IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 23-342

**STATE OF WEST VIRGINIA EX REL.
THE HONORABLE TIMOTHY L. SWEENEY,
Judge of the Circuit Court of Pleasants County**

Petitioner,

vs.

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; WELLS H. DILLON; The West Virginia Lawyer Disciplinary Board; and The West Virginia Office of Lawyer 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)

RESPONDENTS' BRIEF

NOW COME Respondents Brian K. Carr, M. Paul Marteney, Harley O. Wagner, Justin Matthew Raber, Jay William Gerber, Jr., Ira Andre Richardson, and Jordan W. West ("Attorney Respondents"), pursuant to Rule 16(g), West Virginia Rules of Appellate Procedure, and this Court's *Amended Scheduling Order* entered June 30, 2023, jointly in opposition to the relief

sought in the *Amended Petition for Writ of Prohibition*. This brief provides the reasons why the petition should be refused, and the Attorney Respondents should be entitled to engage in limited discovery clearly authorized by Rule 3.4, West Virginia Rules of Lawyer Disciplinary Procedure.

INTRODUCTION

This consolidated lawyer disciplinary proceeding[1] involves the City of St. Marys, West Virginia ("City"), and its long-running community service initiative known as the "Slow Down for the Holidays Program" ("Program"). Contrary to Petitioner's declaration that the Program was "a collaboration between the Pleasants County Prosecuting Attorney, the City of St. Marys Police Department, and various Pleasants County magistrate judges,"[2] the record reveals that the City, its police department, and its municipal court system (municipal judge and municipal court clerk) were **solely** responsible for designing, advertising,[3] implementing, and maintaining the Program since its inception in 2007.[4] Respondents Carr and Marteney, as County

[1] HPS's *Order Granting Respondents' Carr and Marteney Motion to Consolidate*, entered March 22, 2023, consolidated each of the instant disciplinary proceedings.

[2] Amended Petition, p. 5-unnumbered.

[3] See media accounts and advertisements announcing the Program, Respondents' Appx. pp. 1-3.

[4] See Minutes of City Council meeting dated November 6, 2007 (Respondents' Appx. pp. 5-8).

Prosecuting Attorneys; Magistrate Judges Taylor and Nutter; and the Attorney Respondents, criminal defense lawyers representing their clients, were never responsible for either the creation of the Program or the Program's operation. Specifically, once each case was deferred/referred to the St. Marys Municipal Court which operated the Program, these individuals were no longer responsible for the disposition of the newly initiated cases lawfully filed by police officers, docketed by the municipal court clerk, Carolyn S. Taylor, and reviewed and adjudicated within the jurisdiction of the City's Municipal Court Judge Kathy Elder.[5]

In addition, a review of the voluminous discovery documentation exchanged in these proceedings establishes that each of the 20 misdemeanor cases at issue was initially filed in the Pleasants County Magistrate Court. Each was then deferred/ referred to the St. Mary's Municipal Court and the Program during the period from September 2018 through December 2020.[6]

[5] The Program handbill prepared by the City for 2020, which was identified in Judith A. McCullough's deposition taken on May 17, 2023, and marked as Deposition Exhibit 4, provides the details and terms of the Program and the participating police agencies, including the Pleasants County Sheriff's Office, the St. Marys Police Department, and with the knowledge and cooperation of the West Virginia State Police. (Respondents' Appx. p. 9.)

[6] See Carr Statement of Charges, Sweeney-Appx. pp. 6-90. For each of the years 2018, 2019, and 2020, the City officially approved the Program and the minutes of the council meetings are attached at Respondents' Appx. pp. 10-19.

Further, each was handled in a lawful manner, consistent with the City's legislative authority established by W. Va. Code § 8-11-1, and according to Municipal Court procedures generally prescribed by W. Va. Code § 8-10-2, and within the guidance provided by the West Virginia Municipal League[7] as published in its Municipal Court Clerk Manual.[8]

Upon information, each case Criminal Judgment Order and other pertinent records were uploaded by the Pleasants County Magistrate Clerk to the Supreme Court's computer system, known as the Unified Judicial Application ("UJA"), Report Beam, and e-mail system; and case disposition records were also transmitted to the Department of Motor Vehicles and the West Virginia State Police. Likewise, the City was required to transmit all case disposition records to government agencies so that the case outcomes would be made part of the permanent public record.

Finally, the Pleasants County Magistrate Court was subject to audit by the State Auditor's Office, as required by W. Va. Code § 50-3-7; no problems, abnormalities, or concerns noted with regard to the manner in which the subject cases were

[7] The West Virginia Municipal League, Inc., was created pursuant to W. Va. Code § 8-12-6, and the City is one of its member municipalities.

