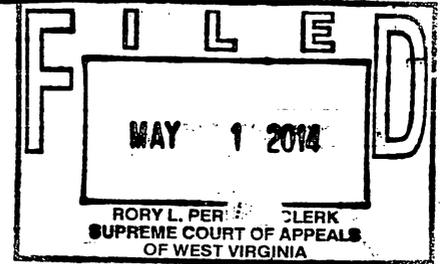


BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA



OFFICE OF DISCIPLINARY COUNSEL,

Petitioner,

v.

No. 14-0348

MARK S. PLANTS,

Respondent.

BRIEF OF THE OFFICE OF DISCIPLINARY COUNSEL

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I. STATEMENT OF THE CASE

A. Nature of Proceedings

This is a disciplinary proceeding brought pursuant to Rule 3.27 of the West Virginia Rules of Lawyer Disciplinary Procedure against Respondent Mark S. Plants, the duly elected prosecuting attorney of Kanawha County (hereinafter "Respondent"). On or about April 11, 2014, the Office of Disciplinary Counsel filed its "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" (hereinafter "Petition"). The Petition reported that Respondent has committed a violation of the West Virginia Rules of Professional Conduct and poses a substantial threat of irreparable harm to the public. *See Lawyer Disciplinary Board v. Albers, 214 W.Va. 11, 585 S.E.2d 11 (2003) (citing Syl. pt. 2, Committee on Legal Ethics v. Ikner, 190 W.Va. 493, 438 S.E.2d 613 (1993)).*

On or about April 18, 2014, Respondent filed his "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" (hereinafter "Response").

Thereafter, on or about April 22, 2014, this Honorable Court entered an Order wherein it found that good cause exists pursuant to Rule 3.27(c) of the West Virginia Rules of Lawyer

Disciplinary Procedure, and further determined that the matter should be expedited. The Court ordered that the Office of Disciplinary Counsel and Respondent are to file their respective briefs on or before May 1, 2014, and set this matter for hearing at 1:00 p.m. on May 5, 2014.

B. Findings of Facts

Respondent was admitted to the West Virginia State Bar on October 22, 2004, and is therefore subject to the lawyer disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and the Lawyer Disciplinary Board. Respondent was first elected Prosecuting Attorney of Kanawha County in 2008, and was re-elected in 2012. As the elected Prosecuting Attorney, it is Respondent's duty:

to attend to the criminal business of the State in the county in which he is elected and qualified, and when he has information of the violation of any penal law committed within such county, he shall institute and prosecute all necessary and proper proceedings against the offender, and may in such case issue or cause to be issued a summons for any witness he may deem material.

W.Va. Code § 7-4-1. As a Prosecuting Attorney, the State of West Virginia is Respondent's client.

On or about March 31, 2014, Sergeant Matthew S. Adams of the West Virginia State Police, Crimes Against Children Unit, filed a Criminal Complaint in the Magistrate Court of Kanawha County, West Virginia against Respondent. (Exhibit A).¹ The Criminal

¹ Upon finding probable cause, Magistrate Tim Halloran signed the Criminal Complaint and the matter was assigned Case No. 14M-2174.

Complaint charged Respondent with the misdemeanor offense of domestic battery in violation of West Virginia Code § 61-2-28(a)², and alleged that, on or about February 22, 2014, Respondent “did unlawfully and intentionally make physical contact of an insulting and provoking nature with his family and household member, namely M.P.³, his juvenile son, and intentionally cause physical harm to said family member.” *Id.*

The Criminal Complaint additionally alleged that on or about February 26, 2014, Respondent’s ex-wife, Allison Plants, “contacted police and made a complaint that the [Respondent] had caused a significant injury to their son, M.P., by whipping M.P. with a belt.” *Id.* The Criminal Complaint alleged that Allison Plants stated that she discovered M.P.’s injury after she overheard her youngest son ask M.P. about the injury, and that she took photographs of the injury and sent a text to Respondent regarding the same. *Id.*

The Criminal Complaint alleged that on or about February 26, 2014, Sgt. Adams interviewed M.P., who informed Sgt. Adams that on the previous Saturday, while at Respondent’s residence, M.P. “discovered his scooter was missing from the residence and a short time later found his step-brother riding the scooter.” *Id.* The Criminal Complaint

² West Virginia Code §61-2-28(a) provides:

(a) *Domestic battery.* – Any person who unlawfully and intentionally makes physical contact of an insulting or provoking nature with his or her family or household member or unlawfully and intentionally causes physical harm to his or her family or household member, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in a county or regional jail for not more than twelve months, or fined not more than five hundred dollars, or both.

³ Respondent’s minor son is referred to throughout the Criminal Complaint as “M.P.” Upon information and belief, Respondent’s minor son’s initials are “P.P.,” as opposed to “M.P.”

further alleged that “M.P. stated that he shoved his step-brother off said scooter and returned home a short time later where he was met outside by the [Respondent].” Id.

According to the Criminal Complaint, “M.P. stated he was sent to his room and a few minutes later, the [Respondent] entered his bedroom.” Id. The Criminal Complaint alleged that “M.P. stated that the [Respondent] held him by his arm and struck him ‘more than ten (10) times’ with a leather belt.” Id. The Criminal Complaint further alleged that “M.P. stated that a short time later, the [Respondent] took him upstairs and stood him in front of his step brother,” asking the step brother “[d]o you think I whipped him enough?” Id.

