Exhibit A

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 23-342

***THE HONORABLE TIMOTHY L. SWEENEY*,**

Petitioner,

v.

WILLIAM MUNDY, Chairman of the Lawyer Disciplinary Board Hearing Panel Subcommittee; LORETTA WALKER SITES, GAIL T. HENDERSON STAPLES, and CYNTHIA TAWNEY, Members of the Lawyer Disciplinary Board Hearing Panel Subcommittee; BRIAN K. CARR, M. PAUL MARTENEY, HARLEY O. WAGNER, JUSTIN MATTHEW RABER, JAY WILLIAM GERBER, JR., IRA ANDRE RICHARDSON, JORDAN W. WEST, and WELLS H. DILLON, members of the West Virginia State Bar; the WEST VIRGINIA LAWYER DISCIPLINARY BOARD; and the WEST VIRGINIA LAWYER DISCIPLINARY BOARD OFFICE OF DISCIPLINARY COUNSEL,

Respondents.

(From the Hearing Panel Subcommittee of the Lawyer Disciplinary Board – Supreme Court Nos. 21-0844, 21-0874, 21-0844, 21-0864, 22-0863, 22-0874, 22-0875, and 22-0845)

AMENDED PETITION FOR WRIT OF PROHIBITION

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TABLE OF CONTENTS

I. QUESTIONS PRESENTED....5

II. STATEMENT OF THE CASE....5

III. SUMMARY OF ARGUMENT....9

IV. STATEMENT REGARDING ORAL ARGUMENT....11

V. ARGUMENT....11

a. Issuance of a writ of prohibition is appropriate to prohibit enforcement of the HPS's Order compelling discovery from Judge Sweeney.....12

b. The judicial deliberative privilege applies to Judge Sweeney's testimony; therefore, it is not discoverable.....15

1. West Virginia has adopted the judicial deliberative privilege.....16

2. The judicial deliberative privilege extends to a judge's actions under Rule 2.15 of the Code of Judicial Conduct.....18

3. The information sought in Respondents' Subpoena is protected by the judicial deliberative privilege.....22

c. The information sought in the Subpoena is protected because Respondents have not shown a substantial need for the information.....24

d. Judge Sweeney is not the "complainant" for purposes of Rule 3.4 of the Rules of Lawyer Disciplinary Procedure.....27

e. Judge Sweeney should not be compelled to produce documents that relate to his reports to the JIC or the ODC.....30

VI. CONCLUSION....31

TABLE OF AUTHORITIES

CASES

Covington v Smith, 213 W. Va. 309, 582 S.E.2d 756 (W. Va. 2003) 29
D'Attilo v. Statewide Griev. Comm., 329 Conn. 624, 188 A.3d 727 (2018) 27
Gum v. Dudley, 202 W. Va. 477, 505 S.E.2d 391 (W. Va. 1997) 29
Harris v. Goins, 2016 U.S. Dist. LEXIS 114680, 2016 WL 4501466 (E.D. Ky. Aug. 26, 2016) 17, 24, 25, 26
In re Petition for a Writ of Prohibition, 111 Nev. 70, 893 P.2d 866 (1995) 27
In re W. Va. Rezulin Litig. v. Hutchison, 214 W. Va. 52, 585 S.E.2d 52 (2003) 13
In the Matter of Enforcement of Subpoena, 463 Mass. 162, 972 N.E.2d 1022 (Mass. 2012). 17, 21, 30
Lawyer Disciplinary Board v. Smoot, 228 W. Va. 1, 716 S.E.2d 491 (2010) 29
Marrs v. Kelly, 95 S.W.3d 856 (Ky. 2003) 25
People v. Drake, 841 P.2d 364 (Colo. App. 1992) 24
Rich v. Simoni, 235 W. Va. 142, 772 S.E.2d 327 (W. Va. 2015) 28
Standard Packaging Corp. v. Curwood, Inc., 365 F. Supp. 134 (N.D. Ill. 1973) 16
State ex rel. Johnson Controls, Inc. v. Tucker, 229 W. Va. 486, 729 S.E.2d 808 (2012) 12
State ex rel. Kaufman v. Zakaib, 207 W. Va. 662, 535 S.E.2d 727 (2000) ..... passim
State ex rel. Rose v. St. Paul Fire & Marine Ins. Co., 215 W. Va. 250, 599 S.E.2d 673 (W. Va. 2004) 28
State ex rel. York v. W. Va. Office of Disciplinary Counsel, 231 W. Va. 183, 744 S.E.2d 293 (2013) 12
State v. Williams, 30 Conn. App. 654 (Conn. App. Ct. 1993) 24
United States v. Dowdy, 440 F. Supp. 894 (W.D. Va. 1977) 17
United States v. Valenti, 120 F. Supp. 80 (D.N.J. 1954) 17

STATUTES

W. Va. Code § 17C-5-2 5
W. Va. Code § 5-11A-3 27
W. Va. Code § 60A-04-401 5

OTHER AUTHORITIES

Complainant, Ballentine's Law Dictionary (3d ed. 2010) 27

RULES

W. Va. Code of Judicial Conduct Rule 2.15 ..... passim
W. Va. Code of Judicial Conduct Rule 3.3 24
W. Va. Code of Judicial Conduct Rule 3.5. 22
W. Va. Law Disciplinary Proc., Rule 2.4 ..... 27, 28
W. Va. Law Disciplinary Proc., Rule 3.4 ..... passim
W. Va. R.A.P., Rule 18 10
W. Va. R.A.P., Rule 19 ..... 10, 11

I. QUESTIONS PRESENTED

This Petition presents questions of fundamental importance to the disposition of this case and the proper administration of justice: Whether the deposition testimony and documents sought from Judge Timothy L. Sweeney about his reasons and rationale for reporting potential attorney and judicial misconduct pursuant to Rule 2.15 of the Code of Judicial Conduct are protected from discovery by the judicial deliberative privilege, as adopted by this Court in *State ex rel. Kaufman v. Zakaib*, 207 W. Va. 662, 670, 535 S.E.2d 727, 735 (2000).

II. STATEMENT OF THE CASE

The facts of the underlying case involves the operation of a Program called the "Slow Down for the Holidays" (the "**Program**"), a collaboration between the Pleasants County Prosecuting Attorney, the City of St. Marys Police Department, and various Pleasants County magistrate judges. A.R. 1–3. Under the Program, each year, the magistrate judges and prosecuting attorney would agree to summarily, and with prejudice, dismiss certain agreed-upon traffic infractions during certain times of the year, in exchange for donations of gift cards or other consideration to the St. Marys Police Department. A.R. 1–2. According to the Statement of Charges filed against Brian K. Carr ("**Carr**") in 2021, Carr participated in the Program as municipal judge for the City of St. Marys and as Pleasants County Prosecutor. A.R. 2. From 2018 to 2020, Carr allegedly participated in the disposition of at least twenty (20) cases through the Program. A.R. 6–90. Judge Sweeney had no involvement with the Program at any time, either during the time that it was administered solely by the City of St. Marys, or as a part of any of the court cases that were dismissed in furtherance of the Program.