[8] https://www.wvml.org/component/rsfiles/files?folder=Public%252FClerks%2Band%2BJudges%2BTraining%2B2020&Itemid=178

handled and disposed of; and the audit reports for years 2018 and 2019 have been made a part of the record as "Exhibit E," *Respondent's Motion to Dismiss Statement of Charges and Motion to Stay*, filed by Respondent Carr on February 4, 2022.

RULE 3.4 AND STANDARD OF REVIEW

Petitioner's challenge to the rulings made by the HPS require a review of Rule 3.4. The rule provides:

> **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 Chairperson of the Hearing Panel Subcommittee shall have authority to hear and resolve objections to discovery.** Unless otherwise ordered by the Hearing Panel Subcommittee, discovery materials shall not be filed with the Clerk of the Supreme Court of Appeals, but shall be retained by the parties and delivered to the Subcommittee if necessary for any prehearing matters. (Emphasis added)

The right to take a deposition of the complainants and the authority vested in the Chairperson of the HPS to hear and resolve objections to the deposition is clear.

This Court in Syllabus Pt. 2 of *Lawyer Disciplinary Board v. Doheny*, 247 W.Va. 53, 875 S.E.2d 191 (2022), stated:

> A *de novo* standard applies to a review of the adjudicatory record made before the Committee on Legal Ethics of the West Virginia State Bar as to questions of law, questions of application of the law to the

> facts, and questions of appropriate sanctions, this Court gives respectful consideration to the Committee's recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the Committee's findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record. (Citing, *Committee on Legal Ethics of the West Virginia State Bar v. McCorkle*, 192 W.Va. 286, 452 S.E. 2d 377 (1994))

Given the nature of the HPS rulings at issue, the *McCorkle* standard of review (mixed fact and law) must be incorporated into the analysis to determine whether the extraordinary remedy sought by the Petitioner is appropriate under the *Hoover* factors set forth below.

RELEVANT FACTS, PROCEDURAL HISTORY, AND PETITIONER'S STATUS IN THE PROCEEDINGS

Petitioner's reference to Attorney Judith A. McCullough and her client Mary Ward and the case handled by Magistrate Judge Taylor in the Pleasants County Magistrate Court is the best segue to reaching the necessary factual information and procedural history to establish that Petitioner's assertions are without merit. Petitioner is a "complainant" and is not entitled to protection under judicial deliberative privilege.

Respondent Carr is the only Attorney Respondent to be charged in relation to the Mary Ward case.[9] Attorney McCullough

[9] Count XX, Statement of Charges, Sweeney-Appx. pp. 86-90.

was Ms. Ward's court-appointed attorney and Respondent Carr appeared on behalf of the State of West Virginia. The final hearing was held before Magistrate Taylor on December 8, 2020; and the Criminal Judgment Order dismissing the misdemeanor charges was entered on December 10, 2020. (Sweeney-Appx. pp. 87-88).

The first disclosure that Attorney McCullough may have been a "complainant" in this proceeding was when ODC submitted its *Third Supplement to the Persons with Knowledge/Possible Witnesses and List of Possible Exhibits by the Office of Lawyer Disciplinary Counsel Pursuant to Rule 3.4 of the Rules of Lawyer Disciplinary Procedure*. Exhibit 65 to the Third Supplement is the Investigative Panel's Closing Order, dated November 4, 2022, in Ms. McCullough's case. (Sweeney-Appx. pp. 96-105.) In Exhibit 65, the IP declared the complaint against Ms. McCullough was closed because:

> However, the Investigative Panel finds that Respondent's actions in the days following the dismissal of her client's case to be particularly compelling in determining what, if any, sanction should be levied against her. Respondent, still troubled by the actions of the Office of the Prosecutor, both by the perceived illegality of the offer, and by the State placing criminal defense lawyers in a precarious ethical dilemma **reported the misconduct to a higher authority**. Within a short period of time of Respondent's report of the program, the Slow Down for the Holiday program's utilization

> in the Magistrate Court of Pleasants County, West Virginia ended. (Emphasis added) (Sweeney-Appx. pp. 104-105)

Because the "higher authority" was not identified by the IP and the narrative that the investigation began with Respondent Carr's self-report on December 21, 2020, appeared to be inaccurate, Respondent Carr served *Respondent's Motion to Depose Complainant* on March 3, 2023. (Sweeney-Appx. pp. 93-95)

