FILED
JAN 25 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BEFORE THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL. MICHAEL T. CLIFFORD,

Petitioner,

v. **No. 12-1324**

WEST VIRGINIA OFFICE OF DISCIPLINARY COUNSEL, and WEST VIRGINIA LAWYER DISCIPLINARY BOARD,

Respondents.

RESPONDENT'S RESPONSE TO PETITION FOR A *WRIT* OF PROHIBITION

Jessica H. Donahue Rhodes [Bar No. 9453]
Lawyer Disciplinary Counsel
Office of Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304
(304) 558-7999
(304) 558-4015 – facsimile

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. QUESTION PRESENTED 1

III. SUMMARY OF ARGUMENT 1

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION 2

V. ARGUMENT 2

A. This Honorable Court has exclusive authority to define, regulate and control the practice of law in West Virginia. 2

B. The ruling of a Circuit Court regarding a Motion for Disqualification of an attorney is not dispositive as to violations of the Rules of Professional Conduct. 5

C. Respondents duties under the Rules of Lawyer Disciplinary Procedure in regards to criminal convictions and reciprocal disciplinary actions still require issues to be presented to this Honorable Court. 8

D. Collateral estoppel and res judicata do not apply to a Circuit Court's decision on a disqualification motion to prevent Respondents from proceeding with a disciplinary case against Petitioner. 9

VI. CONCLUSION 11

TABLE OF AUTHORITIES

Cases:

Accord, Stitz v. Bethlehem Steel Corp.,
650 F.Supp. 914, 916 (D.Md. 1987) 6

Allen v. McCurry
449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308, 313 (1980) 9

Carey v. Dostert
170 W.Va. 334, 294 S.E.2d 137 (1982) 5

Committee on Legal Ethics v. Blair
174 W.Va. 494, 327 S.E.2d 671 (1984) 1

Committee on Legal Ethics v. Frame
189 W.Va. 641, 433 S.E.2d 579 (1993) 7, 9

Committee on Legal Ethics v. Karl
192 W.Va. 23, 449 S.E.2d 277 (1994) 1

Committee on Legal Ethics v. McCorkle
192 W.Va. 286, 288, 452 S.E.2d 377, 379 (1994) 2

Conley v. Spillers
171 W.Va. 584, 301 S.E.2d 216 (1983) 9, 10

F.S. & P. Coal Co. v. Intermountain Coals, Inc.
179 W.Va. 190, 366 S.E.2d 638 (1988) 6

Garlow v. Zakaib
186 W.Va. 457, 413 S.E.2d 112 (1991) 1, 5, 6

In re Disciplinary Action Against Albrecht
660 N.W.2d 790, 794 (Minn. 2003) 10

In re Disciplinary Action Against W. Shaughnessy
467 N.W.2d 620, 621-22 (Minn. 1991) 10

In re Estate of McIntosh
144 W.Va. 583, 109 S.E.2d 153 (1959) 9

In re: Panel Case No. 17289
669 N.W.2d 898 (2003) 10

In re: Weiss
460 Mass. 1012, 954 N.E.2d 19 (2011) 9

Lane v. Williams
150 W.Va. 96, 100, 144 S.E.2d 234, 236 (1965) 9

Lawyer Disciplinary Board v. Allen
198 W.Va. 8, 479 S.E.2d 317 (1996) 4

Lawyer Disciplinary Board v. Kupec (Kupec I)
202 W.Va. 556, 505 S.E.2d 619 (1998)
remanded with directions 2

Lawyer Disciplinary Board v. Taylor
192 W.Va. 139, 451 S.E.2d 440 (1994) 11

Shields v. Romine
122 W.Va. 639, 13 S.E.2d 16 (1940) 6

State Bar v. Earley
144 W.Va. 504, 109 S.E.2d 420 (1959) 5

State ex rel. Askin v. Dostert
170 W.Va. 562, 295 S.E.2d 271 (1982); 4, 5, 8

State v. Miller
194 W.Va. 3, 459 S.E.2d 114 (1995) 9

West Virginia Statutes and Rules:

R. of Appellate Proc. Rule 16(g) 1

R. of Civil Proc. Rule 11 10

R. Law Disc. Proc.	Rule 1	1
R. Law Disc. Proc.	Rule 2.9(c)	3
R. Law Disc. Proc.	Rule 3.18	8
R. Law Disc. Proc.	Rule 3.20	8
R. Law Disc. Proc.	Rule 4.4	2
R. Professional Conduct	Rule 1.9(a)	3, 4
R. Professional Conduct	Rule 1.11(a)	3, 4
W. Va. Code	§ 51-1-4a	5

I. INTRODUCTION

At the request of this Honorable Court, I, Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, pursuant to Rule 16(g) of the Rules of Appellate Procedure hereby submits this response to Petitioner's Petition for a *Writ* of Prohibition on behalf of the West Virginia Office of Lawyer Disciplinary Counsel and the West Virginia Lawyer Disciplinary Board, Respondents herein.