On November 8, 2020, Mary M. Ward was pulled over by a member of the Pleasants County Sheriff's Department for a suspected motor vehicle violation, and was later charged with

driving under the influence in violation of W. Va. Code § 17C-5-2(e)(i) and possession of a controlled substance without a prescription in violation of W. Va. Code § 60A-04-401(c). A.R. 086–87. After attorney Judith McCullough was appointed to represent Ms. Ward, the parties appeared at a pre-trial hearing on December 8, 2020. A.R. 87. At the hearing, Carr offered to dismiss the pending charges in exchange for Ms. Ward's payment of $1500 in cash of gift cards to the Program. A.R. 87. Despite attorney McCullough's admonition that the amount to be paid to the Program exceeded the costs and fines Ms. Ward faced if convicted, Ms. Ward directed attorney McCullough to accept the offer to dismiss the criminal charges. A.R. 87. The agreed-upon amount was subsequently paid, and the pending charges were dismissed on Carr's Motion by then-Pleasants County Magistrate Taylor on December 10, 2020. A.R. 88.

After the pending charges had been dismissed, attorney McCullough notified Judge Sweeney in his capacity as the Circuit Judge for West Virginia's Third Judicial District of her recent involvement with the Program on behalf of Ms. Ward, and concerns that she had about its administration. A.R. 105, 118, 127. Upon hearing of the *Ward* case from attorney McCullough, Judge Sweeney had ethical concerns about it. A.R. 118, 127. Pursuant to his obligations under Rule 2.15 of the West Virginia Code of Judicial Conduct, Judge Sweeney contacted the Judicial Investigation Commission ("**JIC**") and the Office of Lawyer Disciplinary Counsel ("**ODC**") and informed them of the circumstances of the Program as relayed to him by Ms. McCullough. A.R. 118, 127. Judge Sweeney never made a formal written complaint, and neither the JIC nor the ODC required or requested that he do so. A.R. 118, 127.

Instead, the ODC exercised its inherent authority to conduct its own investigation *sua sponte* into the Program and its participants. A.R. 114–15, 118–19. Many respondents self-reported, including Carr. *See* A.R. 180. Eventually, the ODC issued formal charges against the

Respondents, and the matter was ultimately referred to the Hearing Panel Subcommittee ("**HPS**") of the Lawyer Disciplinary Board ("**LDB**") pursuant to the West Virginia Rules of Lawyer Disciplinary Procedure. A.R. 3. The HPS has the power to conduct a hearing on the charges and make findings of fact, conclusions of law, and recommendations as to discipline. W. Va. Law Disciplinary Proc., Rule 3. The charges that were brought against each of the attorneys involved their participation in one or more of the cases that were disposed of through the Program. Given his role as Circuit Judge, and the manner in which each case was involved, Judge Sweeney had no involvement in any of these cases.

On April 11, 2023, the HPS entered an order granting Carr's Motion to Depose Complainant. A.R. 110. The next day, ODC filed a motion to reconsider, explaining how the Program had come to its attention, and that it was the ODC's position that it was the complainant in the cases, based at least in part on the self-reports that had been made to it. A.R. 118–19. On April 16, 2023, HPS denied the motion to reconsider, holding that Judge Sweeney and Judith McCullough were the complainants who the Respondents could depose under W. Va. Rule of Lawyer Disciplinary Procedure 3.4. A.R. 138–40. The HPS directed that the depositions occur no later than May 19, 2023. A.R. 140.

On April 26, 2023, Respondents served a subpoena on Judge Sweeney (the "**Subpoena**") to produce:

> Any and all paper and/or digital/electronic files, documents, writings, e-mails, text messages, and notes, evidencing any report, notice, or communication with the Judicial Investigation Commission and its counsel, JDC, and the Lawyer Disciplinary Board and its counsel, ODC, concerning the "Slow Down for the Holidays" program authorized, created, operated, and maintained by the City of St. Marys, West Virginia, and any misdemeanor criminal cases filed and adjudicated by the Pleasants County Magistrate Court during the years 2018 through the present, which involved in any way the referral, deferral, or dismissal of same so that a Defendant could participate in the "Slow Down for the Holidays" program.

A.R. 160–61. The Subpoena also demanded that Judge Sweeney appear for a deposition in this case on May 9, 2023 to allow Respondents to depose Judge Sweeney about the above communications with JIC, JDC, LDB, and ODC and his basis and/or reasons for such reports and/or communications. A.R. 160.

By May 4, 2023, JIC, ODC, and Judge Sweeney had all filed separate motions to quash the Subpoena. A.R. 162–222. In his Motion, Judge Sweeney asserted that the documents and testimony sought by the Subpoena were protected by the judicial deliberative privilege, that Judge Sweeney's testimony and documents could only be compelled if they were necessary and that no showing of necessity had been made, that Judge Sweeney was not required to respond to the Subpoena because he was not the complainant, and that he could not produce the documents over which he is not a custodian. A.R. 191–200. Carr filed his responses to JIC's and ODC's motions on May 7, 2023, but he never addressed or responded to Judge Sweeney's Motion. A.R. 223–33.

On May 8, 2023, HPS Chairman William Mundy summarily denied all three motions in a one-page order. A.R. 259–60. On May 12, 2023, Judge Sweeney filed a Motion to Stay Deposition and Discovery Pending his filing a Writ of Prohibition to this Court, which the HPS granted the same day. A.R. 264. On May 18, 2023, HPS entered a supplementary memorandum in which it set forth the basis for denying the motions to quash. A.R. 268–74. As to Judge Sweeney's Motion, the HPS simply held that the judicial deliberative privilege, and this Court's ruling applying it in *State ex rel. Kaufman v. Zakaib*, 207 W. Va. 662, 670, 535 S.E.2d 727, 735 (2000), did not apply because "[t]here have been no allegations that Judge Sweeney was acting as a judge in any of the respondents' cases or that he was a decision maker or played any role in any of the respondents' cases." A.R. 273. The HPS made no findings or conclusions of any kind with respect to Judge Sweeney's contention that the judicial deliberative privilege applies to a judge's

exercise of his or her obligations under Rule 2.15 of the Code of Judicial Conduct in responding to potential judicial or lawyer misconduct or any of his other arguments as to why the subpoena should be quashed. *Compare* A.R. 196–97 *with* A.R. 273.

