

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

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State of West Virginia, ex rel.
The Honorable Timothy L. Sweeney,
Judge of the Circuit Court of Pleasants County,
Petitioner

v.

No. 23-342

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 Mathew Raber,
Jay William Gerber, Jr.,
Ira Andre Richardson,
Jordan W. West,
Wells H. Dillon,
The West Virginia Lawyer Disciplinary Board, and
The West Virginia Office of Lawyer Disciplinary Counsel,
Respondents

**CHIEF LAWYER DISCIPLINARY COUNSEL'S RESPONSE TO
PETITION FOR *WRIT* OF PROHIBITION**

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I. INTRODUCTION

At the request of this Honorable Court, pursuant to the Rules of Appellate Procedure, Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel of the Office of Lawyer Disciplinary Counsel (hereinafter “ODC”), submits this Response to Petitioner for *Writ* of Prohibition for this Court’s consideration. ODC requests the *Writ* be granted.

II. PROCEDURAL BACKGROUND

On or about March 3, 2023, Respondents Carr and Marteney filed a motion to depose the “Complainant” in these matters. On or about April 11, 2023, the HPS granted the motion and it was ordered that Chief Lawyer Disciplinary Counsel identify “the actual persons(s) who first informed, or complained to, the court or any member or personnel employed by the judiciary, the Office of Disciplinary Counsel (ODC), the Lawyer Disciplinary Board, the Judicial Investigative Commission, the Judicial Disciplinary Counsel or any ‘higher authority’ that led to Statement of Charges filed against Mr. Carr and Mr. Marteney.”

On or about April 12, 2023, Chief Lawyer Disciplinary Counsel filed a “Motion to Reconsider the Order Granting Respondent’s Motion to Depose Complainant.” ODC correctly asserted that it opened the complaints pursuant to its authority under the Rules of Lawyer Disciplinary Procedure. On or about April 17, 2023, Respondent Carr filed “Respondent’s Response to Motion to Reconsider the Order Granting Respondent’s Motion to Depose Complainant.” By Order entered April 19, 2023, the HPS improperly determined that Petitioner Sweeney and Attorney Judith McCullough were Complainants and denied Chief Lawyer Disciplinary Counsel’s motion to reconsider.

On or about April 21, 2023, Respondent Carr filed a “Notice to Take Deposition *Duces Tecum* of The Honorable Timothy L. Sweeney.” On or about May 1, 2023, Chief Lawyer Disciplinary Counsel filed a “Motion to Quash Subpoena, In Part and Motion to Limit Testimony of The Honorable Judge Sweeney.” On or about May 3, 2023, Respondents filed “Respondents’ Corrected Joint Motion for Stay Pending Writ Proceeding.” On that same date, the Hearing Panel Subcommittee entered an Order denying the same. On or about May 4, 2023, Judge Sweeney filed a “The Honorable Timothy L. Sweeney’s Motion to Quash Subpoena.” The Judicial Investigation Commission also filed “Judicial Investigation Commission’s Motion to Quash in Part Judge Sweeney’s Subpoena/Subpoena *Duces Tecum* and/or for Protective Order & Memorandum of Law in Support Thereof.” on or about April 28, 2023. On or about May 7, 2023, Respondent Carr filed “Respondent’s Response to Judicial Investigation Commission’s Motion to Quash in Part Judge Sweeney’s Subpoena/Subpoena *Duces Tecum* and/or for Protective Order & Memorandum of Law in Support Thereof”; and Respondent’s Response to Motion to Quash Subpoena, In Part and Motion to Limit Testimony of the Honorable Judge Sweeney.” On or about May 8, 2023, the Judicial Investigation Commission filed “Judicial Investigation Commission’s Motion for Leave to Reply to Respondent’s Motion to Quash and JIC/JDC’s Motion to Intervene.” On or about May 8, 2023, the HPS denied the Motions. On or about May 11, 2023, Respondent Carr filed a “Second Amended Notice to Take Deposition *Duces Tecum* of the Honorable Timothy L. Sweeney.” On or about May 12, 2023, Judge Sweeney filed a “Motion to Stay the Deposition and Response to Subpoena Pending Writ Proceeding Filed by The Honorable Timothy L. Sweeney.” By order entered May 16, 2023, and

the HPS granted the Motion. The HPS issued a “Memorandum Opinion Denying Motions to Quash” on or about May 18, 2023.

