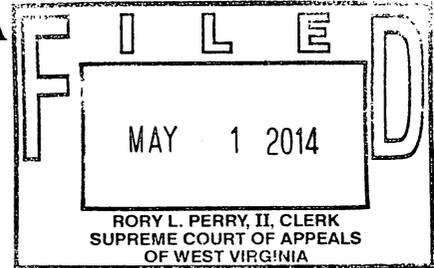


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**BEFORE THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA**



OFFICE OF LAWYER DISCIPLINARY COUNSEL,

Petitioner,

v.

Supreme Ct. No. 14-0348

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

Respondent

**RESPONDENT PLANTS' BRIEF IN SUPPORT OF HIS RESPONSE
RESISTING PETITION SEEKING HIS IMMEDIATE SUSPENSION AND/OR
HIS DISQUALIFICATION AND THAT OF THE KANAWHA COUNTY
PROSECUTING ATTORNEY'S OFFICE 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 as directed by the Order of this Honorable Court entered April 22, 2014, respectfully timely submits this brief of authorities and argument in support of his Response filed with this Honorable Court on April 18, 2014 resisting the Petition of the Office of Disciplinary Counsel (hereinafter "ODC") filed April 11, 2014.

That Response filed by Respondent in this matter urges this Honorable Court to conclude that the allegations of charged ethical misconduct do not meet the elements or standards clearly required by W.V.R.L.D.E. 3.27, that action upon the Petition as prayed by the ODC, particularly any suspension from practice, is unnecessary as the joint action by the Honorable Court, early action taken by Respondent and his office in proper respect for the reasonable expectations of the public and prompt recent action by the Circuit Court of Kanawha County have made such drastic measures unnecessary. Further Respondent here argues that such action is not necessary, given that the present arrangements carefully put in place protect the public's reasonable expectation of the ethics and honor of the bar and of the courts and that to suspend Respondent in such circumstance would unnecessarily and unfairly impact his individual rights in the defense of the criminal charges that are pending against him as well as any anticipated ethics charge that might later be filed.

ISSUES PRESENTED

The action of the Office of Disciplinary Counsel initiating the present action seeks extraordinary action by the Court pursuant to W.V.R.L.D.E 3.27 Extraordinary Proceedings (hereinafter "Rule 3.27"). While there is no question of the authority of this Honorable Court to act under such rule to seek the Rule's appropriate goals, serious and compelling reasons exist for the Court to agree that no action is presently required to obtain the proper goals of Rule 3.27 and to determine that justice requires that it decline further involvement in this proceeding, awaiting normal developments in the various proceedings in which Respondent is involved.

Further, Respondent argues that the full suspension prayed by the ODC in its Emergency Petition of April 11th, 2014 is an inappropriate, disproportionate remedy to seek the goals of Rule

3.27, the imposition of which penalty would cause unnecessary and unwarranted impact upon him personally as well as the Office of Prosecuting Attorney in Kanawha County, with the additional impact of causing him to defend unproven charges the accuracy and legal merit of which are subject to serious legal and practical question at the present time.

STATEMENT OF THE CASE

This proceeding was initiated with an emergency petition by the ODC, pursuant to W.V.R.L.D.E. 3.27 dated April 11, 2014 (“the Emergency Petition”) seeking the immediate suspension of Respondent, the elected Prosecuting Attorney of Kanawha County, West Virginia from all law practice and/or disqualification of Respondent and his office, that of the Kanawha County Prosecutor, from instituting and prosecuting allegations of domestic violence involving a parent or guardian and a minor child. The Petition, in summary, noted the existence of a criminal charge against Respondent, which charge is still in its early stages, which, in summary, alleged Respondent had committed the crime of domestic battery in violation of West Virginia Code §61-2-28(a) in that he had made “physical contact of an insulting and provoking nature with his family and household members, namely M.P., his juvenile son, and intentionally caused physical harm to said family member.” The Criminal Complaint further alleged that the complaint was lodged some four days after the alleged domestic battery incident by Respondent’s ex-wife, who indicated the injury was the result of a 20-second whipping and forced apology of M.P. with a belt after M.P. had been involved in a dispute with his step-brother over a scooter and forcibly took it away from him. The charge asserts M.P. alleged he had been struck more than ten (10) times with a leather belt, which Respondent denies. The alleged physical harm included

allegations of a single U-shaped bruise mark some six or seven inches long. The filing by the ODC included as Exhibits E and F, a defense Motion to Dismiss the criminal charge, supported by a Memorandum of West Virginia law presently applicable to such matters, which Memorandum indicates that such parental disciplinary actions as are charged do not constitute a violation of law in the State of West Virginia

Respondent, in his verified response filed here, readily admitted disciplining M.P. under the basic circumstances alleged in the Criminal Complaint but also reluctantly more fully described M.P.'s bullying incident and his reasons for administering discipline, denied striking M.P. more than a total of four times and that the incident took little over 20 seconds or so, including the apology, and was appropriate parental discipline for M.P.'s bullying of his younger, smaller step-brother. He notes that M.P. had made no immediate complaint of injury or unusual pain to himself or any other person. Further Respondent indicated that M.P.'s mother and he both were accustomed to disciplining M.P. by using a belt. In his Response Respondent also emphasized that the legal merit of the charge was highly questionable under West Virginia law as had been revealed in Exhibits E "Motion to Dismiss" and F "Memorandum in Support of Motion to Dismiss" of the ODC's Emergency Petition. Further, Respondent's Response alleged that ongoing disqualification actions previously taken in good faith by him and his office, some taken even before his receipt of the ODC Emergency Petition, and others before the civil prohibition proceedings to be determined after the date of the filing of his Response were reasonably calculated by him to address the reasonable expectations and demands of the public, the bar, the ODC and the Courts for the fairness, integrity and impartiality in the justice system in light of the charges pending against him and his overall response to them. By its Order of

April 22, 2014, this Honorable Court ordered that both Respondent and the ODC file briefs in support of their respective positions on or before Thursday, May 1, 2014 and that both parties appear before the Court for Rule 19 argument on Monday, May 5th, 2014.