II. QUESTION PRESENTED

Are Respondents without jurisdiction to prosecute an alleged conflict of interest ethics charge against Petitioner when a Circuit Court Judge, who earlier was asked to address this same alleged conflict of interest, pursuant to this Court's holding in Syllabus Point 1 of Garlow v. Zakaib, 186 W.Va. 457, 413 S.E.2d 112 (1991), entered an Order that has never been appealed or challenged concluding Petitioner had no conflict of interest to be disqualified under the same facts forming the basis for the present ethics charge?

III. SUMMARY OF ARGUMENT

Respondents have proper jurisdiction to investigate and prosecute violations of the West Virginia Rules of Professional Conduct. [Rule 1 of the Rules of Lawyer Disciplinary Procedure]. The Supreme Court of Appeals is the final arbiter of formal legal ethic charges and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law. Syl. Pt. 3, Committee on Legal Ethics v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984); Syl. Pt. 7, Committee on Legal Ethics v. Karl, 192 W.Va. 23, 449 S.E.2d 277 (1994).

Because Petitioner was engaged in the practice of law in West Virginia and this Court has the exclusive authority to define, regulate and control the practice of law in West Virginia, Respondents have proper jurisdiction and authority to investigate and prosecute Petitioner for alleged violations of the Rules of Professional Conduct. "In the exercise of this authority to regulate and control the practice of law, we have delegated to the [Board] certain administrative, investigative, and adjudicatory functions." Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 505 S.E.2d 619 (1998) quoting Committee on Legal Ethics v. McCorkle, 192 W.Va. 286, 288, 452 S.E.2d 377, 379 (1994). Further, the Office of Disciplinary Counsel was established by this Court to prosecute violations of the Rules of Professional Conduct. [Rule 4.4 of the West Virginia Rules of Lawyer Disciplinary Procedure]. Nothing done in the investigation and prosecution of Petitioner has been in violation of the authority provided by this Court.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents do not object to oral argument in this matter. However, Respondents believe that this Court can properly issue a Decision and Order pursuant to the written arguments submitted by the parties.

V. ARGUMENT

A. This Honorable Court has exclusive authority to define, regulate and control the practice of law in West Virginia.

Petitioner is a member of the West Virginia State Bar and is therefore subject to the Rules of Professional Conduct and Rules of Lawyer Disciplinary Procedure. On or about

November 13, 2012, a Statement of Charges was issued against Petitioner for violations of Rule 1.9(a) and Rule 1.11(a) of the West Virginia Rules of Professional Conduct.[1] [Appendix 1-9]. It is undisputed that Petitioner formerly represented the State of West Virginia as prosecuting attorney for Kanawha County, West Virginia, from January 1, 2001, until December 31, 2004. During Petitioner's tenure as prosecutor in 2003, three (3) individuals were killed by an alleged sniper in 2003 in Kanawha County, West Virginia. Respondent was briefed on the investigation into the sniper shootings, which also included the announcement of an award for any information leading to the arrest and conviction of the individual involved in the sniper shooting. The sniper shootings remained unsolved when Petitioner left the prosecutor's office on December 31, 2004.

On or about March 29, 2011, several police agencies obtained a search warrant to search the property of Sandra Shaffer in Kanawha County, West Virginia, for any possible evidence relating to the sniper shooting. It has been alleged that the property was destroyed during the execution of the search warrant. On or about April 13, 2011, Petitioner sent a Notice of Claim letter to the City of Charleston and Kanawha County officials on behalf of Ms. Shaffer. On or about June 3, 2011, Petitioner filed a Complaint in the Circuit Court of Kanawha County, West Virginia, on behalf of Ms. Shaffer against the City of Charleston, the

---

[1] The Statement of Charges filed in this matter was the result of Petitioner's objection to the admonishment issued by the Investigative Panel of the Lawyer Disciplinary Board on or about July 3, 2012. Rule 2.9(c) of the Rules of Lawyer Disciplinary Procedure specifically states "[i]f . . . the respondent files a timely objection to the written admonishment, the Investigative Panel shall file a formal charge with the Clerk of the Supreme Court of Appeals. Petitioner filed his objection on or about July 16, 2012. [Appendix 38-45].