ODC did not respond, and the Chairperson entered *Order Regarding Respondents', Carr and Marteney, Motion for Deposition* on April 11, 2023. The Order granted Respondents the right to take the deposition and directed that "ODC shall identify the complainant or complainants who first asserted claims against Mr. Carr and Mr. Marteney." (Respondents' Appx. pp. 20-23) On April 12, 2023, ODC filed its *Motion to Reconsider the Order Granting Respondent's Motion to Depose Complainant* and informed that:

> In or about mid-December of 2020, the Honorable Circuit Court Judge Timothy Sweeney was made aware of the existence of the "Slow Down for the Holidays" program by attorney Judith McCullough and, as he was concerned about the ethical impropriety and/or criminality of the same, he consistent with his reporting obligations under the Code of Judicial Conduct, contacted the Judicial Investigation Commission and the Office of Lawyer Disciplinary Counsel. Judge Sweeney did not file a verified complaint with the Office of Disciplinary Counsel.

> After being made aware of the existence of the "Slow Down for the Holidays" program, 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 on December 21, 2020. By letter dated January 6, 2021, a complaint was opened against Prosecuting Attorney Brian K. Carr by ODC pursuant to its authority as set forth in Rule 2.4(a) of the Rules of Lawyer Disciplinary Procedure. (Sweeney-Appx. pp. 118-119)

In response to ODC's motion to reconsider, Respondent Carr filed *Respondent's Response to Motion to Reconsider the Order Granting Respondent's Motion to Depose Complainant*. (Sweeney-Appx. pp. 124-136) Thereafter, the Chairperson of the HPS entered the *Second Order Regarding Respondents' Carr and Marteney Motion for Deposition* and, in well-reasoned analysis, concluded:

> Clearly these individuals, Judge Timothy Sweeney and attorney Judith McCullough, made accusations of possible improper ethical conduct against the Respondents. These are the individuals who instigated the complaints the led to the charges being filed against the Respondents.
>
> The logical conclusion to a ruling holding that the ODC was the complainant simply because it opened this file, performed an investigation and prosecuted the Respondents, would make the ODC to be the Complainant in every case. Such a result is logically flawed.

> Moreover, in this case it appears ODC did not require that its formal complaint document be completed by neither Judge Timothy Sweeney nor attorney Judith McCullough. The decision to require a written complaint which identifies the person(s) making the allegations was ODC's decision. To allow ODC to unilaterally determine who the complainant is by making a determination of whether it will require a written complaint and thus potentially depriving a respondent of the knowledge and opportunity, to confront his real accusers. Further a holding that ODC was the complainant in these cases would render useless certain defenses specifically provided under the Rules For Disciplinary Proceedings. (Sweeney-Appx. pp. 137-140)

After receiving the second order entered by the HPS, counsel for Respondent Carr telephoned Petitioner and secured a date and place for his deposition and, by correspondence dated April 21, 2023, served Petitioner with *Notice to Take Deposition Duces Tecum of The Honorable Timothy L. Sweeney*. (Sweeney-Appx. pp. 143-154). Thereafter, by email dated April 24, 2023, Petitioner informed counsel that "Please be advised that I am not willing to accept service of your deposition subpoena duces tecum via email. Additionally, I have retained counsel who is unavailable at the previously designated time." The email from the Petitioner was acknowledged and the deposition was canceled. (Respondents' Appx. p. 24-89)

On April 25, 2023, Respondent Carr served an *Amended Notice to Take Deposition Duces Tecum of The Honorable Timothy*

L. Sweeney. (Sweeney-Appx. pp. 155-161) On April 28, 2023, JIC 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*, (with exhibits which were not made a part of the appendix submitted by Petitioner.) (Sweeney-Appx. pp. 162-178)[10]. ODC then filed its *Motion to Quash Subpoena, in part and Motion to Limit Testimony of The Honorable Judge Sweeney* on May 1, 2023. (Sweeney-Appx. pp. 179-189). Both JIC and ODC asserted attorney-client and work product privileges in support of their motions to quash. By specific email dated May 2, 2023, 7:11 AM, the Chairperson of the HPS acknowledged receipt of ODC's motion to quash and directed that a privilege log, together with any documents being withheld on the basis of work product privilege, be produced, forthwith, by May 4, 2023. (Sweeney-Appx. p. 241). No privilege log has been produced, to date, by JIC, ODC, or Petitioner.