In response to the April 22nd Order, Respondent now files his brief of authorities and arguments in support of his position that any action as prayed by the ODC under Rule 3.27 is unnecessary, would work unnecessary additional disruption of the Office of the Kanawha County Prosecuting Attorney and would work injury to his family and unfairness to him in his defense of the criminal charges. Upon filing of the Brief of the ODC, this matter will proceed to its scheduled argument on May 5, 2014 and this Honorable Court will then decide whether grant of extraordinary relief as prayed by the ODC is justified or appropriate.

SUMMARY OF ARGUMENT

Respondent argues that it is inappropriate to take any action under Rule 3.27 as (1) the matter is based upon mere allegations, not reliably established fact, (2) the facts now before the Court, even if true as alleged, do not constitute a crime under the law of State of West Virginia and either exercise of proper prosecutorial discretion or decision by a jury will so establish, thus a critical element supporting the Emergency Petition does not exist; (3) even if this Honorable Court assumes only the facts as alleged by the ODC to be true, they do not constitute an “extreme case of lawyer misconduct” justifying extraordinary action under Rule 3.27; (4) even assuming the facts alleged by the ODC to be true and to establish a valid charge of a crime, they fail to meet the “necessity” requirement implicit in Rule 3.27 in that other thorough and effective actions on the part of Respondent and by the City of Charleston and its Police Department, in

cooperation with Respondent and his Office and the Circuit Court of Kanawha County have provided full and adequate protection to the citizens of the state, the bar and the Courts making additional extraordinary action of the Supreme Court of Appeals in the form of the heavy penalty of suspension of Respondent's law license unneeded and potentially unnecessarily unfair and prejudicial to the personal rights of Respondent as he responds to the criminal charges and any ethics charge that may be lodged against him.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This is a proceeding under the Rules of Lawyer Disciplinary Procedure, specifically, its Rule 3.27. As an emergency proceeding this Honorable Court, in exercise of its wide supervisory powers over the bar and the justice system has, after review of the original Petition of the ODC and the Respondent's Response, has found "good cause" to exist in this matter and has ordered expedited briefing by the parties, due on May 1, 2014 and expedited argument on May 5, 2014 in this matter.

ARGUMENT

I. Based on Mere Allegations, Insufficient Basis For Extraordinary Rule 3.27 Action Exists

Review of the relatively few disciplinary cases that discuss the appropriateness of Court action under Rule 3.27, reveals that this Rule historically is based upon more than mere early-stage allegations of criminal conduct on the part of a Respondent. Indeed the name of Rule 3.27 "Extraordinary Proceedings" as well as the relative handful of situations in which Rule 3.27

action has been taken, underlines the appropriate policy that this Rule ought to be applied only when there is an extraordinary need for public protection.

In Syl. Pt. 1, Office of Disciplinary Counsel v. Battistelli, 193 W.Va.629, 457 S.E.2d 652 (1995) this Court has set a very high requirement for use of Rule 3.27, stating that “the special procedures outlined in Rule 3.27 of the West Virginia Rules of Lawyer Disciplinary Procedure should only be utilized in the most extreme cases of lawyer misconduct.” This is not, for a number of reasons discussed hereafter, such a case. Indeed, in Battistelli this Court found proceedings under Rule 3.27 appropriate when Battistelli had engaged in “an unprecedented and continuing pattern of inappropriate conduct meriting a serious sanction.” The pattern found by this Court was a series of proceedings, some of which numerous proceedings were in active prosecution by the ODC, in another a charge of lies to disciplinary counsel during disciplinary proceedings was made and apparently most importantly, continuing threat to the public was represented by charges of six unfair loan transactions indicating financial misconduct by Battistelli as to client funds, for which he never expressed recognition of the wrongfulness of his conduct. In contrast, the yet-unproven charge of a crime against Respondent which arises out of a family parental-discipline situation.

In ODC v. Hayhurst, 2010 WL 3322858 (2011) [ODC Filing], the “serious threat of irreparable harm” related to a final criminal conviction of Hayhurst for improper handling of federal income and FICA taxes withheld from employees of Hayhurst’s prior practice and alleged misappropriation of \$405,081.53 from employees. Clearly the facts relating to this prosecution called for some Court response to the irreparable harm which Hayhurst’s actions posed to the public’s opinion of the judiciary and the legal system. Respondent Plants’ alleged improper

conduct arises from a single incident of domestic nature - a disciplinary action taken in his home, clearly different as to type of alleged crime and degree of seriousness of the conduct alleged.