On or about June 8, 2023, Judge Sweeney (hereinafter “Petitioner”) filed “Petitioner The Honorable Timothy L. Sweeney’s Petition for *Writ* of Prohibition” against 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. On or about June 12, 2023, Petitioner filed a “Motion for Leave to Amend Petition and Amend Case Style.” A scheduling order was entered on or about June 14, 2023, ordering that the HPS file a response to the Petition on or before July 12, 2023. On or about June 19, 2023, Respondents Carr; Marteney; Wagner; Raber; Gerber; West; and Richardson filed a Joint Response by Attorney Respondents to Motion to Amend Petition.” On or about June 22, 2023, ODC filed a “Response to Motion for Leave to Amend Petition and Amend Case Style.” On or about June 26, 2023, the Court entered an order granting Petitioner’s motion to amend the petition and case style to include the additional Respondents and ordered that their responses to the Petition be filed on or before July 12, 2023.

On or about June 27, 2023, Respondents filed a “Joint Motion to Extend Response Deadline.” On or about June 29, 2023, ODC filed a “Motion to Extend Deadline.” On or about June 30, 2023, the Court entered an Order granting the motions and directed responses to the Petition be filed on or before July 31, 2023.

III. SUMMARY OF ARGUMENT

Rule 3.4 provides in pertinent part that “[t]he 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.” *See* Rule 3.4 of the Rules of Lawyer Disciplinary Procedure. The HPS erred when it unilaterally declared Judge Sweeney and Respondent Judith McCullough were “Complainants” subject to deposition under Rule 3.4 of the Rules of Disciplinary Procedure.

As properly set forth by Petitioner in its petition, this Court should issue a *Writ* of prohibition to prohibit the HPS from enforcing its Order and the subpoena served on Judge Sweeney should be quashed. While ODC agrees with Petitioner’s argument that a judicial officer should not be compelled to violate judicial deliberative privilege by testimony and/or the production of documents in violation of that privilege, Petitioner Sweeney is not a “Complainant” pursuant to Rule 3.4 of the Rules of Lawyer Disciplinary Procedure and is therefore not subject to deposition without a showing of good cause, of which there is none.

Additionally, the HPS improper determination that Attorney Judith McCullough was a Complainant, and thus subject to deposition under Rule 3.4 of the Rules of Lawyer Disciplinary Procedure, resulted in her deposition on or about May 17, 2023. Attorney McCullough’s was not a “Complainant” and in fact, Attorney McCullough’s only interaction as it relates to the “Slow Down for the Holidays” program was as a Respondent in her own disciplinary matter. During that deposition, Attorney McCullough was compelled to discuss and disclose the investigation of her closed disciplinary matter which is information that is otherwise protected by Rule 2.6 of the

Rules of Lawyer Disciplinary Procedure and Daily Gazette Co., v. Committee on Legal Ethics of the West Virginia State Bar, 174 W.Va. 359, 326 SE2d 705 (1984).

This is not simply an abuse of discretion by the Hearing Panel Subcommittee, it is clearly erroneous and has the potential to undermine future investigations into disciplinary matters. The primary purpose of disciplinary proceedings is not punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministrations of persons unfit to practice. The Court's proper intervention by the granting of this *writ* of prohibition is necessary as the HPS improper and unilateral determination that Petitioner Sweeney and Attorney Judith McCullough are "complainants" subject to deposition is a clear misapplication of the law and the enforcement of this Order will deter judges and lawyers from cooperating with ODC and fulfilling their obligations to report concerns of misconduct which severely undermines the primary purpose of lawyer disciplinary proceedings to protect the public.

IV. STATEMENT REGARDING ORAL ARGUMENT

ODC agrees with the Petitioner that this matter can be decided on briefs without the need for oral argument because it involves the application of settled law. If oral argument is deemed necessary by this Court, the matter should be set for argument pursuant to Rule 19 of the Rules of Appellate Procedure.