III. SUMMARY OF ARGUMENT

This Court should issue a writ of prohibition to prohibit the HPS from enforcing its Order and the Subpoena served on Judge Sweeney because (1) the information sought is protected by the judicial deliberative privilege, (2) subpoenas against judges cannot be granted unless the information sought in the subpoena is necessary to establish an essential element of the case or exceptional circumstances exist to warrant such discovery, (3) Judge Sweeney is not the complainant for purposes of Rule 3.4 and cannot be deposed in this case, and (4) Judge Sweeney should not have to produce documents that are privileged and are not in his custody as its legal custodian.

First, the judicial deliberative privilege prohibits discovery of any information sought in the Subpoena. The judicial deliberative privilege is an absolute bar on discovery regarding "the reasons that motivated [judges] in their official acts." *State ex rel. Kaufman v. Zakaib*, 207 W. Va. 662, 670, 535 S.E.2d 727, 735 (2000). It is not limited solely to cases over which a Judge presides, but necessarily extends to a judge's professional obligation to take action regarding known or potential violations of a judge's or attorney's ethical duties. *See* W. Va. Code of Judicial Conduct Rule 2.15. Judge Sweeney's actions regarding the Program were performed in accordance with those special professional obligations. Since the information sought by the Subpoena is about the reasons why Judge Sweeney took those actions, the judicial deliberative privilege protects all information sought by the Subpoena. Judge Sweeney cannot be compelled to testify or produce

documents regarding that privileged information, and the HPS should be prohibited from enforcing its Order requiring that he do so.

Second, and alternatively, public policy in West Virginia and other states prohibits judges from being compelled to respond to a subpoena unless the subpoenaed information is necessary to establish an essential element of the case. There has been no showing as to why the information sought from Judge Sweeney is necessary or relevant in the context of these proceedings. On the contrary, it is evident that the information sought from Judge Sweeney is not necessary or relevant; the same information can be obtained from non-judicial sources, if it is needed at all. Therefore, Judge Sweeney cannot be compelled to respond to the Subpoena, and HPS should be prohibited from enforcing that Subpoena.

Third, Respondents' and HPS's sole justification for enforcing the Subpoena is that Rule 3.4 of the West Virginia Rules of Lawyer Disciplinary Procedure allows a respondent to depose the complainant. But Judge Sweeney is not the complainant for purposes of that Rule. Rule 3.4 only allows discovery from third parties who have personal knowledge about the factual basis for the complaint, and it does not extend to judges who fulfill their obligations under Rule 2.15 of the Code of Judicial Conduct by making reports to the JIC, ODC, or other appropriate entities.

Fourth, Judge Sweeney should not be compelled to produce any documents that are subject to the judicial deliberative privilege, or documents over which he is not the custodian. This includes all magistrate court files or records from his @wvcourts.gov email address, which are controlled by the Pleasants County Magistrate Court Clerk and the West Virginia Supreme Court of Appeals, respectively.

IV. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 18(a)(3) of the West Virginia Rules of Appellate Procedure, Judge Sweeney believes that this case can be decided on the briefs without oral argument because it involves the application of the judicial deliberative privilege that has been authoritatively decided by this Court in *Zakaib*. If the Court deems oral argument advisable, the matter should be set for argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure because it involves the application of settled law. If oral argument under Rule 19 is granted, Judge Sweeney believes that the matters raised herein are appropriate for resolution by memorandum decision.

V. ARGUMENT

In *State ex rel. Kaufman v. Zakaib*, 207 W. Va. 662, 670, 535 S.E.2d 727, 735 (2000), this Court adopted the judicial deliberative privilege as a fundamental part of West Virginia law and broadly applied it to prohibit litigants from forcing judges to testify in discovery about their reasons and rationale for judicial decisions and actions. From a policy standpoint, this decision was both reasonable and necessary to protect the independence and operation of the judiciary and the critical role that judges play in our system of criminal and civil dispute resolution. To ensure its broad application, this Court held that the privilege prohibited discovery from judges—even about purely factual matters—if the inquiry could invade or compromise the mental processes employed by the judge in decided whether or how to act in his or her official capacity.

The HPS's decision requiring Judge Sweeney's deposition, along with the production of his email communications his staff, the JIC, and/or the ODC, fundamentally limits the judicial deliberative privilege both by limiting its application to cases over which a judge actually presides, and by excluding judicial decisions made pursuant to Rule 2.15 of the Code of Judicial Conduct from its scope. The HPS offered no legal basis or rationale for its decision, implicitly reasoning

that Carr's request to ask Judge Sweeney what he knew about the Program somehow justified a razor-thin reading of *Zakaib,* and an unprecedented and unwarranted narrowing of its application.

This Court should exercise its original jurisdiction and issue a writ of prohibition to the HPS to preclude the enforcement of the subpoena for Judge Sweeney's testimony and documents for four reasons. First, this Court's decision in *Zakaib* clearly protects judges like Judge Sweeney from being compelled to testify or produce documents about their official judicial acts through the judicial deliberative privilege. The exception to the privilege that the HPS crafted to compel Judge Sweeney to comply with Carr's subpoena simply does not exist. Second, assuming *arguendo* that a judge's actions in deciding whether to take action pursuant to Rule 2.15 of the Code of Judicial Conduct, and ultimately taking appropriate action, is somehow not deliberative, then discovery from a sitting judge is only appropriate if exceptional circumstances exist warranting such discovery. The HPS made no finding as to the existence of such circumstances because none exist in this case. Third, Judge Sweeney is not a "complainant" who may be deposed under Rule 3.4. And fourth, Judge Sweeney cannot produce many of the documents requested, as they are privileged and he is not the custodian of his @wvcourts.gov email or the magistrate court criminal records.

a. **Issuance of a writ of prohibition is appropriate to prohibit enforcement of the HPS's Order compelling discovery from Judge Sweeney.**

In *State ex rel. York v. W. Va. Office of Disciplinary Counsel*, 231 W. Va. 183, 187, 744 S.E.2d 293, 297 (2013), this Court explained that "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court.[1] It will only issue where the trial court has no

[1] This Court has applied the same principles applicable to a trial court under a writ of prohibition against actions by the LDB and ODC connection with alleged ethics violations because they act "as a quasi-judicial tribunal." *Id.* at 297 n.5 (citations omitted). Therefore, all principles applicable to a trial court in the authorities cited herein are equally applicable to the HPS.

jurisdiction or having such jurisdiction exceeds its legitimate powers." In determining whether a writ of prohibition is proper, this Court has held that it will examine five relevant factors:

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the tribunal's order is an oft repeated error of law or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

State ex rel. Johnson Controls, Inc. v. Tucker, 229 W. Va. 486, 493, 729 S.E.2d 808, 814 (2012). In evaluating these factors, this Court does not need to find that all factors are present; rather, it may use a combination of the factors to grant the writ. *Id.*

This Court had held that where an adjudicative body wrongfully orders a deposition of a judge to take place, a writ of prohibition should be granted in favor of the judge. *State ex rel. Kaufman v. Zakaib*, 207 W. Va. 662, 672, 535 S.E.2d 727, 737 (2000). Just as the above factors weighed in favor of a writ of prohibition in *Zakaib*, so all five factors above weigh in favor of granting a writ of prohibition in the case at bar.