Similarly, ODC v. Nichols, 212 W.Va. 318, 570 S.E.2d 577 (2002) involved a situation in which this Court elected extraordinary action only after this Court found that there was at that time active prosecution by the ODC relating to numerous complaints of misrepresentation of case status to clients that created “ a threat of irreparable harm to the public.” Similarly, in ODC v. Grafton, 2011 WL 1870581 (2011) [ODC Filing] this Court confirmed, citing Battistelli that a pattern of deceitful activity toward clients constitutes a “substantial threat of irreparable harm to the public. In comparison, here there is no existing ethics prosecution based on a “probable cause” finding, as required by Rule 2.8(b), W.V.R.L.D.P., no pattern of improper conduct, but merely an early-stages investigation; the criminal charge is merely that - a charge and that charge subject to legitimate legal question as shown below. Using the Nichols analysis, we urge that the facts now before the Court in this matter show no clearly-established threat from any pattern or otherwise nor does the unproven charge pose irreparable harm as the purported harms listed in the emergency petition - objective prosecution and public confidence in prosecutors - have been fully addressed by less-“emergency”, appropriate and full procedures.

As support for its claim of “irreparable” damage due to public position, the ODC has cited a pre-Rule case Committee on Legal Ethics v. Roark, 181 W.V. 260, 382 S.E.2d 313 (1989) and we note that the finding of misconduct and of enhanced penalty occurred only after Roark had pled guilty and been convicted of six federal misdemeanor counts - relating to his possession of cocaine. Another of the few Rule 3.27 cases, considered to be a lead case, ODC v. Albers, 214 W.Va. 11, 585 S.E.2d 11 (2003), involved Court action and a finding of “extreme” need as

Albers had been involved in prior disciplinary proceedings in the form of an administrative suspension, was serving a one-year jail term and was awaiting possible indictment on an additional felony matter at the time Rule 3.27 proceedings began. In contrast, mere charges exist in this matter, as explained by Attorney Plants' Response, which charge is a misdemeanor and, as noted, unproven and subject to legitimate question as to legal support. In summary, the nature of the charge against Respondent in this proceeding lacks a sufficiently strong factual basis to justify imposition of the extreme sanction of a suspension from practice with the resulting impacts upon the operation of the Office of Prosecuting Attorney in Kanawha County and upon Respondent and his rights.

II. Facts Alleged by the ODC and in Respondent's Response Do Not Constitute a Crime

Clearly, the facts alleged by the ODC as the basis for the request for extraordinary relief here are those alleged by investigating police officials and contained within filings in the criminal proceeding against Respondent Plants. That there is a strong possibility that there will not be a conviction of the domestic assault charge must be considered when this Court weighs the wisdom of taking "emergency" steps that will be so detrimental to Respondent. Reference to the verified facts contained in Respondent's Response filed here illustrates that, when considered in the context of parental discipline, even if one assumes *arguendo* the truthfulness and accuracy of the most serious of the factual allegations made, no crime exists, as illustrated by the Motion to Dismiss and Memorandum in Support of Motion to Dismiss filed by Charleston defense counsel, James Cagle, Esq., on behalf of Respondent Plants, which documents are Exhibits E and F to the ODC's Petition in this matter.

Specifically, the Motion to Dismiss and its supporting Memorandum argue convincingly that proof of the misdemeanor crime of domestic battery requires elements of unlawful and intentional physical contact and unlawful and intentional physical harm to a family member. The Memorandum, which will not be reproduced here in full, due to space limitations, explains how much more severe handling and physical injury to children in parental discipline cases in West Virginia have established that a parent has authority to administer chastisement or correction to a child and that malice cannot be attributed to a defendant in a domestic battery case from the mere fact that a defendant administered correction to his child, nor can criminal intent be attributed to him from that fact alone - rather the chastisement must exceed the bounds of chastisement and “go to the extent of actually endangering the child’s life or limb”. The attack must be brutal and result in the infliction of serious injury upon the child. State v. McDonie, 89 W.Va.185, 109 S.E.2d 710 (1921). Establishing a clear fact situation for imposition of a criminal penalty for injury to a child, the child in McDonie had a torn ear, a deep abrasion of his lower lip, a tongue cut in several places, 68 cuts on his back, cuts to his hands and arm, a solidly bruised abdomen, scalded feet, other burns and scabs. In a much more recent, and factually closer, case Smith v. W.Va.Bd. of Education, 170 W.Va. 593, 295 S.E.2d 680 (1982) corporal punishment with a paddle by a principal administered as *in loco parentis* was not condemned as criminal in this Court’s discussion of the related civil claim where the student had multiple bruises and required prompt medical treatment in the hospital. Here, of course, no medical treatment was necessary and the bruising, according to all concerned, was not discovered for a period of days.

The Motion of Respondent also provides strong support for the broad authority for a parent to use corporal punishment for disciplinary purposes. Parental responsibility for damages

to children can arise from facts of significant injury or death from intentional or wilful conduct but liability does not arise from reasonable corporal punishment for disciplinary purposes.

Courtney v. Courtney, 186 W.Va. 413 S.E.2d 418 (1991). Indeed this Court has held that the Due Process Clause of the West Virginia and Federal Constitutions protect “the fundamental right of parents to make decisions concerning the care, custody and *control* of their children.”