Sgt. Adams stated that he “observed and photographed said injury which was dark purple to brown in color and was an approximately six (6) to seven (7) inch ‘U’ shaped bruise on the back of M.P.’s left thigh.” Id.

According to the Criminal Complaint, shortly thereafter, Respondent arrived at M.P.’s residence. Id. Sgt. Adams stated he “explained the situation to the [Respondent], who then agreed to make a statement.” Id. The Criminal Complaint alleged that Respondent initially stated that he struck M.P. “two (2) times,” but later stated that he struck M.P. “maybe three (3) or four (4) times.” Id. According to the Criminal Complaint, “[a]t the conclusion of the interview, the [Respondent] stated the incident lasted ‘no more than twenty (20) seconds,’ and “that he did strike M.P. with a leather belt.” Id.

A warrant was issued for Respondent’s arrest on or about March 31, 2014. (Exhibit B). Respondent appeared for his initial appearance in the Magistrate Court of Kanawha County, West Virginia on or about March 31, 2014. (Exhibit C). At that time, bail was set

in the amount of \$1,000.00, and Respondent was released on his own personal recognizance. (Exhibit D).⁴ Also on or about March 31, 2014, the undersigned opened and docketed a complaint in the name of the Office of Disciplinary Counsel against Respondent.⁵

Thereafter, on or about April 7, 2014, Respondent, through counsel, filed a “Motion to Dismiss” and “Memorandum in Support of Motion to Dismiss” in the Magistrate Court of Kanawha County, West Virginia. (Exhibits E and F). In support of his Motion to Dismiss, Respondent alleged, in pertinent part, that the allegations contained in the Criminal Complaint: “a. state that [Respondent] was acting as a parent to discipline his child, therefore, he was acting within a constitutionally protected right to control his child; and b. under West Virginia law there is no liability from the reasonable use of corporal punishment for disciplinary purposes.” (Exhibit E). Further, Respondent has admitted that he “spanked his son with his leather belt.” (Exhibit F).

On or about April 11, 2014, the Office of Disciplinary Counsel filed its Petition citing the aforementioned facts in support thereof. (Petition at ¶¶ 1-13). As of the date the Petition

⁴ In his Response to the Petition, Respondent, through counsel, assumes that “the small amount of bail and release on recognizance, as recorded in Exhibit D indicate the relative lack of seriousness of the charges.” (Response at ¶ 10). Although the seriousness of the offense charged is one factor the magistrate considers when determining the amount of bail, the magistrate shall also consider the previous criminal record of the defendant, his financial ability, and the probability of his appearance, as set forth in West Virginia Code § 62-1C-3. The Office of Disciplinary Counsel disputes Respondent’s assumption that the magistrate made the determination as to Respondent’s bail and release on recognizance solely because of “the relative lack of seriousness of the charges” set forth in Case No. 14M-2174.

⁵ Rule 2.6 of the Rules of Lawyer Disciplinary Procedure indicates in relevant part that the details of complaints filed with or investigations conducted by the Office of Disciplinary Counsel shall be confidential, except that when a complaint has been filed or an investigation has been initiated, the Office of Disciplinary Counsel or the lawyer may release information confirming or denying the existence of a complaint or investigation.

was filed, Respondent had made no effort to disqualify himself or his office from any case involving allegations of domestic violence. Id. at ¶ 16.

In addition to the domestic battery charge set forth in Case No. 14M-2174, Respondent has also been charged with violating an Emergency Protective Order⁶, as set forth in the Criminal Complaint filed in the Magistrate Court of Kanawha County, West Virginia against Respondent, on or about March 18, 2014 (hereinafter “March 18, 2014 Complaint”). (Exhibit G). The charges set forth in the March 18, 2014 Complaint arise from Respondent allegedly violating the terms of the Emergency Protective Order issued against him on or about February 27, 2014 in the Magistrate Court of Kanawha County, West Virginia. (Exhibit H).⁷ Specifically, the March 18, 2014 Complaint charged that, on or about March 17, 2014, Respondent violated West Virginia Code §48-27-903⁸ when he “was

⁶ See Case No. 14M-1818.

⁷ On or about February 27, 2014, based on the alleged events of February 22, 2014, Allison Plants filed a Domestic Violence Petition against Respondent in the Magistrate Court of Kanawha County, West Virginia, which resulted in the issuance of the Emergency Protective Order, also on or about February 27, 2014. (Exhibit I, filed under seal).

⁸ West Virginia Code §48-27-903, Misdemeanor offenses for violation of protective order; repeat offenses; penalties, provides, in pertinent part:

- (a) A person is guilty of a misdemeanor if the person knowingly and willfully violates:
 - (1) A provision of an emergency or final protective order entered pursuant to:
 - (A) Subsection (a) or (b) of section five hundred two of this article;
 - (B) If the Court has ordered such relief; subsection (2), (7), (9), or (14) of section five hundred three of this article;
 - (C) Subsection (b) or (c) of section five hundred nine, article five of this chapter; or
 - (D) Subsection (b) or (c) of section six hundred eight, article five of this chapter;
 - (2) A condition of bail, probation or parole which has the express intent or effect of protecting the personal safety of a particular person or persons; or

standing by [Allison Plants's] vehicle talking to their two children when she exited the Fruth Pharmacy along Oakwood Drive in Charleston, Kanawha Co., WV at approximately 1938 hrs." Id. "In response, counsel for the Respondent represents to the Court that the Respondent seeing and approaching his children in the parking lot of Fruth Pharmacy was happenstance and is not a violation of the *Emergency Protective Order.*" Id.