However, on May 4, 2023, Petitioner filed *The Honorable Timothy L. Sweeney's Motion to Quash Subpoena*, as directed by the Chairperson's May 2, 2023, email and, for the first time, asserted the judicial deliberative privilege as the basis to avoid being deposed and producing the documents being subpoenaed. (Sweeney-Appx. pp. 191-222). Respondent Carr filed

[10] JIC's Motion to Quash and all exhibits are made a part of Respondents' Appx. pp. 90-144.)

timely responses to each of the three motions to quash. By *Order Denying Motion to Quash and to Limit the Testimony and Document Production of Judge Timothy Sweeney*, entered May 8, 2023, the Chairperson denied the motions to quash and directed that Petitioner's deposition "shall occur on or before Friday, May 19, 2023." (Sweeney-Appx. pp. 259-262)

Thereafter, by *Memorandum Opinion Denying Motions to Quash*, entered by the Chairperson on May 18, 2023, each of the motions to quash Petitioner's deposition and production of documents was analyzed and relevant factual and procedural information was provided so that this Court would have a complete understanding as to the basis of the rulings. (Sweeney-Appx. pp. 267-276) The Memorandum Opinion specifically addresses Petitioner's claim to protection under the judicial deliberation privilege, adopted by this Court in *Kaufman v. Zakaib*, *infra*. By *Order Granting the Motion To Stay the Deposition and Response to Subponea* [sic] *Pending Writ Proceeding Filed by The Honorable Timothy L. Sweeney*, Petitioner was afforded the opportunity to file his petition for writ of prohibition with this Court. (Sweeney-Appx. p. 264)

Respondent Attorneys conducted their deposition of Ms. McCullough on May 17, 2023, within the time frame directed by the HPS to complete same. Her deposition was informative and assisted in a better understanding of the genesis of the

investigation in this proceeding. (Respondents' Appx. pp. 145-297) Upon information and belief, the following is a chronology of relevant occurrences best understood, at present, given that Petitioner's deposition has not been taken and the subpoenaed documents have not been produced:

1. On December 8, 2020, Respondent Carr, Attorney McCullough, and her client, Mary Ward, appeared before Magistrate Taylor and the offer to participate in the Program was made and accepted. Also present were two police officers from the Pleasants County Sheriff's Department (Sergeant Coplin and Corporal Marant).

2. On December 10, 2020, Magistrate Taylor entered the Criminal Judgment Order in Ms. Ward's case.

3. On December 15, 2020, Attorney McCullough approached Petitioner, during the day assigned for pre-trial motions in the county, and first informed Petitioner of her concerns with the Program being offered to Defendants in the Pleasants County Magistrate Court as an alternate disposition to trial and verdict in that system.

4. On December 15, 2020, Petitioner called Magistrate Taylor to inquire as to the Mary Ward case.

5. Also on December 15, 2020, Petitioner telephoned JIC and ODC and verbally informed the disciplinary agencies of Attorney McCullough's report made concerning the Program.

6. On December 16, 2020, JIC telephoned Magistrate Taylor and advised that an investigation into the Program had been

initiated and its use as an alternative disposition to misdemeanor case in the Pleasants County Magistrate Court should cease.

7. On December 16, 2020, JIC opened judicial ethics complaints against Magistrates Nutter and Taylor.

8. On December 16, 2020, Magistrate Taylor sent a text message to Respondent Carr on his cell phone and advised him of her conversation with JIC. Thereafter, Respondent Carr and Magistrate Taylor had a short face-to-face conversation.

9. On December 16, 2020, Respondent Carr received a telephone call to his office from ODC and he returned the call shortly after receiving the message and discussed the Mary Ward case and the Program with Chief Lawyer Disciplinary Counsel.

10. On December 21, 2020, Respondent Carr submitted his "self-report" to ODC as suggested by Chief Lawyer Disciplinary Counsel during their telephone call on December 16, 2020. The report identified multiple respondents.

11. On January 6, 2021, ODC initiated formal complaints and investigation of Attorney Respondents.

12. On February 18, 2021, JIC and ODC jointly filed a motion to consolidate the investigations of Attorney Respondents and Magistrates Nutter and Taylor for "the purposes of discovery," as well as a motion to seal the motion to consolidate. The Court granted both of their motions.

