied that the “personal conflict” provision of Rule 1.7(b) is applicable here as the asserted “personal conflict” can be, and has been, easily avoided by Respondent’s voluntary direction to his staff that he and they have advised and will continue to advise the Circuit Court in any domestic violence case of the existence of this proceeding. Further, as a matter of respect for the public, Respondent has instructed his staff that, pending disposition of the criminal charge and this disciplinary charge against him, they shall take steps to recuse in cases of domestic violence which involve corporal punishment of a minor child.
15. Admitted. In further answer, Respondent wishes to continue, as he has successfully done in the past, to perform the duties of his office as the citizens of Kanawha County have elected him to perform them. In that regard, he further answers and states that the request of the ODC to suspend his license in this proceeding is a grossly-overreaching demand in disregard for the authority of the citizens of Kanawha county to entrust him with such duties. In further answer and as an illustration of availability of other possibilities for addressing the concerns of the ODC, as a result of a developing dispute with the Charleston Police, the City of Charleston and its Police Department have filed a Petition for writ of Prohibition in the Circuit Court of Kanawha County seeking Petitioner’s disqualification from all cases of domestic violence involving the Police Department which will come on for hearing on Tuesday April 22nd before Judge Bloom.

16. Denied that such is a true statement at present. In fact, while Respondent will not disqualify himself and his office from all cases alleging domestic violence, he has notified the Kanawha Circuit Courts of this proceeding as noted above, and has directed his staff to recuse/disqualify and seek special counsel in the handful of domestic violence cases which will arise involving facts or issues of corporal punishment of minor children by parents or guardians pending outcome of his criminal case. In addition, pending disposition of this specific matter, he and his staff will disqualify from the broader set of all cases involving domestic violence toward children . This move was made to assure that the public will have absolute confidence in the discretion and diligence of prosecution of such cases and out of Respondent's respect for the ODC filing and the right of the public to respect, and to have confidence in, those wielding the powers of prosecution in Kanawha County.
17. Denied. In further answer, the ODC's possession of the Motion for Dismissal and supporting Memorandum which are Exhibits E and F to its Emergency Petition should have indicated that there is substantial doubt as to the existence of any criminal conduct on the part of Respondent. In further answer, both the prosecution of the criminal charges based upon the focal incident of parental discipline and the ODC's overreaction and unreasonably-broad requests for action by this Court are seen as inappropriate when practical actions taken by Respondent presently address adequately all of the alleged ethical and public concerns stated in the Emergency Petition for Suspension.
18. Denied as an overdrawn and illogical statement based upon an alleged conflict which, for all practical purposes, no longer exists as to Respondent's present or anticipated

connection with any cases the fact patterns of which are even somewhat similar to those in which he is presently, improperly, forced to defend. Denied that conflict exists as ODC assumes that the Respondent's position in his own case is adverse to his representation of the State of West Virginia, when, in fact, Respondent must respect, and does respect, the same law as he has sought to have applied to his own case, which law he, in fact, does apply to all such similar cases. Denied further that the allegations of the Emergency Petition justify the requested broad limitation of the alleged "representation of the State of West Virginia", when cases factually similar to the criminal Complaint against Respondent constitute a small proportion of all the types of criminal and civil matters in which Respondent must be involved as Prosecuting Attorney. Answering further, this Honorable Court's acceptance of such a broad prohibition would unwisely result in severe administrative problems and involve it in issues of a family dispute and local law and politics which are well outside the goals and justifications for emergency petitions under W.V.R.L.D.E. 3.27 and are best left to the civil law and the citizens, police force and officials of Kanawha County.

19. Admitted that the authority cited in paragraph 19 of the Emergency Petition exists, denied that it is applicable to this factually and legally different situation and, specifically, that it is relevant given the fact that the practical actions of Respondent, made before any person or agency, other than the ODC asked that such be done, avoid any reasonably based erosion of public confidence in the justice system and any situation of conflict, in fact.
20. Admitted that the primary purpose of the ODC is as stated in paragraph 20 of the Emergency Petition. In further answer, it is denied that such purpose is advanced by its

present action, given the present legal, political and factual situation that exists, and denied that the emergency proceeding will further protect the public or assure the public of the integrity of the reliability and integrity of attorneys.

