

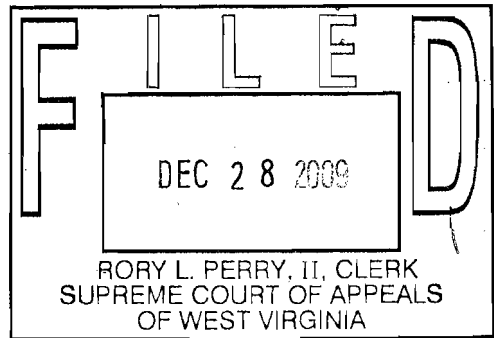
**BEFORE THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA**

JAY M. POTTER
Petitioner,

v.

Supreme Court No. 091633

**OFFICE OF DISCIPLINARY COUNSEL
OF THE STATE OF WEST VIRGINIA,**
Respondent.



**OFFICE OF 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 Rule 14(b) of the Rules of Appellate Procedure, Rachael L. Fletcher Cipoletti, Chief Counsel of the Office of Disciplinary Counsel, submits this Response to Petitioner's Petition for *Writ* of Prohibition.

When the Court promulgated the Rules of Lawyer Disciplinary Procedure it set forth clear parameters for the disciplinary system to operate. The Office of Disciplinary Counsel (hereinafter referred to as "ODC") is grateful for the opportunity to demonstrate to the Court, the members of the Bar and the public its full compliance with the Rules, promulgated by this Court, that govern the lawyer disciplinary system. Respectfully, the Rules of Lawyer Disciplinary Procedure prohibit ODC from discussing the details of the closed disciplinary complaints and the details of the investigations conducted in an open forum. Regardless, there is no evidence to suggest or allegations made by Petitioner that ODC's actions violated his privacy. The evidence herein clearly establishes that ODC complied with the Rules of Lawyer Disciplinary Procedure. Specifically, the Rules of Lawyer Disciplinary Procedure do not authorize the ODC to remove complaints, responses, or evidence gathered during the investigative process from its confidential files, nor should they.

II. STATEMENT OF CASE

1. On or about May 5, 2006, the Office of Disciplinary Counsel received a report from Mr. Potter making allegations against his estranged wife, both of whom are members the West Virginia State Bar. [Exhibit A].

2. Pursuant to Rule 2.4 of the Rules of Lawyer Disciplinary Procedure, as this complaint alleged a violation of the Rules of Professional Conduct on its face, the same was

docketed for investigation and forwarded to Ms. Potter for a verified response.

3. Disciplinary Counsel reported this complaint and its findings to the Investigative Panel of the Lawyer Disciplinary Board at its May 12, 2007 meeting. As Mrs. Potter admitted that she took a personal file from Mr. Potter's law office, the Investigative Panel voted to close the instant complaint. The disposition stated that "[d]espite the motivation behind filing the complaint, knowingly and wrongfully removing files from a lawyer's office for use in any proceeding is a serious matter. It is noted, however, that the parties are involved in contentious divorce proceedings and the same mitigates in Respondent's favor. Moreover, in reviewing Respondent's history as a member of this Bar, her conduct in this case appears to be an isolated incident of poor judgment. Respondent is strongly cautioned about her conduct in this matter and warned that similar conduct in the future may result in disciplinary action." [Exhibit B].

4. By letter dated June 5, 2007, ODC sent the final disposition to Mr. Potter at his firm's new address.¹

5. The closed case was then filed per the customary procedure of the ODC and the parameters set forth in Daily Gazette Co, Inc. v. Committee on Legal Ethics of the West Virginia State Bar, 174 W.Va. 359, 326 S.E.2d 705 (1985).

¹Disciplinary Counsel attempted to send a copy of the disposition of Petitioner's complaint, but Petitioner had earlier failed to update his address at the West Virginia State Bar and two attempts were returned by the United States Post Office. Disciplinary Counsel ultimately contacted Petitioner by telephone to determine the correct mailing address and the same was sent to him forthwith.