V. STATEMENT OF THE CASE

Over thirteen (13) years ago, a law enforcement officer for the St. Marys Police Department ("SMPD") introduced a program for the City of St. Marys, West Virginia. The initiative was called "Slow Down for the Holidays." During the relevant time-period as approved

by the City of St. Marys, if the SMPD pulled over a defendant, a flyer detailing the Slow Down for the Holidays program was provided, along with the citation. The flyer advised that the defendant could face his or her criminal charges in St. Marys Municipal Court or opt to make a donation to the SMPD program. If the defendant chose to donate to the program and pay to the program the amount assessed to them by SMPD, the Municipal Court Judge would dismiss the citation and the defendant would avoid the criminal fines, pay no court costs, and no convictions would appear on the defendants' record. [App. p. 1, Exhibit 1 and p. 309-310, Exhibit 4]

From 2004-2015, Respondent Carr served as the St. Marys Municipal Judge. As Municipal Judge, Respondent Carr signed dismissal orders for the Slow Down for the Holidays Program. In 2016, Respondent Carr was elected Pleasants County Prosecuting Attorney. Respondent took office on or about January 1, 2017. Respondent Carr ran unopposed and was re-elected for a second term in 2020. Respondent Carr continues to hold the position of public trust as the duly elected prosecuting attorney of Pleasants County, West Virginia. [App. p. 310, Exhibit 4] Respondent Marteney was hired as an Assistant Prosecutor in Pleasants County, West Virginia in or about 2011. Respondent Marteney remained as assistant prosecutor after Respondent Carr took office in 2016 and continues to hold the position of public trust. [App. p. 310, Exhibit 4]

At its October 2, 2018, common council meeting, the City of St. Marys unanimously voted to allow the SMPD to operate the Slow Down for the Holidays program from October 1 through December 12, 2018. At its September 17, 2019, common council meeting, the City of St. Marys unanimously voted to allow the SMPD to operate the Slow Down for the Holidays program starting September 16, 2019. The minutes reflect that the SMPD Chief represented to

the council that the SMPD and Pleasants County Sheriff's Department ("PCSD") "are teaming together again this year for Slow Down for the Holidays" program. At its October 20, 2020 common council meeting, the City of St. Marys unanimously voted to allow the "police department" to operate the Slow Down for the Holidays program from October 1 through December 16, 2020. [App. p. 310-311, Exhibit 4]

From 2018-2020, Respondents, illegally disposed or attempted to dispose of hand selected magistrate court cases that involved defendants charged with violations of the West Virginia Code. [App. p. 309-400, Exhibit 4] By Order entered November 9, 2020, Attorney McCullough was appointed to represent Defendant Mary Ward on criminal charges pending in Pleasants County Magistrate Court. State v. Ward, 20-M37M-367. The parties appeared for the December 8, 2020, pre-trial hearing and Prosecutor Carr offered to dismiss the pending magistrate court charges in exchange for Defendant Ward's payment of One Thousand Five Hundred Dollars (\$1,500.00) by money or gift cards to the Slow Down for Holidays program. Attorney McCullough conveyed Respondent Carr's offer to her client. Attorney McCullough recommended that her client not accept the State's offer and advised Defendant Ward that the requested amount to be paid to the Slow Down for the Holidays program exceeded the amount of costs and fines she faced if convicted. Nonetheless Defendant Ward directed Attorney McCullough to accept Respondent Carr's offer to dismiss the criminal charges in exchange for her payment. [App. p. 406, Exhibit 5]