21. Admitted that Rule 3.27 and its purposes are correctly alleged in paragraph 21 of the Emergency Petition. Further answering it is denied that Rule 3.27 has any applicability as alleged, given the present facts and law applicable to Respondent and his criminal case and that the existence of such charges will now have no impact upon the infrequent domestic violence cases relating to injury to children by corporal punishment in Kanawha County.
22. Admitted that Rule 3.27 is properly used only in “the most extreme cases of lawyer misconduct” and in further answer, for the reasons given here its use as prayed in the Emergency Petition would not only be improper under ODC v. Battistelli, but an unwise abuse of such authority by the ODC.
23. Denied as a false dilemma as stated. In further answer and explanation, while we deny any present conflict exists, we answer that any appearance of such has been negated by the practical and efficient action of Respondent Plants to recuse/disqualify himself and his office from current and future involvement in domestic violence cases factually similar to the one in which he is personally involved until such case is resolved.
24. Denied as lacking logic for the reasons stated in paragraph 23, above. In further answer, the description of “irreparable harm to the public” as alleged is speculative and unrealistic, particularly when viewed in light of the practical resolution to the stated concerns of the ODC already in place due to the positive actions of Respondent as

described in this Response.

25. Denied as an unjustified, excessive and illogical demand for unnecessary discipline upon mere charges, as yet unproven. While Respondent readily admits that he and all other public officials are held to high standards of conduct, he denies that his present situation, being charged with a questionable and, in any event, unproven and relatively minor criminal offense, amounts to the degree of criminal conduct and betrayal of public trust stated in Committee on Legal Ethics v. Roark.
26. Denied that the statement of law and public policy, while true in itself, is applicable to the instant proceeding, as explained in this response.
27. Denied. There is no “evidence” of a violation, merely allegations of a crime the existence of which is, viewed objectively in light of applicable law, questionable and in further answer it is specifically denied there is any reasonable threat of public harm, much less “substantial threat” as required in Rule 3.27 proceedings, as illuminated by applicable case decision. In further answer, for the reasons and upon the facts and law cited here, neither complete suspension of the license of Respondent Plants or even a limitation upon his practice as a Prosecuting Attorney is justified, necessary, or wise in this inappropriately-brought emergency proceeding.

WHEREFORE, Respondent Mark S. Plants, Esq., elected Prosecuting Attorney of Kanawha County, West Virginia urges immediate rejection of the Emergency Petition filed against him by this Honorable Court and rejection of the unnecessary and unsupported demands

for his suspension or a material limitation upon the types of cases he and his staff are charged to handle as Prosecuting Attorneys, including disqualification from investigation, instituting or prosecuting all civil and criminal cases involving a parent or guardian and a minor child.

This the 16th of April, 2014

Respectfully Submitted,



Robert H. Davis, Jr., Esq.
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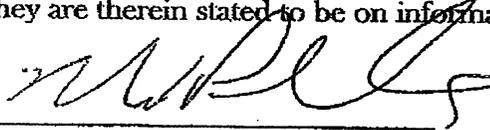
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VERIFICATION

STATE OF SOUTH CAROLINA
COUNTY OF HORRY , to-wit:

I, Mark S. Plants, Esq. a member of the West Virginia State Bar, named in the foregoing action, being first duly sworn, depose and say that the facts and allegations contained in the foregoing Respond to Petition Seeking Immediate Suspension of Respondent are true and correct, except insofar as they are therein stated to be on information and belief, and that insofar as they are therein stated to be on information and belief, I believe them to be true.

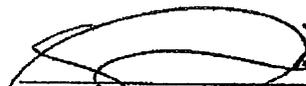


Mark S. Plants, Esq., Respondent

Taken, subscribed and sworn to before the undersigned authority this the 10th day of April, 2014.

My commission Expires:

8/22/23

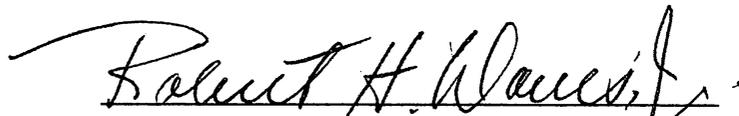

NOTARY PUBLIC

CERTIFICATE OF SERVICE

This is to certify that I, Robert H. Davis, Jr., Esq, counsel for Respondent Mark S. Plants, Esq., have this date served a true copy of the foregoing Response to Petition Seeking Immediate Suspension of Respondent and/or Disqualification of Respondent and the Kanawha County Prosecuting Attorney's Office from Instituting and Prosecuting Allegations of Domestic Violence Involving a Parent or Guardian and Minor Child Pursuant to Rule 3.27 of the Rules of Lawyer Disciplinary Procedure upon the Office of Disciplinary Counsel by mailing the same, United States Priority Mail, and properly addressed to the following address:

Joanne M. Vella Kirby, Esq., Disciplinary Counsel
Office of Lawyer Disciplinary Counsel
City Center East, Suite 1200 C
4700 MacCorkle Avenue, S.E.
Charleston, WV 25304

This the 17th of April, 2014


Robert H. Davis, Jr.
Counsel for Respondent Mark S. Plants/Esq., P..A.