Any information imparted to the Court by JIC and ODC concerning their verbal contact and document exchange with

Petitioner is, as yet, unknown since *Respondent's Motion to Unseal LDB and JIC Joint Motion to Consolidate* was denied by the HPS *Order Denying Respondents' Motion to Unseal*, entered April 13, 2023, which concluded "the panel is of the opinion that it does not have the legal authority to unseal an order entered by the West Virginia Supreme Court of Appeals." Regardless of this ruling, this Court has available to it the joint filings made by JIC and ODC and can review and determine whether the information contained in the filings are relevant to the issues presented by the instant petition. See *Order* entered by the Court February 22, 2021. (Respondents' Appx. p. 294)

In addition, Petitioner's status in these proceedings is further demonstrated by ODC's disclosure of him as a witness who may "testify regarding the allegations set forth in the Statement of Charges." Petitioner has also been disclosed by ODC as an expert witness in Respondent Wagner's case. His qualifications and anticipated testimony were described by ODC as follows:

> Judge Sweeney was admitted to the practice of law in West Virginia in 1981. He was the elected prosecutor of Pleasants County from 1985 to 2010. In December 2010, he was appointed to the bench in the Third Judicial Circuit. He was elected in 2012 and re-elected in 2016, and he presently serves as the Circuit Court for the Third Judicial Circuit. He is a member of the West Virginia Judicial Association. He is a former member of the Lawyer Disciplinary

> Board, a former president of the West Virginia Prosecuting Attorneys Association, a former member of the West Virginia Trial Lawyers Association and the National College of District Attorneys.
>
> Testimony may include the illegal and unethical nature of the Slow Down for the Holidays program, prosecutorial discretion, and judicial reporting obligations of unethical conduct by another judicial officer and/or a lawyer.

Thus, the record, as it now exists, clearly establishes that Petitioner was the first person to report and complain to JIC and ODC about the Program and its use in the Mary Ward case. It is inconceivable that Petitioner would be identified as an expert witness, had he not previously disclosed information and documentation to ODC supporting his anticipated testimony recited verbatim above. Certainly, Petitioner would not have agreed to serve in such capacity, as a witness, had he been involved in any of the underlying misdemeanor cases handled by the Attorney Respondents in an official proceeding where he had been or could have been called upon to engage in judicial deliberation. See Rules 2.10 and 3.3, Code of Judicial Conduct. Thus, Petitioner's assertions that he is not a "complainant" and, even if he was one, that he should be protected from deposition and document production by application of the judicial deliberation privilege are without factual basis.

SUMMARY OF ARGUMENT

Petitioner fails to meet the heavy burden establishing that the Chairperson of the HPS acted without authority and clearly erred in finding Petitioner was a "complainant" and that he is entitled to avoid being deposed pursuant to Rule 3.4 upon the assertion of the judicial deliberation privilege. The judicial deliberation privilege is not applicable in this proceeding because Petitioner was not acting in any official case when he received information *ex parte* from Attorney McCullough and verbally reported the same to JIC and ODC. Petitioner is a complainant because he "instigated" the investigation resulting in the subsequent issuance of the statements of charges against each of the Attorney Respondents.

ARGUMENT

I. PETITIONER IS NOT ENTITLED TO ISSUANCE OF A WRIT PROHIBITING HIS DEPOSITION.

It is understood, "[t]his Court is restrictive in the use of prohibition as a remedy," and has stressed repeatedly — and recently — that it is "reserved for really extraordinary causes." *State ex rel. AmerisourceBergen Drug Corp. v. Moats*, 245 W. Va. 431, 439, 859 S.E.2d 374, 382 (2021) (quotation marks and footnote omitted); *State ex rel. Johnson & Freedman, LLC v. McGraw*, 243 W. Va. 12, 20, 842 S.E.2d 216, 224 (2020) ("Prohibition is an extraordinary remedy that we issue only in

extraordinary cases."); *State ex rel. Vanderra Res., LLC v. Hummel*, 242 W. Va. 35, 45 n.34, 829 S.E.2d 35, 45 n.34 (2019) ("[W]e remind the parties that a writ of prohibition is an extraordinary remedy to be utilized in extremely limited instances.").

This is not one of those extraordinary cases. The factors used for determining whether a lower tribunal has exceeded its legitimate authority are well-known. *See* Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996) (quoting factors). Here, Petitioner fails to satisfy the most significant one of all (factor 3): the existence of a "clear error" as a matter of law. And for several other required factors, Petitioner all-but-concedes that he cannot satisfy them. *See* Amended Petition, at 13 (describing the HPS order as "the first of its kind in this context" (*contra* factor 4), and which also does "not raise new problems or issues of law" (*contra* factor 5)). Having failed to establish a clear-cut error, as well as admitting that Petitioner cannot satisfy the final two factors, the amended petition should be denied. The adjudicatory record below should be fully developed to ensure a fair due process for all those charged, as well as for the benefit of this Court's subsequent review as the ultimate arbiter in attorney disciplinary proceedings.

