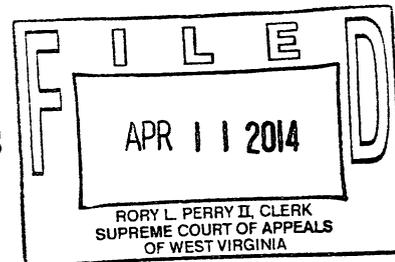


BEFORE THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA



NO. 14-0340

OFFICE OF LAWYER DISCIPLINARY COUNSEL,

Petitioner,

v.

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

Respondent.

**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**

NOW COMES the Office of Disciplinary Counsel by Joanne M. Vella Kirby, its counsel, and reports to this Court pursuant to Rule 3.27 of the West Virginia Rules of Lawyer Disciplinary Procedure that the elected Prosecuting Attorney of Kanawha County, West Virginia, Mark S. Plants (hereinafter "Respondent"), has committed a violation of the West Virginia Rules of Professional Conduct and poses a substantial threat of irreparable harm to the public. Accordingly, the Office of Disciplinary Counsel requests that the Court

temporarily suspend Respondent from the practice of law, and/or disqualify 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, until Respondent's underlying disciplinary proceedings before the Lawyer Disciplinary Board have been completed.¹

In support of this request, the Office of Disciplinary Counsel states as follows:

FACTS

1. 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 elected the Prosecuting Attorney of Kanawha County, West Virginia in 2008, and was re-elected in 2012.
2. On or about March 31, 2014, Sergeant Matthew S. Adams with 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.]
3. The Criminal Complaint charged Respondent with domestic battery in violation of West Virginia Code § 61-2-28(a), and alleged that, on or about February 22, 2014, Respondent "did unlawfully and intentionally make physical contact of an insulting

¹Complaint I.D. No. 14-06-187 was docketed by the Office of Disciplinary Counsel against Respondent on or about March 31, 2014.

and provoking nature with his family and household member, namely M.P., his juvenile son, and intentionally cause physical harm to said family member.”

4. 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.” 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.
5. 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.” The Criminal Complaint 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].”
6. According to the Criminal Complaint, “M.P. stated he was sent to his room and a few minutes later, the [Respondent] entered his bedroom.” 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.” 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?”

7. 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.”
8. According to the Criminal Complaint, shortly thereafter, Respondent arrived at M.P.’s residence. Sgt. Adams stated he “explained the situation to the [Respondent], who then agreed to make a statement.” 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.” 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.”
9. A warrant was issued for Respondent’s arrest on or about March 31, 2014. [Exhibit B].
10. 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].

11. On or about March 31, 2014, the undersigned opened and docketed a complaint in the name of the Office of Disciplinary Counsel against Respondent.²
12. 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].
13. 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].
14. 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:

² 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.

- (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.

15. Respondent is the elected Prosecuting Attorney of Kanawha County, West Virginia.

As such, it is his 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.

16. To date, Respondent has made no effort to disqualify himself or his office from any case involving allegations of domestic violence.
17. Based on the information provided above, the Office of Disciplinary Counsel has received sufficient evidence demonstrating that Respondent has violated, and continues to violate, 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) as set forth above, 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. 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.

18. Furthermore, the conflict of interest cannot be waived. 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. His own interest in arguing such a defense limits both his and his office's ability to argue against any defense asserted by individuals being prosecuted in similar cases.
19. Additionally, 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. 97, 102, 416 S.E.2d 55, 60 (1992). "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).

20. Further, “the 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).
21. 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.
22. 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).
23. Respondent, the elected chief law enforcement officer in the county, has created a conflict of interest that cannot be waived, as set forth above, and thus, has violated Rule 1.7(b) of the West Virginia Rules of Professional Conduct.
24. Furthermore, Respondent’s continued representation of his client, the State of West Virginia, in cases in which allegations of domestic violence are involved, while facing criminal charges of having committed a domestic battery himself, poses a substantial

threat of irreparable harm to the public in that it undermines the integrity and impartiality of our system of justice³. 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.

25. Respondent's license should be immediately suspended, in part, because 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. 260, 265, 382 S.E.2d 313, 318 (1989). "Ethical 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.
26. 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.
27. There is sufficient evidence to establish that Respondent has committed a violation of the West Virginia Rules of Professional Conduct, that Respondent poses a substantial threat of irreparable harm to the public and there is good cause shown to

³Because 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."

immediately suspend his law license in the State of West Virginia and/or disqualify 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, until Respondent's underlying disciplinary proceedings before the Lawyer Disciplinary Board have been completed.

WHEREFORE, the Office of Disciplinary Counsel requests that the Court temporarily suspend Respondent from the practice of law, and/or disqualify 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, until Respondent's underlying disciplinary proceedings before the Lawyer Disciplinary Board have been completed.

Respectfully submitted,

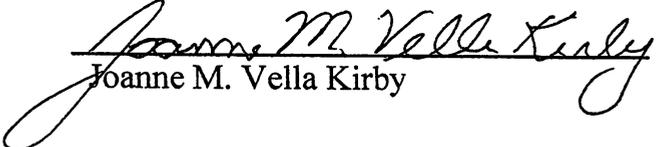
Office of Disciplinary Counsel, by


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CERTIFICATE OF SERVICE

This is to certify that I, **Joanne M. Vella Kirby**, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 11th day of April, 2014, served a true copy of the foregoing **“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 Respondent, Mark S. Plants, by mailing the same, United States Mail with sufficient postage, to the following addresses:

Mark S. Plants, Esquire
Kanawha County Prosecuting Attorney’s Office
301 Virginia Street East
Charleston, West Virginia 25301


Joanne M. Vella Kirby