First, Judge Sweeney has no other adequate means, such as direct appeal, to prevent enforcement of the Subpoena. Rule 3.4 of the Rules of Lawyer Disciplinary Procedure states simply, "The Chairperson of a Hearing Panel Subcommittee shall have authority to hear and resolve objections to discovery," and those Rules provide no method of appealing the Chairperson's decision on those discovery matters. Judge Sweeney has moved the HPS to quash the Subpoena, but the HPS denied Judge Sweeney's motion. Judge Sweeney has no other remedy before the HPS and has no ability to directly appeal the HPS's decision. As a result, a writ of prohibition is the appropriate, and only, mechanism for relief. Therefore, factor (1) weighs in favor of granting the writ of prohibition in favor of Judge Sweeney.

Second, Judge Sweeney will be damaged or prejudiced in a way that is not correctable on appeal. As stated above, Judge Sweeney has no ability to directly appeal HPS's decision. But even if he were able to appeal the decision, any such appeal would come too late. Judge Sweeney will have been compelled to produce documents which he has no authority to produce, sit for a deposition in violation of West Virginia law, and disclose privileged information. These damages cannot be remedied after the fact. Therefore, factor (2) weighs in favor of granting the writ of prohibition in favor of Judge Sweeney.

Third, HPS's order is clearly erroneous as a matter of law. This Court has stated, "it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." *In re W. Va. Rezulin Litig. v. Hutchison,* 214 W. Va. 52, 62, 585 S.E.2d 52, 62 (2003). The other portions of the discussion section of this Petition demonstrate why the HPS's order is clearly erroneous as a matter of law, and therefore, factor (3) weighs in favor of granting the writ of prohibition in favor of Judge Sweeney.

Fourth, while the HPS's order appears to be the first of its kind in this context, the potential for the HPS's error to be repeated in future LDB proceedings is great. Judges are duty-bound to report lawyer or judge misconduct that may violate applicable ethics rules to the appropriate governing bodies. If the HPS is not prohibited from enforcing the Subpoena, other HPSes in future lawyer disciplinary proceedings may similarly allow respondents to wrongfully depose judges on privileged information. This Court should act here to prevent past, current, and future repeated errors of law by HPS. Therefore, factor (4) weighs in favor of granting the writ of prohibition in favor of Judge Sweeney.

Fifth, HPS's order does not raise new problems or issues of law. The rules of law prohibiting HPS from compelling Judge Sweeney's testimony is well-established in West Virginia

under this Court's decision in *Zakaib*, and has been followed and applied by courts nationwide. Nonetheless, the issues of law raised herein are important for the judiciary. HPS's order will negatively impact the judiciary's special status, dignity, and independence, and the chilling effect on judicial reporting of professional misconduct will be significant. Therefore, factor (5) weighs in favor of granting the writ of prohibition in favor of Judge Sweeney.

Therefore, in line with the well-established factors and analysis outlined above, this Court should grant a writ of prohibition in this case, prohibiting HPS from enforcing its order enforcing the Subpoena to Judge Sweeney.

b. <u>The judicial deliberative privilege applies to Judge Sweeney's testimony; therefore, it is not discoverable.</u>

Judge Sweeney's testimony is not discoverable because it is protected by the judicial deliberative privilege. Privileged information is protected from discovery by Rules 26 and 45 of the West Virginia Rules of Civil Procedure. One such privilege—the judicial deliberative privilege—applies to all documents and testimony regarding "the reasons that motivated [judges] in their official acts." *State ex rel. Kaufman v. Zakaib*, 207 W. Va. 662, 670, 535 S.E.2d 727, 735 (2000). The purpose behind the judicial deliberative privilege is to protect the status, dignity, and independence of the judiciary.

The judicial deliberative privilege applies not just to decisions from the bench; it also applies to a judge's other professional obligations. One such obligation is Rule 2.15 of the Code of Judicial Conduct, which ***requires*** judges to take "appropriate action" where the judge believes a lawyer's conduct might be in violation of the Rules of Professional Conduct. Since these actions are mandatory for judges, they are necessarily "official acts," and therefore protected by the judicial deliberative privilege. Applying the judicial deliberative privilege to a judge's decision-making and actions under Rule 2.15 promotes the same policy reasons that underlie the judicial

deliberative privilege—the status, dignity, and independence of the judiciary. Since the testimony and documents sought by the Subpoena are directed to Judge Sweeney's decision-making and actions pursuant to Rule 2.15, and since those actions are protected by the judicial deliberative privilege, the HPS clearly erred in ruling that they are discoverable.

1. **West Virginia has adopted the judicial deliberative privilege.**

This Court officially recognized and adopted the judicial deliberative privilege in *State ex rel. Kaufman v. Zakaib*, 207 W. Va. 662, 535 S.E.2d 727 (2000). In that case, a husband and wife were engaged in litigation related to a divorce before Judge Tod J. Kaufman in Kanawha County. *Id.* at 666, 731. The husband filed a separate civil lawsuit that was assigned to, and pending before, Judge Paul Zakaib against the wife's attorney and her expert, claiming that they conspired to provide false information to the divorce judge. *Id.* In the course of the civil case before Judge Zakaib, the husband sought to depose Judge Kaufman. *Id.* Judge Kaufman argued that his entire testimony was privileged, but Judge Zakaib nonetheless ordered the deposition to be taken. *Id.* Judge Kaufman then sought a writ of prohibition from this Court to prevent Judge Zakaib from enforcing the order. *Id.* at 666–67, 731–32. This Court granted Judge Kaufman's petition and held that the entirety of his proposed testimony was protected by the judicial deliberative privilege. *Id.* at 667, 732.

In so holding, this Court made clear that "judicial officers may not be compelled to testify concerning their mental processes employed in formulating official judgments or the reasons that motivated them in their official acts." *Id.* at 670, 735. This Court did not limit the privilege solely to rulings made by a judge in a case over which he or she was presiding. To the contrary, this Court explained that the privilege applies if two basic conditions are met: "a judge must be acting as a judge, and … it is information regarding his or her role as a judge that is sought." *Id.* Even

in instances where the information sought from a judge in discovery is purely factual in nature, the privilege applies if the inquiry could invade or compromise the judge's mental processes in deciding whether or how to act on an official matter:

> The essential line of demarcation appearing from the cases is that judicial and quasi-judicial officers may be compelled to testify only as to relevant matters of fact that do not probe into or compromise the mental processes employed in formulating the judgment in question. . . . Thus, even though a particular inquiry may be factually directed, it may still be objectionable if it invades upon an official's good-faith decision-making prerogatives.