II. THE HPS DID NOT COMMIT ERROR BY REQUIRING TESTIMONY FROM PETITIONER UNDER THE FACTUAL AND PROCEDURAL CIRCUMSTANCES OF THE PROCEEDING BELOW.

In several recent decisions, this Court has emphasized that a simple error of law will not justify the granting of the extraordinary writ of prohibition. Rather, the error committed by the lower tribunal *must* be "substantial," "clear-cut," and "plainly" in contravention of law — that is, it must be manifestly "clear." *State ex rel. W. Virginia Reg'l Jail Auth. v. Webster*, 242 W. Va. 543, 548, 836 S.E.2d 510, 515 (2019) (quotation marks and citations omitted); *see, e.g.*, *Johnson & Freedman*, 243 W. Va. at 20, 842 S.E.2d at 224; *AmerisourceBergen Drug Corp.*, 245 W. Va. at 439, 859 S.E.2d at 382. "[T]he existence of clear error as a matter of law[] should be given substantial weight." *Id.* This factor is dispositive here, because the HPS committed no error — much less an error of such manifest clarity that compels the issuance of a writ of prohibition.

III. THE JUDICIAL DELIBERATIVE PRIVILEGE DOES NOT APPLY TO PETITIONER BECAUSE THE SCOPE OF THE TESTIMONY DOES NOT INVOLVE THE MENTAL PROCESSES EMPLOYED IN THE FORMULATION OF AN OFFICIAL JUDGMENT OR THE REASONS THAT MOTIVATED HIM IN AN OFFICIAL ACTION.

The seminal case concerning the judicial deliberative privilege is *State Ex Rel. Kaufman v. Zakaib*, 207 W. Va. 662, 670, 535 S.E. 2d 727 (2000). In that case, this Court was confronted with a situation in which Judge Kaufman was ordered

to give a deposition in a civil lawsuit that arose from a divorce and custody proceeding **over which he presided**. Judge Kaufman sought a writ of prohibition to prevent his deposition. This Court granted Judge Kaufman's petition and held: "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.*, 207 W.Va. at 670, 535 S.E.2d at 735. This Court went on to state:

> The Court is mindful that this protection from discovery proceedings has its limits, and those limits are that **a Judge must be acting as a Judge and that it is information regarding his or her role as a Judge that is sought**. (Emphasis added.)

Id. This case is not a proceeding over which Petitioner presided or formulated official judgment.

The testimony sought from Judge Kaufman involved his mental impressions relative to a proceeding over which he presided and over which he retained jurisdiction. The Plaintiff in the subsequent civil case previously attempted to disqualify Judge Kaufman from the domestic relations case. The circumstances in *Kaufman* are clearly distinguishable from the factual occurrences in this case.

Petitioner was not the judicial officer involved in any of the underlying magistrate court misdemeanor cases nor an official involved in the proceedings before the Lawyer

Disciplinary Panel. He is simply a fact witness as to how the disciplinary proceedings were instigated.

Petitioner seeks the protection of the judicial deliberative privilege on the grounds that his call to the JIC and/or ODC was an official judicial act. In support of this motion, he relies upon Rule 2.15 of the Code of Judicial Conduct, which provides as follows:

> 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.

Rule 2.15(B) of the Code of Judicial Conduct is nearly identical to the language contained in Rule 8.3(a) of the Rules of Professional Conduct[11]. In development of this argument, Attorney McCullough testified that she likely had an *ex parte* conversation with Petitioner regarding this matter at the Doddridge County Courthouse on December 15, 2020. (Respondents' Appx. pp. 161-162 – McCullough Depo. pp. 80-81). That conversation reportedly prompted Petitioner to telephone JIC and

[11] Rule 8.3(a) provides as follows:

> A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

ODC. Thus, Petitioner was the instigating person for the disciplinary proceedings that followed. His verbal report with JIC and ODC had nothing to do with any judicial proceeding or matter over which Petitioner was then or had presided. His verbal report, not in compliance with Rule 2.3, was not an official judicial action. In sum, Petitioner's action is nothing more than perceived responsibility owed by any judge and lawyer to mandatorily report potential judicial and attorney misconduct.

This Court recognized difficulties with regard to the scope of the judicial deliberative privilege in reaching its decision in *Kaufman*. In this regard, it stated:

> When applied to the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court, the doctrine of absolute immunity has not been particularly controversial. Difficulties have arisen in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges. Here, as in other context, immunity is justified and defined by the function it protects and serves, *not by the person to whom it attaches*.