The Motion and Memorandum for Respondent Plants also discusses the factually most-similar case John P.W. on behalf of Adam and Derek W. v. Dawn D.O., 214 W.Va 702, 591 S.E.2d 260 (2003). [“John P.W.”] Rejecting a claim of civil domestic battery in that the Appellant had not exceeded proper bounds of discipline, this Court found in John P.W. that, in the case in which the child, Adam, and his mother had a physical altercation in which he was alleged to have been scratched and/or bruised in the struggle, which injuries were contested and no medical attention was required, “[w]hile we do not go so far as to hold that physical harm which does not require medical attention cannot qualify as domestic violence...we do not find sufficient evidence of physical harm to meet the definition of physical violence.” This Court concluded that “[w]e cannot by any stretch of the imagination view the Family Court’s finding that the Appellant ‘exceeded the bound of propriety in attempting to discipline’ her child as sufficient to constitute to constitute an act of domestic violence...”

In John P.W. this Court stated “While there are clear exceptions to the broad authority afforded parents in rearing their children where a child’s ‘physical or mental health is jeopardized’ the evidence presented in this case does not rise to that level.” Id. Respondent argues in the criminal matter, and here, that applying this Court’s test in John P.W. which found the untreated scratching and/or bruising resulting from an act of parental discipline insufficient to

meet the civil burden of a domestic battery to the facts in Respondent's case, his conduct clearly cannot be held to be criminal. Respondent urges that his Motion ought to be successful and/or that its content should encourage an objective prosecutor to exercise appropriate discretion to withdraw the charges against Respondent Plants and that this Court should decide the present proceeding in light of its present holdings on the same and closely-related legal and factual situations.

The facts now before this court, including clear evidence that the disciplined child was not aware of the bruising for period of four days and neither complained to either parent nor sought medical treatment for the condition during that period, do not reasonably support a finding that there will likely be a conviction of Respondent Plants of domestic assault under the tests and rationale this Court has expressed in McDonie , Smith v Board and John P.W. thus initiation of any later disciplinary proceeding justifying any action against Respondent Plants is in serious question, making the extraordinary action of immediate full suspension sought by the ODC clearly inappropriate.

III. There is No "Extreme Case of Lawyer Misconduct"

Viewed purely in the context of the reasons for Rule 3.27 emergency petitions, the unproven and legally-flawed charges now lodged against Respondent, even if assumed *arguendo* to be supported by fact and law, do not rise to the level of the type of lawyer misconduct justifying the extreme action of emergency suspension by this Court.

As was mentioned in Part I. above, the extreme sanctions sought in this proceeding have traditionally been reserved for attorney conduct of clearly greater seriousness than here alleged.

As of this writing the only fact of Respondent Plants' actions clearly before this Court is that he has been *charged* with conduct which the ODC is actively investigating. When one contrasts the fact of a present un-adjudicated charge of misdemeanor domestic battery arising in a domestic situation with the circumstances of the use of the extreme sanction of interim suspension in ODC v. Albers in which Albers was incarcerated, had been on interim suspension, was then on reinstatement subject to supervision by a fellow attorney, was charged with a second criminal act arising from the family situation in which the first conviction had occurred, it is clear that the actions of Respondent Plants do not meet the "extreme lawyer misconduct" test necessary to imposition of any Rule 3.27 sanction.

Similarly, as noted above, Respondent Plants' factual situation does not rise to the level of facts reliably known to exist in the lead case of Battistelli : a ten-count Statement of Charges after proper probable cause finding by the ODC existed concurrently with filing of the emergency action plus a pattern of charges of neglect of client matters over an extended time and relating to a number of clients, coupled with misrepresentations to ODC staff and apparent inability to realize the impropriety of his conduct, showed clear propensity of Battistelli to engage in future conduct damaging to his clients. The actions of Respondent here, initially self-initiated and then cooperative, to deal with reasonable public concerns are the opposite of the Battistelli fact pattern. ODC v. Nichols also included a situation in which a pattern of misconduct involved repeated misrepresentations to clients as to the status of claims which actions caused a real threat that some claims might be lost by non-filing or neglect without swift action on the part of this Court.

Finally, in another recent case involving a charged Prosecuting Attorney, ODC v. Sparks, 2013 WL 5521906 (2013) [ODC Filing] immediate suspension was found appropriate upon Federal Charges against Mingo County Prosecuting Attorney Michael Sparks for conspiracy with Mingo County Circuit Court Judge Thornsby's efforts to violate the rights of a person targeted by the Judge and due to his involvement in a pattern of repeated failures to comply with specific ethical duties of prosecutors, specifically Rule 3.8, W.Va.R.P.C., and the duty to report improper judicial conduct under Rule 8.3(b), W.Va.R.P.C., all of which are serious charges clearly unlike the factual situation of Respondent Plants now before this Court.

Stated plainly, it is Respondent Plants' position that in light of the facts now before this Honorable Court, his actions while punishing his son simply do not rise to the type of conduct, legal or otherwise, that the public and this Court should reasonably and objectively classify as either "extreme misconduct" or "extreme lawyer misconduct." This is also true as to the unintentional and unfortunate later contact Respondent had with his children.

IV. Cooperative Action by Respondent and Others Has Made Further Action Unnecessary

Finally, Respondent argues that no further "extraordinary" action by this Court in the form of any suspension of Respondent Plants is warranted in light of the broad and effective response and jointly-agreed safeguards now in place. Specifically, after this Court's appointment of Michael D. Flanigan, Magistrate of Mercer County to Case No. 14M-1818 by its Administrative Order of March 21, 2014, and of a Special Prosecutor for the Plants case and filing of the Prohibition action by the City of Charleston and its Police Department.