Kanawha County Commission, James Hunt, David H. Armstrong, and John Doe in case number 11-C-914. [Appendix 48-54]. The complaint addressed the destruction of Ms. Shaffer's property that occurred during the execution of the search warrant. On or about July 6, 2011, the Kanawha County Commission, John Doe Members of the Kanawha County Sheriff's Department, and David H. Armstrong filed a Motion to Disqualify Petitioner from representing Ms. Shaffer. [Appendix 55-71]. The Motion was based upon Petitioner's position as prosecuting attorney at the time of the sniper shootings and his involvement in the investigation of the sniper shooting during his time as prosecutor. The Motion referred to both Rule 1.9 and Rule 1.11 of the West Virginia Rules of Professional Conduct. On or about July 29, 2011, the City of Charleston and James Hunt also filed a Motion to Disqualify Petitioner based upon the same reasoning. [Appendix 72-78]. On or about September 12, 2011, the Circuit Judge in the matter entered an Order denying all of the Motions to Disqualify, finding that the Defendants in the matter had not proven the substantial relationship test "to show a nexus between the sniper case (which in criminal in nature) and the civil suit filed by Mrs. Shaffer, so as to render [Petitioner] disqualified." [Appendix 101-102].

Petitioner was obviously practicing law in the State of West Virginia and licensed to practice law during his time as prosecutor and when he was representing Ms. Shaffer. This Honorable Court has the exclusive authority to define, regulate and control the practice of law in West Virginia. *See* Lawyer Disciplinary Board v. Allen, 198 W.Va. 8, 479 S.E.2d 317 (1996); Syl. pt. 1, State ex rel. Askin v. Dostert, 170 W.Va. 562, 295 S.E.2d 271 (1982);

State Bar v. Earley, 144 W.Va. 504, 109 S.E.2d 420 (1959); W. Va. Code § 51-1-4a. There is no argument from Petitioner that he was not practicing law nor that he is not subject to the jurisdiction of this Court.

In a case involving the disqualification of attorneys before the Circuit Court that was ruled on by this Honorable Court, this Court stated that:

> "In Carey v. Dostert, 170 W.Va. 334, 294 S.E.2d 137 (1982), we held that a circuit court judge has neither statutory nor common-law authority to suspend or annul a lawyer's license to practice law. In Carey, we relied upon syllabus point 1 of State ex rel. Askin v. Dostert, 170 W.Va. 562, 295 S.E.2d 271 (1982), which states: 'The exclusive authority to define, regulate and control the practice of law in West Virginia is vested in the Supreme Court of Appeals.'"

Garlow v. Zakaib, 186 W.Va. 457, 413 S.E.2d 112 (1991). This Court may allow the Circuit Courts to control the cases before those courts, but this Court has maintained jurisdiction on disciplinary matters. The Petitioner's practice of law in West Virginia falls under the jurisdiction of this Court to handle disciplinary matters.

B. The ruling of a Circuit Court regarding a Motion for Disqualification of an attorney is not depositive as to violations of the Rules of Professional Conduct.

A Circuit Court has the authority to make a decision regarding a motion to disqualify. Garlow v. Zakaib, 186 W.Va. 457, 413 S.E.2d 112 (1991). The Garlow case came to this Court after the Circuit Court disqualified the attorneys and the attorneys filed a writ of prohibition to this Court. This Honorable Court dealt with the question as to "whether a circuit court judge has the authority to disqualify a lawyer from a case because that lawyer's

representation may be in violation of the Rules of Professional Conduct." Id. at 115, 460. This Honorable Court held

> "that a circuit court, upon motion of a party, by its inherent power to do what is reasonably necessary for the administration of justice, may disqualify a lawyer from a case because the lawyer's representation in the case presents a conflict of interest where the conflict is such as clearly to call in question the fair or efficient administration of justice. Such motion should be viewed with extreme caution because of the interference with the lawyer-client relationship."

Id. at 116-117, 461-462. This Court in Garlow ultimately found that the record was not sufficient to determine if the disqualification was proper and denied the writ of prohibition without prejudice to allow the parties to go back to circuit court to develop a record.

While the Garlow case certainly indicates that a Circuit Court has the authority to make a ruling on a motion to disqualify, it also states:

> "it is this Court, and not the trial court, that has the authority to define, regulate, and control the practice of law, the trial court 'has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction.' Syl. pt. 3, in part, Shields v. Romine, 122 W.Va. 639, 13 S.E.2d 16 (1940) (internal citation omitted). Accord, syl. pt. 2, F.S. & P. Coal Co. v. Intermountain Coals, Inc., 179 W.Va. 190, 366 S.E.2d 638 (1988)."