Kaufman, at 207 W.Va. at 671, 55 S.E.2d at 736 (emphasis added), quoting *Forrester v. White*, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).

Again, any reporting obligation that Petitioner faced was the identical reporting obligation confronting any West

Virginia lawyer, including complainant, Attorney McCullough and the self-report by Respondent Carr. Petitioner's verbal report to JIC and ODC was not particular to his role as a judicial officer and any official judgment rendered in a case over which he presided.

Attorney Respondents' significant due process rights are paramount and must be taken into account in this analysis. The disciplinary proceedings below quite literally affect the livelihoods of each of the Attorney Respondents. In the case of *In re Ruffalo*, 390 U.S. 544 (1968), the United States Supreme Court said that state lawyer disciplinary proceedings are adversarial and of a quasi-criminal nature. The Court held that a lawyer respondent is entitled to constitutional due process in state court disciplinary proceedings. *Id.* at 1226; *see also Committee on Legal Ethics of the West Virginia State Bar v. Graziani,* 157 W.Va. 167, 200 S.E.2d 353 (1973).

In accord with *Ruffalo,* this Court has held that "[w]e have recognized that in attorney disciplinary proceedings, a lawyer is entitled to due process of law." *Committee on Legal Ethics of the West Virginia State Bar v. Geary M. Battistelli*, 185 W.Va.109, 114 405 S.E.2d 242, 247 (1991); *see also Committee on Legal Ethics v. Folio*, 184 W.Va. 503, 401 S.E.2d 248 (1990); *Committee on Legal Ethics v. Boettner*, 183 W.Va. 136, 394 S.E.2d 735 (1990). An essential component of a lawyer respondent's

fundamental due process right is the ability to cross-examine his or her accuser. This fundamental right is reflected and given life in Rule 3.4, which unequivocally declares that respondents "shall be entitled to depose the complainant or complainants on any charge." This rule contains no qualifying language excepting judicial officers who are mere witnesses to occurrences or information relevant to the proceeding.

The Chairperson of HPS appropriately noted in his *Second Order Regarding Respondents Carr and Marteney's Motion for Deposition* that a complainant is commonly understood to be "one who instigates prosecution or who prefers [sic] [an] accusation against [a] suspected person." (Sweeney-Appx. p. 139). The Chairperson further captured the essence of the issue in the following analysis:

> The logical conclusion to a ruling holding that the ODC was the complainant simply because it opened this file, performed an investigation and prosecuted the Respondents, would make the ODC to be the Complainant in every case. Such a result is logically flawed.
>
> Moreover, in this case it appears ODC did not require that its formal complaint document be completed by neither Judge Timothy Sweeney nor attorney Judith McCullough. The decision to require a written complaint which identifies the person(s) making the allegations was ODC's decision. To allow ODC to unilaterally determine who the complainant is by making a determination of whether it will require a written complaint and thus potentially

> depriving a respondent of the knowledge and opportunity, to confront his real accusers. Further, a holding that ODC was the complainant in these cases would render useless certain defenses specifically provided under the Rules For Disciplinary Proceedings.

(Sweeney-Appx. pp. 139-140).

Under the facts found here, Petitioner indeed was a complainant. His verbal communication with JIC and ODC on December 15, 2020, admittedly commenced the investigative process that followed. Thus, Respondents will be deprived of their constitutional due process rights to depose a complainant if the judicial deliberative privilege is wrongfully afforded as requested by Petitioner.

Further, this Court in *Hatcher v. McBride*, 221 W. Va. 5, 650 S.E.2d 104 (2006), confirmed the limited scope of the judicial deliberative privilege from *Kaufman*. In *Hatcher*, a convicted individual sought a Writ of Prohibition to challenge the denial of his writ of *habeas corpus*. One ground for the writ of prohibition was that the prosecuting attorney called Judge Alfred Ferguson to testify at the penalty phase of the petitioner's murder trial. Judge Ferguson's testimony was based on his experience with the petitioner as a juvenile. This Court concluded that Judge Ferguson's testimony did not violate the Code of Judicial Conduct. *Id.*, 221 W.Va. at 10, 650 S.E.2d at 109. The petitioner further challenged Judge Ferguson's

testimony on the grounds that it was improper pursuant to this Court's ruling in *Kaufman*. This Court stated:

> We believe the appellant's reliance on *Kaufman* is misplaced. *Kaufman* relates to eliciting testimony in a deposition in a civil case about mental processes used by a Judge in making official decisions in a specific case. The testimony in the instant case relates to testimony elicited from the Judge about the appellant's propensity towards future dangerousness based upon the Judge's experience with the appellant in Court as a juvenile and not the mental processes used by the Judge in making his official decisions.