Id. at 670, 735 n.9 (quoting *Standard Packaging Corp. v. Curwood, Inc.*, 365 F. Supp. 134, 135 (N.D. Ill. 1973)). "The prohibition against compelling the testimony of a judge is reflected in a long-standing principal of our jurisprudence, namely, that a court speaks only through its orders." *Id.* at 671, 736. Other courts have described West Virginia's judicial deliberative privilege as "narrow but absolute." *Harris v. Goins*, 2016 U.S. Dist. LEXIS 114680, *3, 2016 WL 4501466 (E.D. Ky. Aug. 26, 2016) (quoting *In the Matter of Enforcement of Subpoena*, 463 Mass. 162, 972 N.E.2d 1022, 1033 (Mass. 2012)).

This Court identified the core policy reasons behind the privilege: to protect the status, integrity, and independence of the judiciary. "While recognizing that judges are subject to the rule of law as much as anyone else, the Court cannot ignore the special status that judges have in our judicial system, and the effect this difference has on the process." *Zakaib*, 207 W. Va. at 668, 535 S.E.2d at 733. This Court explained that "in the context of the courtroom, a judge holds a special status," which is why, for instance, judges cannot testify in a case over which he or she presides or testify as a character witness. *Id.* (citations omitted). "Should a judge be vulnerable to subpoena as the basis of every action taken by him, the judiciary would be open to 'frivolous attacks upon its dignity and integrity, and … interruption of its ordinary and proper functioning.'" *Id.* at 670,

735 (quoting *United States v. Dowdy*, 440 F. Supp. 894, 896 (W.D. Va. 1977) (citing *United States v. Valenti*, 120 F. Supp. 80 (D.N.J. 1954))).

Since *Zakaib*, other courts have similarly adopted and applied the judicial deliberative privilege to protect the status and independence of the court. For example, the Massachusetts Supreme Court has explained: "Independence means freedom from every form of compulsion or pressure …. The moment a decision is controlled or affected by the opinions of others or by any form of external influence or pressure, that moment the judge ceases to exist." *In re Enforcement of a Subpoena*, 463 Mass. 162, 170, 972 N.E.2d 1022, 1030 (2012). The court further explained:

> The threat that any of the many such decisions a judge must make—very frequently unpopular with one party or the other—might lead to a requirement that the judge detail his internal thought process weeks, months, or years after the fact would amount to an enormous looming burden that could not help but serve as an 'external influence or pressure,' inconsistent with the value we have placed on conscientious, intelligent, and independent decision–making.

Id. at 172, 1031.

The judicial deliberative privilege exists to achieve these policy goals. It broadly prohibits judges from testifying regarding as to "the reasons that motivated them in their official acts." *Zakaib*, 207 W. Va. at 670, 535 S.E.2d at 735. Under *Zakaib*, the test to determine its applicability is simple and straightforward: "a judge must be acting as a judge, and … it is information regarding his or her role as a judge that is sought." *Id.* at 670, 735.

2. **The judicial deliberative privilege extends to a judge's actions under Rule 2.15 of the Code of Judicial Conduct.**

The judicial deliberative privilege extends to a judge's unique professional obligations under the West Virginia Code of Judicial Conduct to respond appropriately to potential violations of the Rules of Professional Conduct. This is because a judge's actions pursuant to his or her

special ethical obligations satisfies the rule in *Zakaib*, and because protecting those actions achieves the policy goals behind the judicial deliberative privilege.

It is beyond dispute that Judges have special obligations under the Code of Judicial Conduct to take action regarding suspected violations of the Rules of Professional Conduct. Rule 2.15 of the Code of Judicial Conduct reads:

> (B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.
> …
> (D) A judge having knowledge indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.

Comment 1 to Rule 2.15 explains the policy reasons for that rule: "Ignoring or denying known misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to **ensure public respect for the justice system**. This Rule limits the reporting obligation to those offenses that **an independent judiciary must vigorously endeavor to prevent**." (emphasis added). A judge has discretion regarding what actions to take to satisfy Rule 2.15(D), but Comment 2 to Rule 2.15 suggests, among other things, "reporting the suspected violation to the appropriate authority or other agency or body."

These ethical obligations are covered by the privilege for two reasons. First, they are "official acts" of the judge in his capacity as judge, so deliberative information regarding those acts are protected under *Zakaib*. Under *Zakaib*, the judicial deliberative privilege protects judges from testifying or being forced to produce documents regarding "the reasons that motivated them in their official acts." *Zakaib*, 207 W. Va. at 670, 535 S.E.2d at 735. If a judge is acting within his or her role as a judge, and "it is information regarding the discharge of that role as a judge that is sought," then the privilege applies. *Id.* at 670, 735. When a judge acts under Rule 2.15, those

are not acts in the judge's personal capacity as an individual; rather, they are the judge's "official acts." After all, Rule 2.15 says the judge "**shall** inform the appropriate authority" and "**shall** take appropriate action"; while private individuals have no such reporting obligations, judges have affirmative duties to do so, simply by virtue of their position as judge. As such, under *Zakaib*, all information regarding "the reasons that motivated them" in acting under Rule 2.15—including purely factual inquiries—is protected by the judicial deliberative privilege.

Second, the policy reasons behind the judicial deliberative privilege— protecting the status, dignity, and independence of the judiciary—apply with particular force to a judge's ethical obligations under Rule 2.15. This Court noted in *Zakaib* that judges hold a "special status" which prevents judges from testifying in various ways, including as a character witness. *Zakaib*, 207 W. Va. at 668, 535 S.E.2d at 733. But Rule 2.15 requires a judge to take action where a lawyer's violation of the Rules of Professional Conduct "raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer." Thus, if a judge were to testify regarding an action he or she took pursuant to Rule 2.15, the judge would necessarily be forced to testify about the lawyer's character—i.e. his "honesty, trustworthiness, or fitness." Therefore, requiring judges to testify regarding their actions under Rule 2.15 would erode the unique or special status of judges in West Virginia and require them to provide testimony about the character of the lawyer about whom a Rule 2.15 report was made.