Id. at 117, 461. The Circuit Court in Petitioner's underlying case had its reasons to deny the motion for disqualification within its jurisdiction and Respondents have not asserted that the Circuit Court overstepped its boundaries in making that determination. However, the jurisdiction of attorney disciplinary matters remains with this Honorable Court and Respondents and such was stated in Garlow.

Further, in the case of Committee on Legal Ethics v. Frame, 189 W.Va. 641, 433 S.E.2d 579 (1993), an oral motion to disqualify a law firm based upon a conflict of interest was denied by the lower court and the matter proceeded to trial where ultimately a settlement was reached within policy limits. The conflict of interest in that case involved the attorney's representation of a client in a divorce after his law firm had already began representation of a plaintiff in a case against the same client. After the conclusion of the case, and after the lower court denied the disqualification motion, an ethics complaint was filed with Bar Counsel of the West Virginia State Bar.[2] A disciplinary hearing was held in that matter and the attorney was publicly reprimanded for his conflicting involvement in the two (2) cases, even though there did not appear to be any injury that resulted from the attorney's misconduct. This case is exactly on point that a lower court's ruling to not disqualify an attorney does not prevent this Honorable Court or the Respondents to proceed with disciplinary proceedings against an attorney for the same facts involving a disqualification motion. The Circuit Court's authority to make a decision on a disqualification motion is not disturbed in any way but any decision upon Petitioner's misconduct is well within the jurisdiction of the Respondents and this Honorable Court.

---

[2] The Committee on Legal Ethics was a committee of the West Virginia State Bar until the formation of the Lawyer Disciplinary Board and the Office of Disciplinary Counsel on or about July 1, 1994. Therefore, ethics complaints are now handled by the Office of Disciplinary Counsel and, if charges are issued by the Investigative Panel of the Lawyer Disciplinary Board, evidentiary hearings are conducted by a Hearing Panel Subcommittee of the Lawyer Disciplinary Board.

C. Respondents' duties under the Rules of Lawyer Disciplinary Procedure in regards to criminal convictions and reciprocal disciplinary actions still require issues be presented to this Honorable Court.

Respondents must take action in regards to criminal convictions and reciprocal disciplinary actions pursuant to Rule 3.18 and 3.20 of the West Virginia Rules of Lawyer Disciplinary Procedure. However, this action involves the presentation of the matter to a Hearing Panel to make a recommendation to this Honorable Court to determine the ultimate decision. A criminal conviction that proceeds under Rule 3.18 of the West Virginia Rules of Lawyer Disciplinary Procedure "will be referred to the Supreme Court of Appeals for disposition . ." [Rule 3.18 of the West Virginia Rules of Lawyer Disciplinary Procedure]. A reciprocal action under Rule 3.20 also is to be referred to this Honorable Court for the ultimate determination of the matter but can result in different discipline then the foreign jurisdiction based upon various factors listed in the rule. [Rule 3.20 of the West Virginia Rules of Lawyer Disciplinary Procedure]. Rule 3.20(e) states that a different discipline can be imposed if "the misconduct proved warrants that a substantially different type of discipline be imposed by the Supreme Court of Appeals." [Id.].

Again, this Court has the exclusive authority to regulate the practice of law in West Virginia. Syl. pt. 1, State ex rel. Askin v. Dostert, 170 W.Va. 562, 295 S.E.2d 271 (1982). The authority even allows this Court to change the discipline to be imposed in this State that is different from the discipline imposed in a foreign jurisdiction. Much like the ruling on disqualification motions, it is this Court that has the ultimate decision as to the sanction and discipline for misconduct under the West Virginia Rules of Professional Conduct.

D. Collateral estoppel and res judicata do not apply to a Circuit Court's decision on a disqualification motion to prevent Respondents from proceeding with a disciplinary case against Petitioner.

The Committee of Legal Ethics v. Frame, as mentioned above, definitely shows that res judicata and collateral estoppel do not apply in this case. The matter of disqualification deals with the administration of justice and the disciplinary process deals with the regulation of attorneys. It is not the same determination.

> "Res judicata generally applies when there is a final judgment on the merits which precludes parties or their privies from relitigating the issues that were decided or the issues that could have been deiced in the earlier action. See Allen v. McCurry, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308, 313 (1980); In re Estate of McIntosh, 144 W.Va. 583, 109 S.E.2d 153 (1959). A claim is barred by res judicata when the prior action involves identical claims and the same parties or their privies. Collateral estoppel, however, does not always require that the parties be the same. Instead, collateral estoppel requires identical issues raised in successive proceedings and requires a determination of the issues by a valid judgment to which such determination was essential to the judgment. Conley v. Spillers, 171 W.Va. 584, 301 S.E.2d 216 (1983); Lane v. Williams, 150 W.Va. 96, 100, 144 S.E>2d 234, 236 (1965)."