Three days after the Office of Disciplinary Counsel filed its Petition, on or about April 14, 2014, the City of Charleston and Charleston Police Department (hereinafter "City of Charleston") filed their "Petition for Writ of Prohibition" in the Circuit Court of Kanawha County, West Virginia against Respondent in his capacity as the Prosecuting Attorney of Kanawha County, West Virginia. (Exhibit J). The Petition for Writ of Prohibition requested that the Circuit Court grant the relief requested, which was prohibition of Respondent and his office "from prosecuting allegations of domestic violence involving parents and minor children ... that are/were reported, investigated, and or charged by members of the [Charleston Police Department] until and unless the conflict identified by the Office of Lawyer Disciplinary Council [*sic*], *infra*, has been resolved." Id.

On or about April 16, 2014, Judge Louis H. Bloom entered a "Rule to Show Cause Order" wherein the Circuit Court ordered that a rule to show cause be issued against

(3) A restraining order entered pursuant to section nine-a, article two, chapter sixty-one of this code.

Upon conviction thereof the person shall be confined in jail for a period of not less than one day nor more than one year, which jail term shall include actual confinement of not less than twenty-four hours, and shall be fined not less than \$250 nor more than \$2,000.

Respondent to show cause why the City of Charleston's Petition for Writ of Prohibition should not be awarded. (Exhibit K). The Rule to Show Cause Order further stated:

More broadly, pursuant to the inherent authority of the Circuit Court, the Court shall also consider whether to disqualify Respondent and the Kanawha County Prosecuting Attorney's Office from: instituting and prosecuting allegations of domestic violence involving a parent, guardian, or custodian of a minor child; enforcing or prosecuting domestic violence contempt orders; or participating in abuse and neglect proceedings under Chapter 49 of the West Virginia Code in the Circuit Court of Kanawha County, until: Respondent's underlying disciplinary proceedings before the Lawyer Disciplinary Board have been completed; or until the pending criminal actions filed against the Respondent have been resolved; or until such other time as the Court determines.

The Court set a hearing for April 22, 2014 at 10:00 a.m. and ordered Respondent to file an answer to the Petition for Writ of Prohibition by April 18, 2014. In addition to the parties of record, the Court directed the Clerk to provide the Office of Disciplinary Counsel with a copy of its Rule to Show Cause Order.

On or about April 18, 2014, Respondent filed "Respondent's Answer to Petition for a Writ of Prohibition." (Exhibit L). In opposition to the relief requested by the City of Charleston, Respondent denied "that the [City of Charleston is] entitled to the extraordinary relief requested in prohibition, in as much as the Respondent had already taken and will continue to take steps to disqualify himself from cases that are outlined by the Petition filed by the Office of Lawyer Disciplinary Counsel ... , and to seek the appointment of a special prosecutor pending the outcome of the ODC Petition." Respondent further stated that "the conflict claimed by [the Office of Disciplinary Counsel] is also overly broad, and that the

only cases of potential or apparent conflict are those involving corporal punishment.” Id. at ¶ 9.

On or about April 22, 2014, the Circuit Court held the hearing on the City of Charleston’s Petition for Writ of Prohibition⁹. Following the hearing, on or about April 23, 2014, the Circuit Court entered the “Amended Agreed Order of Disqualification.” (Exhibit M).¹⁰ The Circuit Court found, *inter alia*, that the matter involved the public interest and that “[i]t is in the public’s interest that child abuse and neglect, violent crimes against children by their parent, guardian, or custodian, and criminal violations of protective orders be prosecuted impartially without any appearance of impropriety.” Id. at ¶ 25.¹¹

Accordingly, the Circuit Court ordered that Respondent and the Office of the Prosecuting Attorney of Kanawha County, West Virginia, be disqualified from prosecuting allegations involving: (1) crimes of violence by a parent, guardian, or custodian against a child; (2) abuse and neglect cases under Chapter 49 of the West Virginia Code; and (3) criminal violations of domestic violence protection orders as addressed in Chapter 48, Article

⁹ At the hearing, “counsel for the Respondent represent[ed] to the Court that the Respondent seeing and approaching his children in the parking lot of Fruth Pharmacy was happenstance and is not a violation of the *Emergency Protective Order*.” (Exhibit M at ¶ 8).

¹⁰ The “Amended Agreed Order of Disqualification” was entered on the same date that the original “Agreed Order of Disqualification” was entered. From a review of both Orders, it appears that the Amended Order was entered to change the reference to Allison Plants as Respondent’s “ex-wife,” as opposed to his “wife,” and that no other changes were made.