Attached hereto is the Agreed Order of Disqualification of Judge Louis H. Bloom entered on April 23, 2014 in the civil prohibition action, City of Charleston v. Plants Civil Action No 14-P-189 in the Circuit Court of Kanawha County, West Virginia [the “Agreed Order”]¹. As this Court can see, the very thorough Agreed Order of Judge Bloom illustrates important facts which weigh against the necessity of any further action, much less the extreme sanction of any suspension of Respondent Plants’ law license, in response to the Emergency Petition. Of particular note, the Agreed Order shows that the Circuit Court is possessed of, and has utilized, appropriate authority effectively to address the situation in which Respondent Plants is involved and the full cooperation of Prosecuting Attorney Plants and of his entire staff from the early stages of the investigation against him to remove himself from any cases which the public reasonably might fear would be improperly influenced by his personal situation.² The Agreed Order also shows that, in conjunction with the Special Prosecutor now assigned to the Plants matter, the operation of the Kanawha County Prosecutor’s Office will be caused the minimum administrative disruption while addressing fully any legitimate public concerns about Respondent Plants’ fitness or objectivity as to any case resembling that which he is presently defending.

We wish the Court also to note, as an important matter, that in his earlier efforts as well as his later agreement to the Agreed Order, Petitioner Plants has shown that he is aware of, and is sensitive to, the importance of public perception that he is performing as Prosecuting Attorney

¹ Presentation of such additional documentation by Respondent Plants is authorized in Syl Pt. 2, Battistelli.

² See Agreed Order of Disqualification, Finding of Fact 17, describing such efforts and Judge Bloom’s Decision, Agreed Order, adopting the arrangement to which Respondent Plants and representatives of the City of Charleston have agreed in order to formalize the proper screening of Prosecuting Attorney Plants and his staff from any case the facts of which might reasonably raise public concern as to his objectivity and diligence.

without allowing his personal views and his present personal interest in a particular interpretation of the criminal law to impact or color his actions or those of his staff as prosecutor. In agreeing to the Order Respondent thus illustrates that he honors, and intends to effectuate, his duty to maintain the highest public respect for him as a prosecutor, for his staff, for the courts and the justice system and will continue diligently to pursue those goals during, and after, the present criminal proceedings.

We further point out that the Agreed Order clearly sets out “parameters for the Respondent and his office that will avoid the appearance of impropriety, conflicts of interest and a compromised legal system,” the very goals which the ODC has stated as the proper focus and goals of the present emergency proceedings. Agreed Order, Decision. We also note Judge Bloom’s confidence, from the presentations made before him, that Respondent Plants is aware of the public’s interest that his office be operated in a manner advancing public confidence in the propriety of his actions and those of his office. We further note that the limitations and disqualification upon Respondent and his office, limited appropriately, and by agreement, to the type of cases which an objective person would find similar and relevant to Petitioner’s case and to positions taken in his defense, nearly match, but slightly more narrowly, the very relief sought by the Office of Disciplinary Counsel in its Emergency Petition. Thus we argue that by Respondent’s recent voluntary cooperation and action by the Kanawha Circuit Court the resulting Agreed Order has, with precision and practical application, made the Emergency Petition and, particularly the harsh penalties urged by the ODC in the resulting proceeding unnecessary.

The Agreed Order is clearly calculated to address legitimate public concerns arising from Respondent Plants’ unfortunate present experience while avoiding unnecessary collateral damage

to the administration of the Prosecuting Attorney's Office in Kanawha County or to Respondent Plants and his family until proper disposition of the criminal charges against him. It effectively and wisely addresses in a properly narrow way the reasonable concerns of the public with the charges against Respondent Plants. We argue that a fair reading of all of the cases relating to the use of Rule 3.27 proceedings leads inevitably to the conclusion that there is a "necessity" requirement implicit in Rule 3.27 and that given the present circumstances, the facts now before the Court do not support that such a necessity exists. That the prayed full suspension of Respondent Plants is not necessary is clearly illustrated by the effective action of the Circuit Court of Kanawha County. It is also appropriate for this Court to consider that full suspension of Respondent Plants will necessarily result in the loss of his position as Prosecuting Attorney, with the ironic result that he will be unable to support the child and family involved in the present charges.

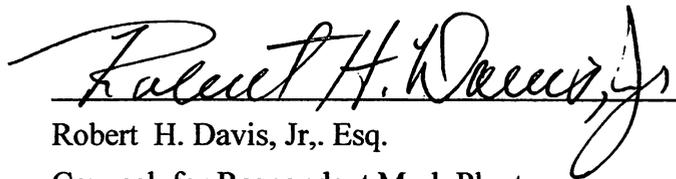
It is also evident that forcing a prompt disciplinary hearing, public by Rule 2.6, W.V.R.L.D.P., could also have direct and negative impact upon Respondent Plants' defense of the criminal charges against him. There is authority that deferral of a disciplinary proceeding when factually similar criminal charges are ongoing is appropriate, so as not to improperly impact the rights of a criminal defendant who is also an attorney. Committee on Legal Ethics v. Pence, 161 W.Va. 240, 240 S.E.2d 688 (1977). We urge that this ethics matter, given its underlying contested facts and probable lack of legal merit, is just such a situation, which also speaks to the "necessity" of emergency action. Therefore, on this additional argument, we urge that the present Rule 3.27 proceeding ought to be dismissed without further action by the Court

other than return of the entire matter to the ODC for its normal investigation and action, should such action be later determined to be justified.