After leaving court that day, Attorney McCullough discussed the Slow Down for the Holidays Program with other members of the legal community outside of Pleasants County and all agreed that the program "was sketchy" and recommended that she send a letter to her client

advising against participation in the same. SMPD Reed issued Defendant Ward a citation bearing the date of December 8, 2020, for “possession marijuana” in violation of an uncited Municipal Ordinance. The ticket bears the notation “SDFH \$1500.00”. The ticket directs Defendant Ward to appear before December 16, 2020. The citation issued by SMPD Reed was dismissed by an Order signed by Municipal Judge Elder on December 9, 2020, which indicates that Defendant Ward paid \$1,500.00 in gift cards to the Slow Down for the Holidays program in exchange for dismissal of her criminal charges. Accompanying the dismissal order and citation, are receipts dated December 9, 2020, for the purchase of three \$500.00 gift cards for \$1,514.85. On December 10, 2020, Respondent Carr made a written motion to dismiss and stated, “Defendant has met her obligations.” The presiding Magistrate granted Respondent Carr’s motion to dismiss on December 10, 2020, and entered a Criminal Judgment Order dismissing the misdemeanor charges on December 10, 2020. [App. p. 407, Exhibit 5]

The Preamble to the Rules of Professional Conduct states that “a lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” Lawyers are entrusted with the responsibility to speak up because they are in the best position to observe misconduct by fellow lawyers. The neglect of this responsibility compromises the independence of the profession and the public interest which it serves. Unlike any other lawyer or judicial officer involved in the Slow Down for the Holidays Program, Attorney McCullough sought counsel from other lawyers about how to manage or ameliorate the situation that she believed to be unethical. Indeed, after the Ward case was dismissed by the magistrate, she was still troubled both by the perceived illegality of the offer, and by the State placing criminal defense lawyers in a precarious ethical

dilemma, she reported her actions to Petitioner Sweeney. Attorney McCullough did not contact the Office of Disciplinary Counsel to discuss the Slow Down for the Holidays Program. Attorney McCullough did not file a verified complaint with the Office of Disciplinary Counsel. In fact, Attorney McCullough was equally subject to investigation by ODC for her role in the Program.

After his discussion with Attorney McCullough, Petitioner Sweeney was concerned about the ethical impropriety and/or criminality of the Program, so consistent with his reporting obligations under the Code of Judicial Conduct, he contacted the Judicial Investigation Commission and the Office of Lawyer Disciplinary Counsel. Petitioner Sweeney was not involved with the Program and did not provide ODC with detailed information about the Program or its participants. Petitioner Sweeney did not file a verified complaint with the Office of Disciplinary Counsel.

It is without question that there is no rule, statute, or case that permits Respondent Carr and Respondent Marteney, the elected prosecutor and his assistant, to usurp the role of the legislature and disregard the judiciary to create a secondary system that allowed select defendants to purchase “innocence” for donations to a charity run by law enforcement. When it learned of the mere existence of the creation of the secondary system of justice through the disposal of magistrate court cases through the illegal use of the Slow Down for the Holidays Program in Pleasants County, West Virginia, the Office of Lawyer Disciplinary Counsel contacted Respondent Carr and inquired generally about the “Slow Down for the Holidays” program and suggested that Respondent Carr self-report and explain the program and all participation by the Office of the Prosecutor to the Office of Disciplinary Counsel.

Respondent Carr self-reported by letter dated December 21, 2020. [App. p. 1-288, Exhibit 1] Respondent Carr identified fifteen (15) Pleasants County Magistrate Court cases that were disposed of by his office through the Slow Down for the Holidays program. After a review of the Respondent Carr's self-report explaining the Slow Down for the Holidays Program, the Office of Disciplinary Counsel opened the complaints with its express authority in the Rules of Lawyer Disciplinary Procedure. Complaints were docketed and opened against all lawyers who ODC could determine were involved with the Slow Down for the Holidays program by ODC pursuant to its authority as set forth in Rule 2.4(a) of the Rules of Lawyer Disciplinary Procedure.

By letter dated January 6, 2021, a complaint was opened against Respondent Carr and Respondent Marteney by ODC pursuant to its authority as set forth in Rule 2.4(a) of the Rules of Lawyer Disciplinary Procedure. Respondents Carr and Marteney were requested to provide a written response within twenty (20) days of receipt of the letter. By letter dated January 7, 2021, complaints were opened against Respondents Wagner, Dillon¹, Raber, Gerber, Hall, McCullough,² Richardson, and West by ODC pursuant to its authority as set forth in Rule 2.4(a) of the Rules of Lawyer Disciplinary Procedure, regarding their participation in the program as criminal defense attorneys. All correspondence clearly identifies that the Office of Disciplinary Counsel initiated the complaint, in its own name pursuant to its authority as set forth in Rule 2.4(a) of the Rules of Lawyer Disciplinary Procedure. The captions of the complaint letters state:

¹ Respondent Wells Dillion is no longer part of the consolidated disciplinary matter and has entered into factual stipulations. His case is still pending before the Hearing Panel Subcommittee awaiting a written recommendation to be filed with the Supreme Court.