¹¹ The Circuit Court specifically cited Rule 1.7 of the West Virginia Rules of Professional Conduct and case law that held that “a lawyer may be disqualified from participating in a pending case if his continued representation would give rise to an apparent conflict of interest or appearance of impropriety based upon that lawyer’s confidential relationship with an opposing party.” Syl. pt. 2, State ex rel. Taylor Associates v. Nuzum, 175 W.Va. 19, 330 S.E.2d 677 (1985).

27 of the West Virginia Code. *Id.* The Circuit Court further found and concluded “that the Respondent’s duty to fairly prosecute these matters appear to materially limit the Respondent’s interest in his own defenses to the charges against him.” *Id.* at ¶ 26.

Thereafter, on or about April 24, 2014, the Circuit Court entered its “Order Appointing Special Prosecutors,” wherein it appointed Donald P. Morris as Chief Special Prosecutor of Kanawha County, West Virginia,¹² for those cases identified above, including, but not limited to, the list of cases identified in the same Order. (Exhibit N).

II. SUMMARY OF ARGUMENT

Rule 3.27 of the West Virginia Rules of Lawyer Disciplinary Procedure provides a mechanism to immediately suspend the license of a lawyer who (1) is accused of violating the West Virginia Rules of Professional Conduct and (2) who is alleged to pose a substantial threat of irreparable harm to the public. The procedure outlined in Rule 3.27 of the West Virginia Rules of Lawyer Disciplinary Procedure is an extraordinary proceeding that “should only be utilized in the most extreme cases of lawyer misconduct.” *See* Syl. pt. 1, Office of Disciplinary Counsel v. Battistelli, 193 W.Va. 629, 457 S.E.2d 652 (1995).

This Honorable Court should temporarily suspend Respondent’s license pursuant to Rule 3.27 until the underlying disciplinary proceedings against Respondent before the Lawyer Disciplinary Board have been completed. By asserting that he did not commit domestic battery in violation of West Virginia Code § 61-2-28(a) as set forth above,

¹² In addition to Mr. Morris, the Circuit Court appointed three assistant special prosecutors and two staff members to assist Mr. Morris until further order of the Court.

Respondent has created a conflict of interest pursuant to Rule 1.7(b) of the West Virginia Rules of Professional Conduct involving his own interests that materially limits his ability to execute properly his duties as the elected Prosecuting Attorney. As such, Respondent has violated Rule 1.7 of the West Virginia Rules of Professional Conduct.

Furthermore, Respondent's continued representation of his client, the State of West Virginia, while facing criminal charges of having committed a domestic battery himself and having violated an Emergency Protective Order, poses a substantial threat of irreparable harm to the public in that it undermines the integrity and impartiality of our system of justice.¹³ Because of the "enormous amount of trust that the public places in its lawyers, this Court must insure that the public's interests are protected and that the integrity of the legal profession is maintained." *See Office of Lawyer Disciplinary Counsel v. Albers*, 214 W.Va. at 13, 585 S.E.2d at 13. Respondent, as an attorney who is a public official, is held to a high standard of conduct, and as such, Respondent's violation of the West Virginia Rules of Professional Conduct is viewed as more egregious due to the betrayal of the public trust attached to his office. *Committee on Legal Ethics of West Virginia State Bar v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989).

Accordingly, the Office of Disciplinary Counsel respectfully requests that the Court temporarily suspend Respondent's license, or order such other action as it deems appropriate,

¹³ Because the Committee on Legal Ethics (the Lawyer Disciplinary Board) "believes that when a Prosecuting Attorney is disqualified for any reason, that disqualification is imputed to the entire office," the Kanawha County Prosecuting Attorney's Office should be likewise prohibited from prosecuting such cases. L.E.I. 92-01, "Imputed Disqualification of Prosecuting Attorneys and Their Assistants."

pursuant to Rule 3.27 until the underlying disciplinary proceedings against Respondent before the Lawyer Disciplinary Board have been completed.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 19 of the Revised Rules of Appellate Procedure, this Honorable Court's April 22, 2014 Order set this matter for oral argument for May 5, 2014.

IV. ARGUMENT

A. Standard of Review

“[T]he primary purpose of the ethics committee [Office of Lawyer Disciplinary Counsel] is not punishment but rather the protection of the public and the reassurance of the public as to the reliability and integrity of attorneys.” Office of Lawyer Disciplinary Counsel v. Albers, 214 W.Va. 11, 13, 585 S.E.2d 11, 13 (2003) *citing* Committee on Legal Ethics of West Virginia State Bar v. Ikner, 190 W.Va. 433, 436, 438 S.E.2d 613, 616 (1993) (internal citations omitted).

Rule 3.27 of the West Virginia Rules of Lawyer Disciplinary Procedure provides a mechanism to immediately suspend the license of a lawyer who (1) is accused of violating the West Virginia Rules of Professional Conduct and (2) who is alleged to pose a substantial threat of irreparable harm to the public. The procedure outlined in Rule 3.27 of the West Virginia Rules of Lawyer Disciplinary Procedure is an extraordinary proceeding that “should only be utilized in the most extreme cases of lawyer misconduct.” *See* Syllabus Point 1, Office of Disciplinary Counsel v. Battistelli, 193 W.Va. 629, 457 S.E.2d 652 (1995). “If the Court, after proceeding in accordance with Disciplinary Rule 3.27(c), concludes that the

respondent lawyer should be temporarily suspended, it will so order.” Id., 193 W.Va. at 636, 457 S.E.2d at 659.