Id.

The testimony sought to be obtained from Petitioner in this case involves the facts and circumstances surrounding the verbal report that he initiated by his verbal communication with JIC and ODC and the exchange of messages and documents limited thereto. Nothing in the Notice of Deposition or the subpoena seeks the mental processes employed by Petitioner in making any official decisions regarding a specific case. Attorney Respondents only seek to examine the complainants in this proceeding. Notably, ODC clearly believed that Petitioner was a witness (and also an expert witness) who could testify to the allegations in various statements of charges filed against the Attorney Respondents and on the fundamental issues of law to ultimately be decided by this Court.

IV. PETITIONER ADMITS THAT THE FINAL TWO *HOOVER* FACTORS WEIGH AGAINST GRANTING THE AMENDED PETITION AND ISSUING THE WRIT.

Although this Court has frequently underscored that a writ of prohibition is reserved for "really extraordinary" cases, Petitioner expressly acknowledges that the petition does not satisfy two essential factors:

1. *Hoover* factor 4 requires consideration as to whether the tribunal's order is an "oft repeated error of law or manifests persistent disregard for either procedural or substantive law." Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). But on this factor, Petitioner concedes that the HPS order is "the first of its kind in this context." Petition, at 13. He instead asserts that the "potential . . . is great" for the HPS to repeat this error in "future LDB proceedings." *Id.* at 14. But Petitioner provides no support for this mere speculation of future events, to which this Court should give little credit. In fact, there is no basis in the record or this Court's precedent to even suggest that a future HPS is likely to issue subpoenas indiscriminately or arbitrarily to sitting judges. Should that actually occur, this Court can intervene then and review the specific case. But here, Petitioner's speculation is not adequate legal grounds for the issuance of an extraordinary writ.

2. *Hoover* factor 5 requires consideration of whether the lower tribunal's order "raises new and important problems or issues of law of first impression." Syl. Pt. 4, *Hoover*, 199 W. Va. 12, 483 S.E.2d 12. Once again, Petitioner admits that the HPS order "does not." Amended Petition, at 13. Indeed, he agrees that the "rules of law" applicable here are "well-established in West Virginia." *Id.*, at 13–14. Thus, all agree: This factor is not satisfied here.

So Petitioner is simply left asserting that his requested relief is "important" because the HPS ruling "will negatively impact the judiciary's special status, dignity, and independence," and will otherwise put a "chilling effect on judicial reporting of professional misconduct." Amended Petition, p. 14. These assertions amount to little more than a "Hail Mary" for a categorical exemption from the responsibility to comply with Rule 2.3 and participation in a mandatory discovery process promulgated by this Court under Rule 3.4. Thus, the judicial deliberative privilege does not categorically shield Petitioner's testimony under the unique circumstances of this consolidated case. The HPS order is well-within the authority granted it by Rule 3.4 and protects the due process and fundamental fairness of these disciplinary proceedings, and it, therefore, should not be disturbed.

CONCLUSION AND REQUEST FOR RELIEF

This Court has repeatedly declared "[p]rohibition is an extraordinary remedy that . . . issue[s] only in extraordinary cases." *State ex rel. Johnson & Freedman, LLC v. McGraw*, 243 W. Va. 12, 20, 842 S.E.2d 216, 224 (2020). Attorney Respondents respectfully request that, upon the reasoning and argument set forth above, the Amended Petition for Writ of Prohibition be refused; and they be allowed to exercise their limited right to discovery under Rule 3.4 to depose Petitioner and obtain the documents he and JIC and ODC exchanged in reference to his status, disclosed by ODC, as a "higher authority," a "complainant," a "witness," and an "expert witness," during the time period from December 15, 2020, through the present.

Respectfully submitted this 26th day of July, 2023.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 23-342

STATE OF WEST VIRGINIA EX REL.
THE HONORABLE TIMOTHY L. SWEENEY,
Judge of the Circuit Court of Pleasants County

Petitioner,

vs.

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; Wells H. Dillon; The West Virginia Lawyer Disciplinary Board; and The West Virginia Office of Lawyer 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)

CERTIFICATE OF SERVICE

I certify that true and correct copies of *Respondents' Brief* and *Respondents' Appendix Record* have been served upon counsel of record via electronic filing and email on the 26th day of July, 2023, to:

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