² Complaint I.D. No. 21-03-010, ODC v. Sara B. Hall, and I.D. No. 21-03-013, ODC v. Judith A. McCullough, were closed by the Investigative Panel of the Lawyer Disciplinary Board on or about October 22, 2022.

ODC v. Brian K. Carr, I.D. No. 20-03-421;
ODC v. M. Paul Marteney, I.D. No. 20-03-421;
ODC v. Harley O. Wagner, I.D. No. 21-03-005;
ODC v. Wells H. Dillon, I.D. No. 21-03-006;
ODC v. Jay William Gerber, I.D. No. 21-03-007;
ODC v. Justin Mathew Raber, I.D. No. 21-03-008;
ODC v. Jordan W. West, I.D. No. 21-03-009;
ODC v. Sara B. Hall, I.D. No. 21-03-010;
ODC v. Ira A. Richardson, I.D. No. 21-03-011; and
ODC v. Judith A. McCullough, I.D. No. 21-03-013

Each lawyer that was investigated and/or that was ultimately charged by the Investigative Panel is and has been completely aware that ODC opened these complaints pursuant to its express authority. At no time, have any Respondents questioned ODC's inherent authority to initiate an investigation into Respondents unethical conduct.

On or about August 6, 2021, Pleasants County Magistrate Taylor and Pleasants County Magistrate Nutter tendered letters of resignation August 13, 2021. On or about August 27, 2021, the Judicial Investigation Commission ("JIC") issued written Admonishments³ to Magistrate Taylor and Magistrate Nutter for their participation in the Slow Down for the Holiday Program. The JIC found that probable cause existed that the magistrates violated Rules 1.1, 1.2, 1.3, 2.2 and 3.7(A)(2) of the Code of Judicial Conduct. The JIC determined that formal charges were not necessary since both magistrates resigned and agreed to never again seek judicial office by election or appointment. The JIC determined by dismissing criminal charges in exchange for donations to a charitable organization, the Pleasants County Magistrates created the appearance

³ Rule 2.7(c) of the Rules of Judicial Disciplinary Procedure states in relevant part "[w]hen it has been determined that probable cause does exist, but that formal discipline is not appropriate under the circumstances, the Commission shall issue a written admonishment to the respondent, who has fourteen days after its receipt to object. The written admonishment shall be available to the public. If the Office of Disciplinary Counsel or the respondent files a timely objection to the written admonishment, the Commission shall file a formal charge with the Clerk of the Supreme Court of Appeals...."

of selling justice in their courtrooms. The JIC further reasoned by going along with Respondent Carr and Respondent Marteney, the Magistrates created a secondary judicial system for select defendants. [App. p. 289-298, Exhibit 2 and App. p. 299-308, Exhibit 3]

Formal charges were filed against Respondents Carr and Marteney were filed on October 18, 2021, and October 22, 2021, respectively. Formal charges were filed against Respondents Wagner and Dillon on November 16, 2022; Respondents Gerber and Raber on November 21, 2022; and Respondents Richardson and West on November 29, 2022. By Order dated March 22, 2023, the Hearing Panel Subcommittee entered an Order consolidating these matters. A hearing was scheduled to begin on June 5, 2023, in Charleston, West Virginia, but has since been continued awaiting the outcome of this petition for *Writ* of Prohibition.