B. Respondent has Violated Rule 1.7(b) of the West Virginia Rules of Professional Conduct

Rule 1.7 of the West Virginia Rules of Professional Conduct provides, in pertinent part:

Rule 1.7 Conflict of Interest: General rules.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

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

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

“The lawyer’s own interest should not be permitted to have adverse effect on representation of a client.” Rule 1.7 cmt. Furthermore, in cases in which the public interest is involved, an attorney may not represent conflicting interests even if all consented. State ex rel. Morgan Stanley & Co., Inc. v. MacQueen, 187 W.Va. 97, 102, 416 S.E.2d 55, 60 (1992) (*quoting Graf v. Frame*, 177 W.Va. 282, 289, 352 S.E.2d 31, 38 (1986)). “The rationale underlying this rule is quite simple: ‘It is essential that the public have absolute confidence in the integrity and impartiality of our system of justice.’ Implicit within this ideal is the ethical requirement that attorneys must ‘avoid, as much as is possible, the appearance of impropriety.’” Id. (internal citations omitted).

In State ex rel. Bailey v. Facemire, multiple petitions were filed seeking writs of mandamus to prohibit a prosecuting attorney and assistant prosecuting attorneys from representing persons in domestic cases under certain circumstances. State ex rel. Bailey v. Facemire, 186 W.Va. 528, 413 S.E.2d 183 (1991). The petitions involved cases in which a prosecutor represented a private client in a domestic proceeding while simultaneously serving as a prosecutor. Id., 186 W.Va. at 530-32, 413 S.E.2d at 185-87. Although the facts of each cases are different, the cases share certain similarities, namely, in each: (1) a prosecuting attorney or assistant prosecuting attorney represented a party to a divorce proceeding; and (2) during the representation of their respective clients, each client had a domestic violence petition filed against him in which a magistrate found that the client had abused the domestic violence petitioner/wife. Id.

Granting the writs, the Court held that a prosecuting attorney is required to withdraw from representing a private client in a domestic proceeding if the attorney identifies a potential or actual conflict of interest between the attorney's duties owed to the state as a prosecutor and the duties owed to his or her private client. Id., 186 W.Va. at 535, 413 S.E.2d at 190. In its opinion, the Court referenced the statutory duties of a prosecuting attorney. Id., 186 W.Va. at 532, 413 S.E.2d at 187. "The duties of a prosecuting attorney are set forth in West Virginia Code §7-4-1 (1990). Among these duties is a nondiscretionary obligation to institute criminal proceedings against persons whom the prosecutor has reason to believe have violated a criminal statute." Id. The Court further noted that "[i]t is clearly the ethical duty of prosecuting attorneys to remove themselves from legal representation of any interests

in conflict with their responsibilities as lawyers for the state,” and that the prosecutors “fail[ed] to see the obvious conflicts involved in the factual scenarios before [the Court].” Id., 186 W.Va. at 533, 413 S.E.2d at 188. Finally, with regard to the prosecuting attorney and assistant prosecuting attorneys in the subject petitions, the Court opined “[w]hat is most distressing about these respondents failing to discern a conflict in these situations is that it may be indicative of the level of importance placed by many having prosecutorial authority on the issue of domestic abuse.” Id.

Turning to the instant matter, Respondent, the elected chief law enforcement officer in Kanawha County, West Virginia, has violated Rule 1.7(b) of the West Virginia Rules of Professional Conduct. By asserting that he did not commit domestic battery in violation of West Virginia Code § 61-2-28(a) because, in admittedly “spank[ing] his son with his leather belt,”¹⁴ he was “acting within a constitutionally protected right to control his child,”¹⁵ Respondent has created a conflict of interest pursuant to Rule 1.7(b) involving his own interests that materially limits his ability to execute properly his duty as the elected Prosecuting Attorney.

In essence, by maintaining that he was acting within a constitutionally protected right to discipline his child by striking him with a belt, and therefore, is not guilty of having violated West Virginia Code §61-2-28(a), Respondent is asserting that the aforementioned criminal statute is unconstitutional insofar as it relates to parents or guardians having violated

¹⁴ See Exhibit F.

¹⁵ See Exhibit E.

it if they were merely exercising their constitutional right to “control” their child. Although Respondent is certainly free to assert this defense in his criminal proceeding, he may not do so while serving as the Prosecuting Attorney of Kanawha County tasked with prosecuting alleged violations of West Virginia law, as such an assertion creates a conflict of interest pursuant to Rule 1.7(b). Respondent cannot represent his client, the State of West Virginia, in cases brought against parents or guardians pursuant to West Virginia Code § 61-2-28 because such representation may be materially limited by his own defense that such alleged criminal conduct is not a violation of the law.