State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

The case of In re: Weiss, 460 Mass. 1012, 954 N.E.2d 19 (Mass. 2011), dealt with an attorney claiming res judicata on the basis that the misconduct that lead to the disciplinary proceeding was the same conduct that the attorney was sanctioned for in the lower court. That court noted that res judicata did not apply because disciplinary counsel was not a party to the underlying case, nor could disciplinary counsel join in the underlying case. Much like

that case, Respondents were not a party to the underlying action, nor would it be likely that Respondents would have been allowed to enter such a case.

> "Whether a stranger to the first action can assert collateral estoppel in the second action depends on several general inquiries: Whether the issues presented in the present case are the same as presented in the earlier case; whether the controlling facts or legal principles have changed substantially since the earlier case; and, whether there are special circumstances that would warrant the conclusion that enforcement of the judgment would be unfair."

Syl. pt. 6, Conley v. Spillers, 171 W.Va. 584, 301 S.E.2d 216 (1983).

"A fundamental due process point relating to the utilization of collateral estoppel is that any person against whom collateral estoppel is asserted must have had a prior opportunity to have litigated his claim." Syl. pt. 8, Conley v. Spillers, 171 W.Va. 584, 301 S.E.2d 216 (1983). It is clear that Respondents did not have an opportunity to have their issue litigated before the lower court.

Another case out of Minnesota, In re: Panel Case No. 17289, 669 N.W.2d 898 (Minn. 2003), involved a case wherein an attorney argued for collateral estoppel of disciplinary proceedings based upon the lower court's failure to impose Rule 11 sanctions for the same misconduct. That Court noted that

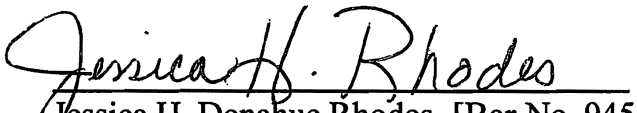
> "the contention that principles of collateral estoppel should apply ignores fundamental differences between the Rules of Civil Procedure and the Rules of Professional Conduct. 'The purpose of attorney discipline is not to punish the attorney, but rather to protect the public, the courts, the legal profession, and the administration of justice.' In re Disciplinary Action Against Albrecht, 660 N.W.2d 790, 794 (Minn. 2003) (citing In re Disciplinary Action Against W. Shaughnessy, 467 N.W.2d 620, 621-22 (Minn. 1991)."

Id. at 905. The Supreme Court of Appeals of West Virginia has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but also to protect the public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard its interests in the administration of justice. Lawyer Disciplinary Board v. Taylor, 192 W.Va. 139, 451 S.E.2d 440 (1994). The purpose of a disqualification motion does not serve the same purpose as attorney disciplinary proceedings. Therefore, neither res judicata nor collateral estoppel apply in this matter.

VI. CONCLUSION

Accordingly, as Respondents have not exceeded their legitimate powers in this matter, Respondents respectfully request that the *Writ* be dismissed and stricken from the Court's docket, and that Respondents be directed to proceed with the prosecution of the Statement of Charges previously filed against Michael T. Clifford, Esquire, pursuant to the West Virginia Rules of Professional Conduct and the West Virginia Rules of Lawyer Disciplinary Procedure.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel

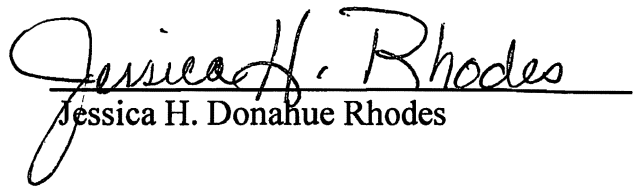


Jessica H. Donahue Rhodes [Bar No. 9453]
Lawyer Disciplinary Counsel
Office of Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304
(304) 558-7999
(304) 558-4015 - *facsimile*

CERTIFICATE OF SERVICE

This is to certify that I, Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 25th day of January, 2013, served a true copy of the foregoing **"Respondent's Response to Petition for a *Writ* of Prohibition"** upon Lonnie C. Simmons, Esquire, counsel for Respondent Michael T. Clifford, by mailing the same via United States Mail, both certified and regular, with sufficient postage, to the following address:

Lonnie C. Simmons, Esquire
Post Office Box 1631
Charleston, West Virginia 25326



Jessica H. Donahue Rhodes

a0050787.WPD