CONCLUSION

Having now made our argument and having discussed the case law which supports our position, Respondent Plants respectfully prays this Honorable Court to find that the facts now before it illustrate that there is not a present substantial threat of irreparable harm to the public, the bar or the courts arising from an extreme case of proven or likely misconduct by Respondent Plants justifying necessary emergency action on the part of the Court and further prays that the present proceeding be ended, that this Court in its dismissal, express its approval and gratitude to Judge Bloom for his prompt and effective action taken, with the cooperation of Respondent and the City of Charleston, to uphold public confidence in the courts and justice system and that the entire ethics charge matter be returned to the Office of Disciplinary Counsel for further handling pursuant to its normal procedures.

Respectfully Submitted this the 30th of April, 2014.



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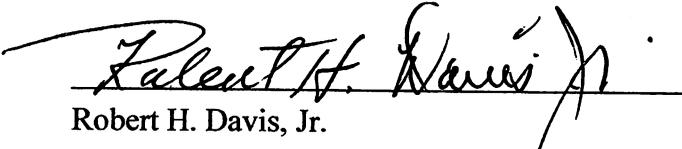
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CERTIFICATE OF SERVICE

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 **RESPONDENT PLANTS' BRIEF IN SUPPORT OF HIS RESPONSE RESISTING PETITION SEEKING HIS IMMEDIATE SUSPENSION AND/OR HIS DISQUALIFICATION AND THAT OF THE KANAWHA COUNTY PROSECUTING ATTORNEY'S OFFICE PURSUANT TO RULE 3.27 OF THE RULES OF LAWYER DISCIPLINARY PROCEDURE** and its accompanying exhibit **Agreed Order of Disqualification of April 23, 2014**, 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 30th April, 2014


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

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

CITY OF CHARLESTON
and CHARLESTON POLICE DEPARTMENT,
Petitioners,

FILED
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2014 APR 23 PM 12:33
KAWAHA COUNTY CIRCUIT COURT

v.

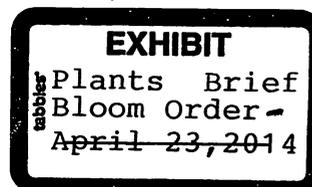
Civil Action No. 14-P-189
Judge Louis H. Bloom

MARK PLANTS, Prosecuting Attorney
of Kanawha County, West Virginia,
Respondent.

AGREED ORDER OF DISQUALIFICATION

On April 22, 2014, came the Petitioners, City of Charleston and Charleston Police Department (City, CPD, or Petitioners, collectively), by counsel, and Paul D. Ellis and R. Grady Ford, and the Respondent, Mark Plants, by Assistant Prosecuting Attorney, Daniel L. Holstein, for a hearing on the Petitioners' *Petition for Writ of Prohibition (Petition)* filed on April 14, 2014, and on the *Rule to Show Cause Order* entered by this Court on April 16, 2014. At the hearing, the Court heard argument from Mr. Ellis and Mr. Holstein and considered whether to disqualify the Respondent and the Kanawha County Prosecuting Attorney's Office from (1) instituting and prosecuting allegations of domestic violence involving a parent, guardian, or custodian of a minor child; (2) enforcing or prosecuting domestic violence contempt orders and violations thereof; and/or (3) participating in abuse and neglect proceedings under Chapter 49 of the West Virginia Code in the Circuit Court of Kanawha County.

The *Petition* generally alleges the Respondent should be disqualified and prohibited from prosecuting criminal matters pertaining to domestic violence between parents/guardians and minor children because the Respondent has been charged with physically abusing his child and violating a domestic violence protective order. On April 18, 2014, the Respondent filed his



Answer to Petition for a Writ of Prohibition, asserting that he should only be disqualified from prosecuting cases involving corporal punishment and that a writ of prohibition is unnecessary. The Respondent's *Answer to Petition for a Writ of Prohibition* further informed the Court of the *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 (Petition Seeking Immediate Suspension and/or Disqualification)* filed with the Supreme Court of Appeals of West Virginia by the Office of Disciplinary Counsel (ODC), by counsel, Joanna M. Vella Kirby and Rachael L. Fletcher, on April 11, 2014. Likewise, the Petitioners incorporated the ODC's *Petition Seeking Immediate Suspension and/or Disqualification* by reference in the instant *Petition* before this Court. Upon consideration of the evidence, the legal memoranda filed herein, and the applicable law, the Court finds and concludes as follows.

FINDINGS OF FACT

1. The Respondent is the duly elected Prosecuting Attorney for Kanawha County, West Virginia.
2. The City is a municipal corporation lawfully incorporated under the laws of West Virginia.
3. The CPD is a law enforcement arm of the City that, among other things, investigates, reports, and charges individuals suspected of domestic battery, abuse and neglect, violations of protective orders, injuries to children, and domestic violence involving parents/guardians and minor children.

4. The Respondent has been charged with domestic battery in Case No. 14M-2174 and with violating an *Emergency Protective Order* in Case No. 14M-1818. The following facts provide the chronology of events related to the charges.