As the Prosecuting Attorney of Kanawha County, Respondent has a nondiscretionary obligation to institute criminal proceedings against persons whom he has reason to believe have violated a criminal statute. *See Facemire*, 186 W.Va. at 532, 413 S.E.2d at 187. It is not reasonable for Respondent to assert that his representation of the State of West Virginia will not be adversely affected by his own interest of his interpretation of West Virginia Code §61-2-28(a) in his own criminal case because, as the Prosecuting Attorney, Respondent is tasked with prosecuting others accused of committing violations of domestic violence or other injuries pursuant to the West Virginia State Code. Moreover, as noted above, the State of West Virginia is incapable of granting its consent because the public interest is involved. *State ex rel. Morgan Stanley & Co., Inc. v. MacQueen*, 187 W.Va. at 102, 416 S.E.2d at 60.

Although the facts in *Facemire* are distinguishable from those in Respondent’s case, *Facemire* nonetheless provides guidance for conflicts analysis regarding prosecutors. In *Facemire*, the prosecutors involved were engaged in representation of private clients in

domestic proceedings while serving as prosecutors. Respondent is not representing a private client in a domestic proceeding, but rather has asserted as a defense in his own criminal case a position that creates a conflict of interest, which cannot be waived, for him in his role as the Prosecuting Attorney of Kanawha County, West Virginia, thereby violating Rule 1.7(b) of the West Virginia Rules of Professional Conduct.

Significantly, at the time the Office of Disciplinary Counsel filed the instant Petition, Respondent had made no effort to disqualify himself or his office from any case involving allegations of domestic violence. Indeed, in “Respondent’s Answer to Petition for a Writ of Prohibition” filed, in response to the City of Charleston’s Petition for Writ of Prohibition, on or about April 18, 2014 in the Circuit Court of Kanawha County, West Virginia, Respondent stated that he “believes that the conflict claimed by ODC is also overly broad, and that the only cases of potential or apparent conflict are those involving corporal punishment.” (Exhibit L at ¶ 9). Finally, in the Circuit Court of Kanawha County’s “Amended Agreed Order of Disqualification,” Respondent, on behalf of the Kanawha County Prosecuting Attorney’s Office, agreed with the Circuit Court’s conclusion that “Respondent’s assertions [in his criminal proceedings] appear to materially limit the ability of the Kanawha County Prosecuting Attorney’s Office to properly prosecute certain cases as identified in [the Circuit Court’s Order],” and that “the State cannot consent to the apparent present conflict.” (Exhibit M at ¶ 26). Accordingly, Respondent agreed with the Circuit Court’s finding and

conclusion that his duty to fairly prosecute the matters identified by the Circuit Court¹⁶ appear to materially limit his interest in his own defenses to the criminal charges against him. Id. Furthermore, the Circuit Court ordered that Respondent and the Office of the Prosecuting Attorney of Kanawha County, West Virginia, be disqualified from prosecuting allegations in the aforementioned matters consistent with the Circuit Court's "Amended Agreed Order of Disqualification" and "Order Appointing Special Prosecutors" until such time as the Circuit Court determines. (Exhibits M and N).

As the Court made clear in State ex rel. Clifford v. West Virginia Office of Disciplinary Counsel, "whether an attorney's conduct warrants professional discipline because it violates the Rules of Professional Conduct is a separate issue from whether an attorney should be disqualified from a case because of a conflict of interest that will prevent the administration of justice." State ex rel. Clifford v. West Virginia Office of Disciplinary Counsel, 231 W.Va. 334, 745 S.E.2d 225, 233 (2013). In Clifford, the circuit court had previously found no basis to disqualify the attorney from a pending case due to an alleged conflict of interest. Id., 231 W.Va. 334, 745 S.E.2d at 231. The attorney/petitioner filed a writ of prohibition before the Court seeking to prevent the respondents, the West Virginia Office of Disciplinary Counsel and the West Virginia Lawyer Disciplinary Board, from

¹⁶ As previously noted, the Circuit Court held that Respondent and the Kanawha County Prosecuting Attorney's Office shall not prosecute cases involving: (1) crimes of violence by a parent, guardian, or custodian against a child; (2) abuse and neglect cases under Chapter 49 of the West Virginia Code; and (3) criminal violations of domestic violence protection orders as addressed in Chapter 48, Article 27 of the West Virginia Code. Id.

pursuing a disciplinary proceeding against the petitioner based upon an alleged conflict of interest in representing a client. Id., 231 W.Va. 334, 745 S.E.2d at 228.

Although the Court held that sanctions in the specific case were not warranted and directed the respondents to dismiss the Statement of Charges filed against the petitioner, the Court significantly held that “a circuit court’s denial of a motion to disqualify an attorney in a pending case based upon an alleged conflict of interest in representing a client does not foreclose disciplinary action against that attorney based upon that alleged conflict of interest.” Id., 231 W.Va. 334, 745 S.E.2d at 234-37. This Honorable Court has the exclusive authority to define, regulate and control 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). “Because circuit courts have no authority to impose disciplinary sanctions upon attorneys, their decisions on motions to disqualify based on an alleged conflict of interest are not dispositive with regard to whether disciplinary action is required.” Clifford, 231 W.Va. 334, 745 S.E.2d at 233.