VI. ARGUMENT

In addressing its obligations in response to a request for a *writ* of prohibition, this Court has explained, “[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W.Va. Code 53-1-1.” Syl. Pt. 1, State ex rel. York v. West Virginia Office of Disciplinary Counsel, 231 W.Va. 183, 744 S.E.2d 293 (2013), Syl. Pt. 2, State ex rel. Peacher v. Sencindiver, 160 W.Va. 314, 233 S.E.2d 425 (1977). This Court is “restrictive in its use of prohibition as a remedy.” State ex rel. West Virginia Fire & Cas. Co. v. Karl, 199 W. Va. 678, 683, 487 S.E.2d 336, 341 (1997). Furthermore,

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ had 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 lower tribunal's order is an oft repeated error 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. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996).

As evidenced in Petitioner's *Writ* of Prohibition, the Court's factors weigh heavily in the issuance of granting Petitioner's application for a *writ* of prohibition. *See* Petition for *Writ* of Prohibition at 10-30. First, other than the issuance of a *writ*, Petitioner Sweeney has no other means, such as a direct appeal of the HPS decision, to prevent the enforcement of the subpoena. *See* Rule 3.4 of the Rules of Lawyer Disciplinary Procedure. Second, absent the granting of the *writ*, in addition to the prejudice to Petitioner Sweeney and the damage to Attorney McCullough's already Court determined rights of confidentiality, subjecting lawyers and judges who simply report concerns about lawyer and judicial misconduct to be unilaterally declared "Complainants" and subject to open ended deposition on all charges will result in considerable harm.

Third, and most critical, the HPS unilateral determination that Petitioner Sweeney and Attorney McCullough are "Complainants" subject to deposition is clearly erroneous as a matter of law. To carry out the Court's constitutional obligations effectively and efficiently, the Court adopted the Rules of Lawyer Disciplinary Procedure that govern attorney disciplinary

proceedings.⁴ While the Rules of Disciplinary Procedure do not define the term “Complainant⁵”, the Rules do differentiate the form of complaints not initiated by the Office of Disciplinary Counsel. Specifically, Rule 2.3 of the Rules of Lawyer Disciplinary Procedure states “the form of complaints shall be determined by the Board. It may require that complaints other than those initiated by the Office of Disciplinary Counsel shall be in writing and verified by the complainant.” [emphasis added] Complainants who file complaints alleging that lawyers have committed professional misconduct potentially subject themselves to deposition about the factual assertions made against the lawyer and those verified complaints are submitted to ODC in writing, with an original notarized signature. It is undisputed that Petitioner Sweeney did not file a verified complaint with ODC and is not a Complainant in these matters. Attorney Judith McCullough did not contact ODC, let alone file a verified written complaint with ODC and is not a Complainant in these matters. Regardless, Attorney McCullough was nonetheless compelled to discuss and disclose the investigation of her closed disciplinary matter which is information that is otherwise protected by Rule 2.6 of the Rules of Lawyer Disciplinary Procedure and Daily Gazette Co., v. Committee on Legal Ethics of the West Virginia State Bar, 174 W.Va. 359, 326 SE2d 705 (1984).

The Rules require ODC to “evaluate all information coming to its attention by complaint or from other sources alleging lawyer misconduct or incapacity” and “..if the information alleges facts that, if true, would constitute a violation of the Rules of Professional Conduct, the Office of

⁴ “The court shall have power to promulgate rules ... for all of the courts of the State relating to ... practice and procedure, which shall have the force and effect of law.” See W.Va. Constitution, Article VIII, § 3. “The exclusive authority to define, regulate and control the practice of law in West Virginia is vested in the Supreme Court of Appeals.” Syl. pt. 1, State ex rel. Askin v. Dostert, 170 W.Va. 562, 295 S.E.2d 271 (1982).

⁵ Black’s Law Dictionary defines “complainant” as “one who applies to the courts for legal redress by filing complaint (i.e plaintiff). Also, one who instigates prosecution or who prefers accusation against suspected person.”

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.” See Rule 2.4(a) of the Rules of Lawyer Disciplinary Procedure. Indeed, while the primary source of lawyer disciplinary complaints is by written verified complaints, it is not at all uncommon for ODC to initiate its own investigations into lawyer misconduct.