5. On or about February 27, 2014, the Respondent's wife filed a *Domestic Violence Petition* with the Magistrate Court of Kanawha County, West Virginia, in Case No. 14-D-260, alleging that the Respondent, "by his own admissions, . . . spanked P.P. on his back thigh—leaving . . . bruises" ¹ Attached to the *Domestic Violence Petition* are pictures of messages, allegedly between the Respondent and his wife wherein the Respondent admits to "spanking" their child. ²

6. Based on the *Domestic Violence Petition*, on February 27, 2014, the Magistrate Court of Kanawha County, West Virginia, issued an *Emergency Protective Order* against the Respondent in Case No. 14-D-260. The Magistrate Court ordered the following: (1) the Respondent "shall refrain from abusing, harassing, stalking, threatening, intimidating or engaging in conduct that places the Petitioner and/or the following children . . . in reasonable fear of bodily injury: Allison Plants, P.P, and G.P.;" (2) the "Respondent shall refrain from contacting, telephoning, communicating with, harassing, or verbally abusing the Petitioner;" (3) the "Respondent shall refrain from entering any school, business, or place of employment of Petitioner or other person named herein for the purpose of violating this Order;" (4) the "Respondent shall refrain from entering or being present in the immediate environs of the Petitioner's residence;" and (5) the Respondent's wife "shall receive temporary custody" of the two children. ³ The *Emergency Protective Order* applies to the Respondent's wife and the two children. The Magistrate Court set a hearing on the *Emergency Protective Order* for March 5, 2014. ⁴

¹ Domestic Violence Pet., Case No. 14D-260.

² *Id.*

³ Emergency Protective Order at 3–6, Case No. 14D-260.

⁴ *Id.*

7. On March 10, 2014, the Magistrate Court of Kanawha County entered an *Order Continuing Hearing and Emergency Protective Order* in Case No. 14-D-260, resetting the March 5, 2014, hearing to March 21, 2014, while ordering the *Emergency Protective Order* to remain in full force and effect.

8. On or about March 17, 2014, the Respondent's wife contacted the police, alleging that the Respondent violated the *Emergency Protective Order* by "standing by her vehicle talking to their two children when she exited the Fruth Pharmacy along Oakwood Drive in Charleston, Kanawha Co., WV" ⁵ 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*. ⁶

9. On March 18, 2014, in the Magistrate Court of Kanawha County, West Virginia, the Respondent was charged with violating the *Emergency Protective Order* and entered a *Criminal Bail Agreement* in Case No. 14M-1818, which set bail at \$2,000.00 and released the Respondent on his own recognizance. ⁷

10. On March 21, 2014, the Supreme Court of Appeals of West Virginia entered an *Administrative Order* assigning Michael D. Flanigan, Magistrate of Mercer County, to Case No. 14M-1818.

11. On March 24, 2014, the Magistrate Court of Kanawha County again entered an *Order Continuing Hearing and Emergency Protective Order*, resetting the March 21, 2014, hearing to June 27, 2014, in Case No. 14-D-260. This continuance modified the *Emergency Protective Order* by an agreement of the parties. The agreement is attached to the March 24, 2014, continuance order.

⁵ Crim. Compl., Case No 14M-1818.

⁶ Hr'g, April 22, 2014.

⁷ Crim. Bail Agreement, Case No. 14M-1818.

12. On March 31, 2014, the Respondent was arrested for domestic battery in violation of section 61-2-28(a) of the West Virginia Code. The Respondent admits that he whipped his child on or about February 22, 2014, with a leather belt, but contends that his actions do not constitute domestic battery as defined in section 61-2-28(a).⁸

13. The Respondent's arrest is the result of a *Criminal Complaint* filed in Case No. 14M-2174 by Sergeant Matthew Adams of the West Virginia State Police against the Respondent, alleging that the Respondent, on February 22, 2014, "did unlawfully and intentionally make physical contact of an insulting and provoking nature with his family and household member, namely M.P. his juvenile son, and intentionally cause physical harm to said family member . . . by whipping M.P with a belt . . . [either] more than ten (10) times [or] three (3) or four (4) times."⁹ The *Criminal Complaint* states Sergeant Adams photographed a six-to-seven inch purple and brown 'U' shaped bruise on the back of the child's left thigh.¹⁰

14. In response to the *Criminal Complaint*, the Respondent filed a *Motion to Dismiss* in Case No. 14M-2174, asserting the Respondent "was acting as a parent to discipline his child, therefore, he was acting within a constitutionally protected right to control his child, and under West Virginia law, there is no liability from the reasonable use of corporal punishment for disciplinary purposes."¹¹

15. On March 31, 2014, the Respondent appeared before the Magistrate Court of Kanawha County in Case No. 14M-2174, and the Magistrate set bail at \$1,000 and released the Respondent on his own recognizance.¹²

⁸ Crim. Compl., Case No. 14M-2174; Mot. to Dismiss, Case No. 14M-2174, Apr. 7, 2014; Warrant for Arrest, Case No. 14M-2174.

⁹ Crim. Compl., Case No. 14M-2174.

¹⁰ *Id.*

¹¹ Mot. to Dismiss, Case No. 14M-2174, Apr. 7, 2014.

¹² Initial Appearance: Rights Statement, Case No. 14M-2174.

16. On April 11, 2014, the ODC filed its *Petition Seeking Immediate Suspension and/or Disqualification*, alleging that Rule 3.27 of the Rules of Lawyer Disciplinary Procedure requires the Respondent to be either suspended or disqualified under Rule 1.7 of the Rules of Professional Conduct.

17. At the hearing on April 22, 2014, Mr. Holstein asserted that the Respondent, as the Kanawha County Prosecuting Attorney, has been taking steps to avoid conflicts of interest, including withdrawing from cases with facts similar to the ones related to the charges against the Respondent. Mr. Holstein and Mr. Ellis agreed that, for the sake of the integrity of the legal system, the welfare of minors, and the public's interest in the same, the Court should establish parameters for the Respondent and his office that will avoid the appearance of impropriety, conflicts of interest, and a compromised legal system. The Court agrees.