The Office of Disciplinary Counsel anticipates that Respondent may argue that the matter before the Court is moot because the Circuit Court has previously ordered Respondent and the Kanawha County Prosecuting Attorney’s Office disqualified from prosecuting allegations in the previously mentioned matters. As the Court noted in Clifford, the Circuit Court’s decision regarding disqualification is not dispositive as to a decision in a disciplinary action. Although the Office of Disciplinary Counsel agrees with the Circuit Court’s conclusions regarding the conflict analysis, the Office of Disciplinary Counsel asserts that

Respondent has, in fact, violated Rule 1.7(b) of the West Virginia Rules of Professional Conduct for the reasons set forth above.

C. Respondent's Possession of his Law License Pending Resolution of the Underlying Disciplinary Proceedings Poses a Substantial Threat of Irreparable Harm to the Public

Because of the “enormous amount of trust that the public places in its lawyers, this Court must insure that the public’s interests are protected and that the integrity of the legal profession is maintained.” *See Office of Lawyer Disciplinary Counsel v. Albers*, 214 W.Va. at 13, 585 S.E.2d at 13. An “attorney who is a public official is held to a high standard of conduct because of his or her (1) professional and (2) public trustee responsibilities.” *Committee on Legal Ethics of West Virginia State Bar v. Roark*, 181 W.Va. at 265, 382 S.E.2d at 318 (internal citation omitted). Indeed, “[e]thical violations by a lawyer holding a public office are viewed as more egregious because of the betrayal of the public trust attached to the office.” *Id.* at syl. pt. 3. Further, “[l]awyer insensitivity to ethical impropriety [or perceived ethical impropriety] is one of the primary sources of this lack of public confidence in the Bar. *The problem is exacerbated when ethical violations are committed by an attorney holding an important public office.*” *Id.* (internal citations omitted) (emphasis in original).

Respondent, as an attorney who is a public official, is held to a high standard of conduct, and as such, Respondent’s violation of the West Virginia Rules of Professional Conduct is viewed as more egregious due to the betrayal of the public trust attached to his office. Furthermore, as of the date the Petition was filed, Respondent had made no effort to

disqualify himself or his office from any case identified by either the Office of Disciplinary Counsel or the Circuit Court of Kanawha County, West Virginia, and thus, Respondent failed to recognize any actual or perceived conflict related to his continued serve as the Prosecuting Attorney of Kanawha County despite his pending criminal charges and his assertions therein. Moreover, in his Response to the Petition, Respondent, through counsel, described the Petition as “ill-advised,” the Office of Disciplinary Counsel’s initiation of the instant proceeding “inappropriately-brought,” and the conduct with which he has been charged in his criminal proceeding “questionable” and a “relatively minor criminal offense.” (Response at ¶¶ 11, 25, and 27). Respondent’s conduct, as noted above, clearly demonstrates his insensitivity to ethical impropriety or perceived ethical impropriety.

Furthermore, Respondent’s continued service as the Prosecuting Attorney of Kanawha County, West Virginia, and his representation of his client, the State of West Virginia, in any capacity during the pendency of the underlying disciplinary proceedings, while personally facing criminal charges, poses a substantial threat of irreparable harm to the public in that it undermines the integrity and impartiality of our system of justice. “It is essential that the public have absolute confidence in the integrity and impartiality of our system of justice. This requires that attorneys who are public officials not only in fact properly discharge their responsibilities but also that they avoid, as much as possible, the appearance of impropriety.” Graf v. Frame, 177 W.Va. 282, 289, 352 S.E.2d 31, 38 (1986).

In addition to undermining the integrity and impartiality of our system of justice, Respondent’s continued service as the Prosecuting Attorney of Kanawha County poses a

substantial threat of irreparable harm to the public in that it undermines the integrity of the Kanawha County Prosecuting Attorney's Office as a whole. Under the leadership of Respondent, the Kanawha County Prosecuting Attorney's Office has not hesitated to prosecute individuals charged with conduct remarkably similar to the allegations giving rise to Respondent's domestic battery charge. A case on point is State of West Virginia v. Edward M. Skaggs, Jr., Kanawha County Circuit Court Case No. 10-M-21.

On or about July 27, 2009, the West Virginia State Police obtained a criminal complaint against Mr. Skaggs for one felony count of child abuse causing bodily injury. (Exhibit O). The complaint alleged that Mr. Skaggs had struck his nine year old daughter with a belt on the buttocks and leg causing severe bruising. Id. Mr. Skaggs was arrested and arraigned on the charge in Kanawha County Magistrate Court on July 29, 2009. (Exhibit P). The State dismissed the charges at the preliminary hearing. The case was subsequently presented to a Kanawha County Grand Jury, which returned an indictment against Mr. Skaggs for one felony count of child abuse cause substantial risk of serious bodily injury, in violation of West Virginia Code § 61-8D-3(c), and one misdemeanor count of domestic battery, in violation of West Virginia Code § 61-2-28(a). (Exhibit Q). Mr. Skaggs entered into a plea agreement with the State whereby he would plead guilty to the domestic battery charge. (Exhibit R). In exchange, one of Respondent's Assistant Prosecutors agreed to dismiss the felony charge and recommend probation. Id. On August 9, 2010, Mr. Skaggs pled guilty pursuant to the plea agreement to the domestic battery charge. (Exhibit S). By Order entered March 31, 2011, the Court sentenced Mr. Skaggs to ninety days in jail.

(Exhibit T). The Court then suspended the sentence and placed Mr. Skaggs on probation for a period of one year. Id.