6. A copy of the complaint filed and the final disposition thereof were placed in Mrs. Potter's public file.

7. The closed disciplinary investigative file was then placed in numerical order in the closed file room at the ODC.²

8. Approximately 6 months later, Mr. Potter again filed complaints against Mrs. Potter and Mrs. Potter's attorney in the divorce proceedings, Joseph R. Zak, Esquire, and the same were received and reviewed by Disciplinary Counsel on or about February 14, 2008. [Exhibit C and Exhibit D].

9. Mr. Potter alleged that on or about February 15, 2006, Mrs. Potter and her attorney unlawfully obtained a tape recorder and a tape that contained an ongoing conversation between Mr. Potter and his longtime friend. Mr. Potter stated that he believed that day that Mrs. Potter retrieved the same from his automobile, but elected not to pursue it further with her.

10. Mrs. Potter and her attorney then had the tape transcribed and submitted the same in a pleading filed in the divorce proceedings on or about July 16, 2007. Mr. Potter further indicated that Mrs. Potter had advised the Court upon inquiry that she did not remove the recording, but that Mr. Potter inadvertently left the recording behind in the marital home. Mr. Potter indicated these allegations were the subject of motions before the Family Court of Kanawha County, West Virginia.

11. On or about February 21, 2008, with reference to the complaint filed against

² It is ODC's general policy to house closed files on-site for approximately 12 months and then ODC transfers the files to its off-site storage facility.

his wife, as the Family Court was the appropriate forum to make the factual determination about the events involving the recorder, Mr. Potter was advised that Disciplinary Counsel believed “the acquisition, use and return of [his] personal property” was best determined by the Family Court at its March hearing and not by the ODC. [Exhibit E].

12. With reference to the complaint filed against Mr. Zak, Mr. Potter was advised by letter dated February 21, 2008, that a determination was made by Disciplinary Counsel not to docket his complaint for investigation. [Exhibit F].

13. Mr. Potter did not appeal either decision not to docket the complaints to the Investigative Panel of the Lawyer Disciplinary Board.

14. The closed cases were then filed per the customary procedure of the ODC and per Daily Gazette Co, Inc. v. Committee on Legal Ethics of the West Virginia State Bar, 174 W.Va. 359, 326 S.E.2d 705 (1985).

15. A copy of the complaints filed and the final disposition thereof were placed in Mrs. Potter’s and Mr. Zak’s public file.

16. The closed disciplinary investigative files were then placed in numerical order in the closed file room at the ODC.

17. Six months after these complaints were closed, by letter dated July 22, 2009, amongst other things, Mr. Potter advised Disciplinary Counsel that “[h]aving been unsuccessful in a series of attempts to obtain a family court hearing to attempt to retrieve the cassette and the reproductions, and with the two-year ethics report limitations period for the February 15, 2006 seizure about to end, [he] filed [his] ethics report in the hope that [the] office would be of some assistance to [him].”

18. Mr. Potter further indicated that on March 17, 2009, he filed a Petition for *Writ* of Mandamus in the Circuit Court of Kanawha County requesting that Court to order the Family Court to return the subject cassette. He filed a Motion to Withdraw his petition because he learned from his estranged wife's brief that ODC had copies of the recordings. Mr. Potter requested that ODC destroy the recordings or send them back to him and/or give him advice how to procure the same from ODC.

19. By letter dated August 13, 2009, Mr. Potter was advised that his request to destroy or return the evidence would be submitted for consideration to the Investigative Panel of the Lawyer Disciplinary Board.

20. Mr. Potter submitted a subsequent letter to Disciplinary Counsel dated August 17, 2009, wherein he outlined what he determined to be an acceptable resolution and proposed that ODC destroy the evidence.

21. By letter dated September 29, 2009, Disciplinary Counsel advised Mr. Potter that the Investigative Panel was not inclined to grant his request to destroy original disciplinary file materials or tender the original to him. Disciplinary Counsel further advised that because of the confidential nature of investigations, the written response and the evidence previously submitted by Mrs. Potter were sealed.