Protecting actions under Rule 2.15 through the judicial deliberative privilege also protects the dignity of the judiciary. This Court noted in *Zakaib*, "Should a judge be vulnerable to subpoena as the basis of every action taken by him, the judiciary would be open to 'frivolous attacks upon its dignity and integrity ….'" *Id.* at 670, 735 (citations omitted). Without the judicial deliberative privilege, judges could be deposed any time they take action against a lawyer pursuant to Rule

2.15. In that deposition, the judge's decision-making process would likely be placed under intense scrutiny by the people most critical of his decision. Questions may include:

- Why did the judge find X evidence more convincing than Y evidence?
- Why did the judge interpret a rule of professional conduct the way he did, when Z authority interprets it differently?
- Why did the judge take the action he took, rather than another, allegedly more "fair" course of action?
- Why did the judge consider lawyer Y's actions worthy of a Rule 2.15 report when lawyer Z's conduct was arguably worse?
- Have you seen similar conduct by other lawyers in the past? Why did you decide to make a Rule 2.15 report about my client now, when you didn't do so in the past?

The judiciary's authority, dignity, and integrity would thus be routinely challenged by persons whose careers and reputations depend on the trustworthiness of the judge's decision. Ironically, the very purpose of Rule 2.15 is "to ensure public respect for the judicial system," but without the protection of the judicial deliberative privilege, Rule 2.15 would only encourage public *disrespect* of that system by forcing judges to undergo this type of examination each time a Rule 2.15 report is made. Given the judge's role in this context, the judicial deliberative privilege must apply to a judge's actions under Rule 2.15 to protect the dignity and integrity of the judiciary.

Finally, and most importantly, protecting a Judge's actions under Rule 2.15 with the judicial deliberative privilege ensures the continued independence of the judiciary. In *In re Enforcement of a Subpoena*, the Massachusetts Supreme Court explained,

> The threat that any of the many such decisions a judge must make—very frequently unpopular with one party or the other—might lead to a requirement that the judge detail his internal thought process weeks, months, or years after the fact would amount to an enormous looming burden that could not help but serve as an 'external influence or pressure,' inconsistent with the value we have placed on conscientious, intelligent, and independent decision–making.

463 Mass. 162, 172, 972 N.E.2d 1022, 1031 (2012). A judge's actions under Rule 2.15 are almost always unpopular with the lawyer whose conduct is questioned. The threat that the disgruntled lawyer could retaliate against the judge by deposing him or her months or years after the decision was made, would amount to an "external influence or pressure" on the judge's decisions regarding whether and how to act under Rule 2.15 when faced with potential lawyer misconduct. That pressure would impact the judge's "conscientious, intelligent, and independent decision-making."

Rule 2.15 was designed to promote "an independent judiciary" by requiring judges to report potentially unethical conduct to appropriate investigatory boards. The judges themselves are not the decision-makers in this context, as the ultimate decision of whether a lawyer has acted unethically in a given case is left to the LDB process and ultimately this Court. The judge's role is to protect the public, free of external influences, by freely reporting potential misconduct when the judge encounters it. But without the judicial deliberative privilege to protect the judge from compelled deposition and document discovery, Rule 2.15 subjects judges to the very external pressure inimical to an independent judiciary. Therefore, to protect the independence of the judiciary, the judicial deliberative privilege must apply to judges' actions under Rule 2.15.

3. The information sought in Respondents' Subpoena is protected by the judicial deliberative privilege.

The entire contents of Respondents' Subpoena is protected by the judicial deliberative privilege. The Subpoena seeks documents and testimony regarding "communication with the Judicial Investigation Commission and its counsel, JDC, and the Lawyer Disciplinary Board and its counsel, ODC, concerning the [Program] …." A.R. 161. Those communications were made pursuant to Judge Sweeney's obligations under Rules 3.5 and 2.15 of the Code of Judicial Conduct, and therefore, they are protected by the judicial deliberative privilege.

First, the communications must have been official judicial acts, because under Rule 3.5 of the Code of Judicial Conduct, Judge Sweeney could only have disclosed that information if the communications were made pursuant to his judicial duties. Rule 3.5 prohibits judges from disclosing "nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties." When attorney McCullough spoke with Judge Sweeney about the Program, it was not in his capacity as a private individual; rather, it was in his capacity as the presiding Circuit Judge. After all, she complained to Judge Sweeney about potential wrongdoing related to the Program in the hope that Judge Sweeney could provide assistance or guidance on those issues in his capacity as judge. Since this information was "acquired in a judicial capacity," Judge Sweeney could only have disclosed that information for a purpose related to the judge's judicial duties. Therefore, Judge Sweeney's communication with JIC, JDC, LDB, and ODC were made in his official capacity as a judge.

Moreover, those communications were made pursuant to Judge Sweeney's special obligations under Rule 2.15 of the Code of Judicial Conduct. After speaking with Ms. McCullough about the Program, Judge Sweeney had "knowledge indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct …." W. Va. Code of Judicial Conduct Rule 2.15(D). Therefore, pursuant to his ethical obligations as a judge under Rule 2.15, he took "appropriate action" by "reporting the suspected violation to the appropriate authority or other agency or body." *Id.* at 2.15(D) and cmt. 2. Judge Sweeney's actions were not performed in his capacity as a private individual; rather, his actions were meant to satisfy his special ethical obligations as a judge. Judge Sweeney's communications cannot be viewed as anything but official judicial acts that are entitled to the full protection of the judicial deliberative privilege under *Zakaib*.

The HPS decision denying Judge Sweeney's Motion to Quash and compelling him to testify and produce documents is patently wrong in light of *Zakaib* and the policy reasons upon which it is founded. The HPS's order which limits application of the privilege to cases over which a judge actually presides is contrary to this Court's clear mandate in *Zakaib* that it applies to all instances where a judge is acting in his or her capacity as a judge, and a party is seeking information about the judge's discharge of that role. The HPS simply ignored Judge Sweeney's obligations and role under Rule 2.15 in relating information to the JIC and the ODC in this case. The HPS apparently ruled that such actions are not subject to the judicial deliberative privilege because they do not arise from a case over which Judge Sweeney actually presided. That ruling is clearly wrong as a matter of law for the reasons discussed herein.