Another manner in which Respondent's continued service as the Prosecuting Attorney of Kanawha County poses a substantial threat of irreparable harm to the public's perception of the integrity of the Kanawha County Prosecuting Attorney's Office relates to a personnel decision Respondent made regarding a former assistant prosecutor. On or about May 8, 2011, Scott F. Reynolds, then employed as an Assistant Prosecuting Attorney with the Kanawha County Prosecuting Attorney's Office, was arrested for allegedly driving under the influence of alcohol. (Exhibit U). Respondent explained that he terminated Mr. Reynolds's employment because "a DUI is a very serious crime," and further stated that "[a] DUI is unacceptable for the general public and they are completely unacceptable for my employees." Id. The Office of Disciplinary Counsel asserts that the public's perception of the integrity of the Kanawha County Prosecuting Attorney's Office would likely be affected by Respondent's decision to terminate an employee of the office for the employee's arrest and allegations of having committed a crime, while Respondent continued to serve as the Prosecuting Attorney of Kanawha County while facing criminal charges himself.

Additionally, at present, there are, essentially, two separate offices operating on behalf of the Kanawha County Prosecuting Attorney's Office. (See Exhibit N). Attorney Donald P. Morris has been appointed as Chief Special Prosecutor of Kanawha County, West Virginia, for cases identified in the Circuit Court's "Amended Agreed Order of Disqualification." The Circuit Court has further ordered that Chief Special Prosecutor

Morris “be paid a reasonable amount as may be agreed to by the County Commission.” Id. at 2. Therefore, a financial cost is clearly associated with the creation of the Chief Special Prosecutor position.

As previously noted, the Circuit Court ordered that Respondent and the Office of the Prosecuting Attorney of Kanawha County, West Virginia, be disqualified from prosecuting allegations in the aforementioned matters consistent with the Circuit Court’s “Amended Agreed Order of Disqualification” and “Order Appointing Special Prosecutors” until such time as the Circuit Court determines. (Exhibits M and N). While the Office of Disciplinary Counsel maintains that the Circuit Court’s actions were necessary and appropriate given the circumstances as set forth in the Petition, the Office of Disciplinary Counsel notes that the existence of “dual” offices of the Kanawha County Prosecuting Attorney’s Office is not a long-term solution in that it does not instill public trust and confidence in the Kanawha County Prosecuting Attorney’s Office or in our system of justice.

Moreover, a substantial threat of irreparable harm to the public would include how Respondent has materially limited the manner in which law enforcement, victims’ advocates and victims themselves respond to domestic violence situations, due to the conflict of interest Respondent has created. Indeed, Kim Eagle, a victims’ advocate for the Charleston Police Department for the past twenty years, has spoken publicly in an April 27, 2014 article that was published in the Charleston Gazette about how the criminal charges Respondent is facing will affect victims of domestic violence. (Exhibit V). The article described how Ms. Eagle “has been trying to regain the trust of victims since prosecutor Mark Plants was

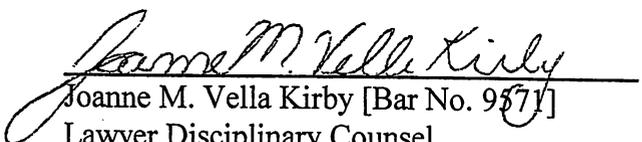
charged with domestic battery and violating a domestic violence protection order,” as victims have expressed concern to her in the wake of the charges filed against Respondent. Id.

For all of the reasons noted above, it is clear that Respondent’s possession of his law license pending resolution of the underlying disciplinary proceedings poses a substantial threat of irreparable harm to the public.

V. CONCLUSION

It is this Honorable Court’s inescapable and unenviable duty to protect the public and preserve the integrity of its Courts and our system of justice. There is sufficient evidence to establish that Respondent has violated the West Virginia Rules of Professional Conduct; that Respondent poses a substantial threat of irreparable harm to the public; that Respondent’s own interests limit his ability to represent and protect the interests of the citizens of Kanawha County, West Virginia; and therefore, this Court should immediately suspend Respondent’s law license in the State of West Virginia pending the outcome of the underlying disciplinary proceedings or other such relief as this Court deems appropriate.

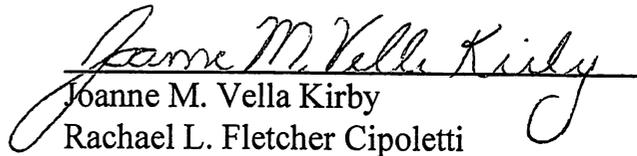
Respectfully submitted,
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CERTIFICATE OF SERVICE

This is to certify that Joanne M. Vella Kirby, Lawyer Disciplinary Counsel and Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 1st day of May, 2014, served a true copy of the foregoing "**BRIEF OF THE OFFICE OF DISCIPLINARY COUNSEL**" upon Robert H. Davis, Jr., Esquire, Counsel for Respondent Mark S. Plants, by mailing the same via United States Mail, both certified and regular, with sufficient postage, to the following address:

Robert H. Davis, Jr., Esquire
121 Pine Street
Harrisburg, Pennsylvania 17101-1209


Joanne M. Vella Kirby
Rachael L. Fletcher Cipoletti