III. STANDARD OF REVIEW

Mr. Potter's Petition for *Writ* of Prohibition is without merit and clearly fails to meet the requisite standard for such an extraordinary remedy as required by West Virginia Code

§ 53-1-1³ and as set forth by this Court in State ex rel. Scales v. Committee on Legal Ethics, 191 W.Va. 507, 446 S.E.2d 729 (1994) and State ex rel. Hoover v. Bergh, 199 W.Va. 12, 483 S.E.2d 12 (1996). The Investigative Panel's decision not to abide by Petitioner's wishes to destroy evidence submitted in the investigation of a disciplinary complaint that he filed against his wife does not constitute abuse, nor justify issuance of a *writ* of prohibition.

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). Thus, "[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." Syl. Pt. 1, State ex rel. Westbrook Health Servs., Inc. v. Hill, 209 W. Va. 668, 550 S.E.2d 646 (2001); Syl. Pt. 2, State ex rel. Peacher v. Sencindiver, 160 W. Va. 314, 233 S.E.2d 425 (1977); *see* W.Va. Code Ann. 53-1-1.

A writ of prohibition will issue only if the appellate court determines that the abuse of the trial court's powers "is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate." Syl. Pt. 1, State ex rel. Kaufman v. Zakaib, 207 W. Va. 662, 535 S.E.2d 727 (2000). As this Court has explained many times:

In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, **this court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear**

³ Section 53-1-1 states: The *writ* of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in the controversy, or, having such jurisdiction, exceeds its legitimate powers.

statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.” [Emphasis added.]

Syl. Pt. 1, Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979); *accord* Syl. Pt. 2, State ex rel. Allstate Ins. Co. v. Gaughan, 203 W. Va. 358, 508 S.E.2d 75 (1998); Syl. Pt. 1, Karl, 199 W. Va. 678, 487 S.E.2d 336; State Farm Mut. Auto. Ins. Co. v. Stephens, 188 W. Va. 622, 626 n.4, 425 S.E.2d 577, 581 n.4 (1992).

IV. ARGUMENT

In determining whether to entertain and issue the *writ* of prohibition for cases where it is claimed that the lower tribunal, in this case, the ODC, exceeded its legitimate powers, this Honorable Court examines five factors: (1) whether the party seeking the *writ* has no other adequate means 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 entity’s order is clearly erroneous as a matter of law; (4) whether the entity’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the entity’s order raises new and important problems or issues of law of first impression. The Court further indicated that all five factors need not be satisfied, but stated that the existence of clear error as a matter of law, should be given substantial weight.

This Honorable Court established the Lawyer Disciplinary Board and ODC to investigate complaints of violations of the Rules of Professional Conduct. The Rules of Lawyer Disciplinary Procedure promulgated by this Honorable Court outline the

responsibilities, duties and 'powers' of the ODC. The ODC has acted within the parameters of the Rules of Lawyer Disciplinary Procedure and has not exceeded its legitimate jurisdiction. ODC's proper decision not to breach Rule 2.6 of the Rules of Lawyer Disciplinary Procedure does not constitute a "clear legal error resulting from a substantial abuse of discretion," and accordingly, the *Writ* of Prohibition sought by Petitioner should not issue.

Petitioner is seeking to destroy evidence submitted in both his divorce proceeding and in connection with an investigation that he sought against a member of the Bar. This is not a legitimate goal and his relief should not be afforded. Petitioner's primary grounds for the issuance of this writ is a violation of his right to privacy, however, no where in his petition does he allege that ODC has taken any action to violate the right to privacy. Moreover, there is no evidence to even suggest that ODC violated Petitioner's rights to privacy as by his own admission ODC had not made the subject material public in any manner. Petitioner has not at all been prejudiced by the actions of ODC in maintaining the integrity and confidentiality of disciplinary files per the applicable Rules of Lawyer Disciplinary Procedure. The actions of ODC are wholly consistent with the Rules of Lawyer Disciplinary Procedure and the applicable case law and do not amount to error as a matter of law. Instead, ODC's actions exhibit continued compliance with the Rules of Lawyer Disciplinary Procedure and the applicable case law. And, contrary to Petitioner's assertion, the confidentiality of the disciplinary system is not an issue of first impression as it was addressed by this Honorable

Court in Daily Gazette Co, Inc. v. Committee on Legal Ethics of the West Virginia State Bar, 174 W.Va. 359, 326 S.E.2d 705 (1985).