Since Judge Sweeney's actions and communications about the Program in this case are unquestionably "official judicial acts," they are protected by the judicial deliberative privilege. Since those communications are privileged, Judge Sweeney has no obligation to testify or produce documents regarding those communications. Therefore, to protect Judge Sweeney's testimonial and evidentiary privileges, and those of the entire judiciary, this Court should prohibit HPS from enforcing its Order and the Subpoena served on Judge Sweeney.

c. <u>The information sought in the Subpoena is protected because Respondents have not shown a substantial need for the information.</u>

Even assuming, *arguendo*, that the testimony and documents sought by the Subpoena were not protected by the judicial deliberative privilege, the information is nonetheless protected because Carr has not shown a substantial need for the information or shown that exceptional circumstances exist to justify its disclosure. Even in jurisdictions unlike West Virginia—jurisdictions where a judge's communications and testimony are not protected by the judicial deliberative privilege, or the privilege is considered to be qualified—courts are still generally

unwilling to compel a judge to testify unless such testimony is "necessary" in the context of a particular case or exceptional circumstances exist to justify such testimony. When it comes to character testimony, Comment 2 to Rule 3.3 of the West Virginia Code of Judicial Conduct states that a judge should only testify if the judge's testimony is "actual[ly] **necess[ary]**" and "the judge is in a unique position to offer meaningful testimony …." (emphasis added). Many courts have applied this same rule to *all* judicial testimony, not just character testimony. These courts have held that requiring judges to testify "should be sparingly used and only when the proponent of the evidence shows the judge's testimony is not only relevant but also **necessary** to prove a material element of the case." *Harris v. Goins*, No. 6:15-151-DCR, 2016 U.S. Dist. LEXIS 114680, *10, 2016 WL 4501466 (E.D. Ky. Aug. 26, 2016) (emphasis added) (quoting *People v. Drake*, 841 P.2d 364, 368 (Colo. App. 1992)); *see State v. Williams*, 30 Conn. App. 654, 660–61 (Conn. App. Ct. 1993) (citations omitted) (holding that calling judges "should be avoided whenever it is reasonably possible to do so …unless there is a **compelling need** for his testimony") (emphasis added). This rule has been widely adopted because courts nationwide have expressed deep concern that if a judge were to testify, "the judge appears to be throwing the weight of his position and authority behind one of the two opposing litigants," which creates an appearance of impropriety. *Marrs v. Kelly*, 95 S.W.3d 856, 863 (Ky. 2003) (citing cases from Arizona, California, Delaware, Indiana, Maryland, New Jersey, New York, Ohio, Texas, and Vermont supporting the Kentucky court's position).

The United States District Court for the Eastern District of Kentucky's decision in *Harris v. Goins* is instructive. In *Goins*, a person accused of various criminal offenses alleged that law enforcement officials conspired to deny him a speedy trial. He subpoenaed the judge who presided over his criminal case regarding *ex parte* communications between the judge and the individuals

involved in the conspiracy. *Goins*, 2016 U.S. Dist. LEXIS 114680 at *6. The court quashed the subpoena, stating that the plaintiff did not show that the subpoenaed information was "essential to any element of his claim." *Id.* at *11. The Court explained: "Regarding *ex parte* communication, if plaintiff believes that Judge House was in contact with other individuals involved in the alleged conspiracy against him, he has the opportunity to depose those individuals under oath," and since the other parties to the *ex parte* communications could be subpoenaed, the plaintiff could demonstrate neither a need for the deposition nor that exceptional circumstances existed to justify doing so. *Id.*

There is no information in the record that Judge Sweeney's testimony is necessary, or that exceptional circumstances exist to justify compelling discovery from him. The facts of this case focus on twenty separate and specific magistrate court cases. Each of the lawyers against whom charges have been filed were involved in at least one of the cases, and Carr was involved in some capacity in all of them. Judge Sweeney was not involved in any of the cases, but learned of the *Ward* case from attorney McCullough. At best, any knowledge that he would have of those matters would be hearsay. Although the HPS based its Order compelling Judge Sweeney's testimony on Carr's request to ask Judge Sweeney about "the program, what he knew about it, when he knew about it, how he knows about it and who he knew was involved in the program," the HPS makes no findings as to how Judge Sweeney's knowledge of these facts, if any, would be relevant in the underlying proceedings, why his specific testimony is necessary in these cases, why the information could not be obtained from another source (such as attorney McCullough), or that any

type of exceptional circumstances exist here that would warrant the deposition of a sitting judge on these matters.[2]

Just as in *Goins*, any information that Carr might need about the magistrate cases that form the basis of the charges against him is already in his possession, or can be obtained from others. As such, the information sought by the Subpoena is not "necessary," and no exceptional circumstances exist to justify compelling Judge Sweeney to testify and produce his communications with his staff, the JIC, and/or the ODC. In the absence of compelling evidence of necessity or exceptional circumstances that clearly do not exist in this case, this Court should prohibit the enforcement of the Subpoena.

d. <u>Judge Sweeney is not the "complainant" for purposes of Rule 3.4 of the Rules of Lawyer Disciplinary Procedure.</u>

Rule 3.4 of the Rules of Lawyer Disciplinary Procedure does not permit Respondents to depose Judge Sweeney, because Judge Sweeney is not the complainant for purposes of that rule. Rule 3.4 states, "The respondent shall be entitled to depose the complainant or complainants on any charge. No other depositions or other method of discovery shall be permitted except upon motion to the Chairperson of the Hearing Panel Subcommittee and only upon a showing of good cause for such additional discovery." The HPS did not hold that good cause had been shown to depose Judge Sweeney; instead, the HPS merely stated that the deposition was required because Judge Sweeney was the "complainant." The HPS was mistaken; Judge Sweeney is not the complainant for the purposes of Rule 3.4.

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[2] Although Judge Sweeney's deposition did not go forward given his motion to stay, Judith McCullough was deposed in her capacity as "complainant" on or about May 17, 2023. Her testimony was neither submitted to nor considered by the HPS, and it made no findings as to why Judge Sweeney's testimony is necessary ***in addition*** to attorney McCullough's testimony about the same facts.

"Complainant" is not defined in the Rules of Lawyer Disciplinary Procedure, but is logically someone who files a formal complaint with the LDB. Ballentine's Law Dictionary defines "complainant" as "a person who files a formal charge …." That is also how other West Virginia statutes define "complainant"; for example, in disputes under the Fair Housing Act, "complainant" is defined as "the person, including the commission, who files a complaint …." W. Va. Code § 5-11A-3(i). Similarly, states like Connecticut and Nevada define "complainant" as the one who submitted a written formal complaint against the lawyer or judicial officer. *D'Attilo v. Statewide Griev. Comm.*, 329 Conn. 624, 639, 188 A.3d 727, 738 (2018); *In re Petition for a Writ of Prohibition*, 111 Nev. 70, 149, 893 P.2d 866, 915 (1995).