Clearly, the HPS determination that Petitioner Sweeney and Attorney McCullough are “Complainants” was without basis in fact or law and was clearly erroneous. Without this improper determination of “Complainant” status, a deposition absent a showing of good cause is not allowable under the Rules of Lawyer Disciplinary Procedure. Specifically, Rule 3.4 of the Rules of Lawyer Disciplinary Procedure provides in relevant part “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 purpose of this Rule was to allow lawyers who face formal disciplinary charges the ability to depose a Complainant who filed a verified complaint alleging misconduct to discover necessary facts about the allegations made by the Complainant. Petitioner Sweeney and Attorney Judith McCullough are at best potential witnesses⁶ who have been previously⁷ and properly disclosed by ODC as individuals that *may* have information, and that *may testify* at disciplinary proceedings. Upon information and belief, as a potential witness Petitioner Sweeney has been

⁶ Communications between Chief Counsel and her potential witnesses in anticipation of trial are protected by the work product doctrine and are not discoverable.

⁷ For example, ODC disclosed these potential witnesses to Respondent Carr by discovery disclosure dated November 12, 2021.

cooperative with counsel in these matters, specifically counsel for Respondent Carr and Respondent Marteney. Additionally,

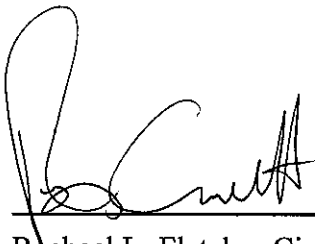
The primary purpose of disciplinary proceedings is not punishment of attorneys, but to protect the public and the administration of justice and provide reassurance of the public as to the integrity of attorneys. Finally, while the HPS's unilateral, unfounded incorrect legal determination that potential witnesses are now Complainants who are subject to deposition has not occurred in the past, as both lawyers and judicial officers are requested and required to cooperate with ODC and are often involved in the investigation of disciplinary matters, the potential for the repeat error is great and the resultant chilling effect on cooperation and reporting of misconduct will be significant. If lawyers and judges believe every question, every concerned conversation, and every inquiry they have with ODC subjects them to deposition, ODC's "phone will simply stop ringing" and the only benefit will be to aid lawyers who engage in misconduct from detection.

VII. CONCLUSION

In December of 2020, ODC became aware of allegations that there were lawyers and judicial officers who abandoned the laws and rules that govern our system in exchange for the creation of an unjust system where the select few were permitted to purchase innocence on the courthouse steps. Pursuant to the mandated authority in Rule 2.4 of the Rules of Lawyer Disciplinary Procedure, ODC immediately commenced investigations. The facts, outrageous as they are, are not largely in dispute and it is evident the charged lawyers have no actual defense to the charged conduct in violation of the Rules of Professional Conduct.

The Court's proper intervention by the granting of this *writ* of prohibition is necessary as the HPS improper and unilateral determination that Petitioner Sweeney and Attorney Judith McCullough are "complainants" subject to deposition is a clear misapplication of the law and the enforcement of this Order will deter judges or lawyers from cooperating with ODC and fulfilling their obligations to report concerns of misconduct which severely undermines the primary purpose of lawyer disciplinary proceedings to protect the public.

Respectfully submitted,
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CERTIFICATE OF SERVICE

This is to certify that I, **Rachael L. Fletcher Cipoletti**, Chief Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel, have this day, the 31st day of July, 2023, served a true copy of the foregoing “**Chief Lawyer Disciplinary Counsel’s Response to Petition for *Writ* of Prohibition**” upon J.H. Mahaney and William C. Brown, counsel for Petitioner Timothy L. Sweeney; J. Michael Benninger and Timothy R. Linkous, counsel for Brian K. Carr; Bader C. Giggenbach, counsel for M. Paul Marteney; Robert P. Fitzsimmons and Christine Pill Fisher, counsel for Harley O. Wagner; William O. Merriman, counsel for Wells H. Dillon; Brian J. Headley, counsel for Jay W. Gerber; Jonathan Zak Ritchie and Michael B. Hissam, counsel for Justin M. Raber; Melvin O’Brien; and Michelle Baldwin, counsel for Jordan W. West and Ira A. Richardson, III, electronically through File and Serve Xpress to the following addresses:

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And to the following Respondents via first class and electronic mail:

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