CONCLUSIONS OF LAW

18. A writ of prohibition is an appropriate means through which a party may move a court to disqualify a lawyer.¹³

19. The West Virginia Supreme Court has stated: "Under the *Code of Professional Responsibility*, 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."¹⁴

20. Specifically, under Rule 1.7 of the Rules of Professional Conduct:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after consultation.

¹³ See *State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 412, 624 S.E.2d 844, 849 (2005); *State ex rel. Moran v. Ziegler*, 161 W. Va. 609, 244 S.E.2d 550 (1978).

¹⁴ Syl. pt. 2, *State ex rel. Taylor Associates v. Nuzum*, 175 W. Va. 19, 330 S.E.2d 677 (1985).

(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.¹⁵

21. Under section 7-4-1 of the West Virginia Code, "It shall be the duty of the prosecuting attorney 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."¹⁶

22. The Supreme Court of Appeals of West Virginia has stated that "the prosecutor is the guardian of the State's interest in the fairness and integrity of our criminal justice system."¹⁷ As the elected Prosecuting Attorney for Kanawha County, West Virginia, the Respondent is entrusted with prosecuting cases of domestic battery and other criminal matters wherein a parent, guardian, or custodian is charged, and a child is the victim. Additionally, the Respondent is entrusted with prosecuting criminal violations of domestic violence protective orders. As such, the Respondent represents the State of West Virginia.

23. In terms of Rule 1.7 of the Rules of Professional Conduct, the State of West Virginia cannot consent to a conflict of interest where the public interest is involved. The Supreme Court has explained this rule: "The rationale underlying this rule is quite simple, 'it is essential that the

¹⁵ W. Va. R. Prof'l Conduct 1.7.

¹⁶ W. Va. Code § 7-4-1.

¹⁷ *Hatcher*, 218 W. Va. at 415, 624 S.E.2d at 852.

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.’¹⁸

24. The City, by and through the CPD, is charged with the protection and promotion of the health safety, and welfare of its citizens, including, but not limited to, the protection of minors.¹⁹

25. The Court finds and concludes that the public interest is involved in the instant matter. It 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.

26. As a defendant in Case No. 14M-2174, the Respondent has asserted that his actions do not constitute domestic battery as defined in section 61-2-28(a) of the West Virginia Code.²⁰ As a defendant in Case No. 14M-1818, the Respondent has asserted that his actions do not violate the *Emergency Protective Order*. The Respondent’s assertions appear to materially limit the ability of the Kanawha County Prosecuting Attorney’s Office to properly prosecute certain cases as identified in this *Order*. Moreover, the State cannot consent to the apparent present conflict. Therefore, the Respondent and his 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

¹⁸ *State ex rel. Morgan Stanley & Co., Inc. v. MacQueen*, 187 W. Va. 97, 102, 416 S.E.2d 55, 60 (1992) (internal citations omitted).

¹⁹ W. Va. Code § 8-12-5(43)–(44).

²⁰ Section 61-2-28(a) of the West Virginia Code reads:

(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.

W. Va. Code § 61-2-28(a).

protection orders as addressed in Chapter 48, Article 27 of the West Virginia Code. The Court finds and concludes 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.

DECISION

Accordingly, the Court does hereby **ORDER** that the Respondent and the Office of the Prosecuting Attorney of Kanawha County, West Virginia, be **DISQUALIFIED** from prosecuting allegations involving the items enumerated above and consistent with this *Order* and the *Order Appointing Special Prosecutors*, as will be set forth by separate order, until such time as the Court determines. The Clerk is **DIRECTED** to send certified copy and to fax a copy of this *Order* forthwith to the counsel of record, the Petitioners, the Respondent, and the Lawyer Disciplinary Counsel at the following addresses:

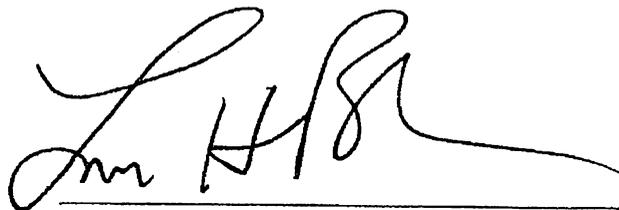
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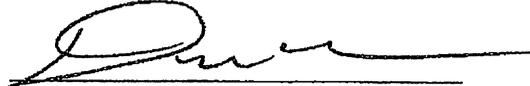
ENTERED this 23 day of April 2014.

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 23
DAY OF APRIL 2014.
Cathy S. Gatson, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
By M. Steward Deputy Clerk

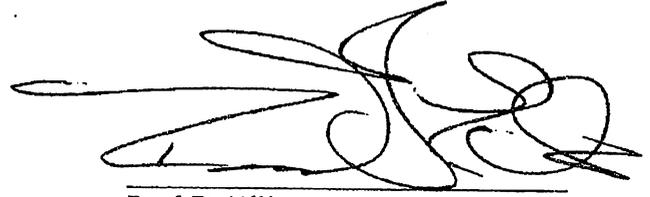


Louis H. Bloom, Judge

Agreed to by:



Daniel L. Holstein
Assistant Prosecuting Attorney



Paul D. Ellis
City Attorney of Charleston
R. Grady Ford
Assistant City Attorney of Charleston