Of course, not every disciplinary case has a complainant. West Virginia Lawyer Disciplinary Procedure Rule 2.4(a) states,

> The Office of Disciplinary Counsel shall evaluate all information coming to its attention **by complaint or from other sources** alleging lawyer misconduct or incapacity. The Office of Disciplinary Counsel may refer matters to committees of The West Virginia State Bar for resolution or attempt to informally resolve the matter **without docketing a complaint.** If the information alleges facts that, if true, would constitute a violation of the Rules of Professional Conduct, the Office of Disciplinary Counsel shall also conduct such investigations as may be directed by the Investigative Panel of the Lawyer Disciplinary Board. **The Office of Disciplinary Counsel may initiate investigations on its own.**

(emphasis added). As Rule 2.4(a) makes clear, the rules of disciplinary procedure themselves contemplate ODC initiating its own investigations, based on information that came to its attention from sources that did not file a "complaint." Therefore, there are some disciplinary cases in which there is no complainant, or in which the complainant is ODC.

In this case, for purposes of Rule 3.4, Judge Sweeney is not the complainant. Judge Sweeney never filed a formal complaint alleging that he had personal knowledge of potential lawyer misconduct or was aggrieved by such conduct. Whether viewed as an application of the judicial deliberation privilege or as an independent interpretation of Rule 3.4, this Court should

not interpret Rule 3.4 to require that a judge who acts under Rule 2.15 of the Code of Judicial Conduct by reporting potential misconduct to the ODC be subject to a deposition or document discovery for two fundamental reasons.

First, requiring a judge to do so would have an obvious chilling effect on judicial decision-making. As discussed above, a judge's duty to respond to potential lawyer misconduct under Rule 2.15 is mandatory. For obvious reasons, a judge's decision to respond as required by Rule 2.15 in a given situation is often challenging, and it can result in serious consequences for the lawyer that is the subject of the response. If a judge reporting potential misconduct can later be compelled to give testimony and produce documents explaining why he or she took that action, a judge must necessarily consider the potential for such discovery in deciding whether, and under what circumstances, to act under Rule 2.15. Although the Judge is not the arbiter of whether a lawyer is guilty of unethical conduct (that, of course, is left to the LDB and ultimately this Court), the Judge would nonetheless have to consider the legal and factual basis for doing so if subpoenaed to explain his or her actions. The chilling effect that such a threatened subpoena would have is the cornerstone of this Court's decision in *Zakaib* and its adoption of the judicial deliberative privilege.

Second, such an interpretation could not be limited to the facts of this case, but would apply with equal force to any judge, including the Justices of this Court, who reports potential attorney misconduct to the ODC. When potential attorney misconduct has appeared in the record in matters before this Court, its Justices have not hesitated to comply with their obligations under Rule 2.15 by referring the matter to the ODC for review. *See, e.g.*, *Rich v. Simoni*, 235 W. Va. 142, 150, 772 S.E.2d 327, 335 (W. Va. 2015) (directing that attorney conduct before the Court be reported to the ODC for further review); *State ex rel. Rose v. St. Paul Fire & Marine Ins. Co.*, 215 W. Va. 250, 258, 599 S.E.2d 673, 681 (W. Va. 2004) (same); *Covington v Smith*, 213 W. Va. 309, 325, 582

S.E.2d 756, 772 (W. Va. 2003) (same); *Gum v. Dudley*, 202 W. Va. 477, 491, 505 S.E.2d 391, 405 (W. Va. 1997) (same). West Virginia United States District Judges have likewise fulfilled their obligations under Rule 2.15 by making similar reports to the ODC. *See, e.g.*, *Lawyer Disciplinary Board v. Smoot*, 228 W. Va. 1, 7, 716 S.E.2d 491, 497 (2010). Under the HPS's ruling, each of the Justices and judges participating in these decisions could be compelled to give deposition testimony about the reasons for the referral and their rationale in doing so. Moreover, each could be compelled to produce not only any communications with the ODC about the alleged misconduct, but also their internal correspondence with law clerks and staff about the referred matters as well.

The intent and purpose behind Rule 3.4 is to give lawyers against whom disciplinary complaints have been made the ability to discover essential facts about the claim from those who have personal knowledge about them. That can clearly be done here without Judge Sweeney's deposition and documents. The Rule was never intended to obligate a judge who has acted under Rule 2.15 to account to the lawyer by explaining his or her rationale for that decision under oath, or to produce all documents that relate to the decision. Given the affirmative role that judges play with respect to the conduct of lawyers who come before them and the legal system as a whole, even the most diligent of judges would be compelled to "think twice" before acting under Rule 2.15. In the end, the only beneficiaries of such an interpretation would be unethical lawyers, with its cost being borne by clients harmed by their conduct.

e. <u>Judge Sweeney should not be compelled to produce documents that relate to his reports to the JIC or the ODC.</u>

For the same reasons that the subpoena seeking Judge Sweeney's deposition testimony should have been quashed, its provisions seeking documents from him should also have been quashed. Judge Sweeney is not the proper custodian to whom such a request should be made. The

@wvcourts.gov email domain is the property of the West Virginia Supreme Court of Appeals, not any individual judge. Moreover, the magistrate court files that the subpoena seeks are within the custody of the Clerk or the Pleasants County Magistrate Court, and are also public record. The HPS simply ignored this argument altogether in denying Judge Sweeney's Motion to Quash.

Of more fundamental concern, a litigant cannot obtain through a document request what he cannot obtain through deposition testimony. The subpoena seeks documents and files that evidence Judge Sweeney's reports or communications with the JIC, the LDB, and/or the ODC concerning the Program. Like the subpoena for his deposition, the document subpoena seeks information from a judicial officer about matters undertaken in his role as a judge. There is no basis to apply *State ex rel. Kaufman v. Zakaib* differently in the context of a document request than it would in the context of a subpoena seeking his deposition testimony, *see In re Enforcement of a Subpoena*, 463 Mass. 162, 178, 972 N.E.2d 1022, 1036 (2012), and the document request should have been quashed along with subpoena for Judge Sweeney's deposition.

VI. CONCLUSION

Based on all of the reasons set forth above, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board committed plain error and exceeded its legitimate powers by compelling Judge Timothy L. Sweeney to testify and produce documents regarding privileged information, despite the fact that the Subpoena was not necessary and the information can be obtained from other sources. Further, the Hearing Panel Subcommittee committed plain error when it concluded that Judge Sweeney was the complainant under Rule 3.4, and therefore must respond to the Subpoena. Lastly, the Hearing Panel Subcommittee committed plain error and exceeded its legitimate powers by requiring Judge Sweeney to produce documents that are not in his possession, custody, or control, and that are otherwise privileged. Therefore, Judge Sweeney requests that this Petition

for Writ of Prohibition be docketed by the West Virginia Supreme Court of Appeals. Judge Sweeney further requests that this Court issue a rule to show cause and stay the proceedings with the Hearing Panel Subcommittee pending the resolution of this Petition. Finally, Judge Sweeney requests that this Court find that the Hearing Panel Subcommittee committed plain error and exceeded its legitimate powers by compelling him to respond to the Subpoena.

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