ODC complied with Rule 2.4(a) of the Rules of Lawyer Disciplinary Procedure when it received Petitioner's sworn report and docketed a complaint for investigation against Petitioner's wife. ODC complied with Rule 2.5 of the Rules of Lawyer Disciplinary Procedure when it notified Mrs. Potter of the nature of the complaint and required her to submit a verified response to the same. After receiving and reviewing the response, ODC complied with Rule 2.4(b)(2) and the matter was later reported to the Investigative Panel of the Lawyer Disciplinary Board at its May 12, 2007 meeting. Pursuant to Rule 2.8(a) of the Rules of Lawyer Disciplinary Procedure, Disciplinary Counsel reported its findings to the Investigative Panel. Pursuant to Rule 2.9(b) of the Rules of Lawyer Disciplinary Procedure, after the Investigative Panel determined that no probable cause existed, the Investigative Panel issued its findings and reasons for closing the complaint filed against Mrs. Potter. In compliance with Rule 2.9(b), a copy of the complaint and the Investigative Panel closing were placed in Mrs. Potter's public file. The closed disciplinary case, including the exhibits thereto, was then filed in numerical order and secured in ODC's closed file room.

Pursuant to Rule 2.6 of the Rules of Lawyer Disciplinary Procedure, the details of the investigation were and have been kept confidential. At the conclusion of the investigation, there was a no probable cause finding by the Investigative Panel of the Lawyer Disciplinary Board. The Gazette Court makes a clear distinction between cases where the Investigative Panel makes a finding of probable cause and cases wherein a no probable cause finding is

made. The Gazette Court stated “in cases where formal disciplinary charges in an attorney disciplinary proceeding are filed, following a determination that probable cause exists to substantiate allegations of an ethical violation, the hearing on such charges shall be open to the public, who shall be entitled to all reports, records, and nondeliberative materials introduced at such hearing, must be publicly accessible, including the record of the final action taken.” However, more importantly in the instant matter, in addition to clarifying what information must be available to the public when a complaint is filed formally, the Court affirmatively identified what was available to the public once a complaint was closed for lack of probable cause. The Gazette Court stated that:

[i]nformation regarding complaints dismissed without formal charges... is a necessary and vital component of the whole public process. While we recognize that there are reputational and investigatory justifications to restrict disclosure of information pertaining to complaints during the initial investigatory stage, those justifications are limited. Under West Virginia Constitution art. III, § 17, the judicial branch and its agencies are required to be fully accountable to the public. **Therefore, once a complaint of unethical conduct in a disciplinary proceeding is dismissed for lack of probable cause, the public has a right of access to the complaint and the findings of fact and conclusions of law which are presented in support of such dismissal.**

[Emphasis Added.] Daily Gazette Co. Inc. v. Committee on Legal Ethics of the West Virginia State Bar, 174 W.Va. 359, 326 S.E.2d 705 (1985). The complaint filed by Petitioner and the Investigative Panel’s disposition are housed in the public filing system located at the ODC. ODC has fully complied with the requirements set forth by the Gazette Court and implemented by the Court in the enactment of the applicable Rules of Lawyer Disciplinary Procedure.

ODC's maintenance of the integrity and confidentiality of the closed disciplinary file is based on Rule 2.6 of the Rules of Lawyer Disciplinary Procedure and the parameters set forth by the Gazette Court which make clear what the public has access to in the course of an investigation and more specifically at its conclusion. ODC asserts that the disciplinary process is better served by adherence to the same. Lawyers in West Virginia are required to respond to disciplinary complaints and failure to do so subjects those lawyers to disciplinary action. *See* Rule 8.1(b) of the Rules of Professional Conduct. The confidentiality provisions set forth in Rule 2.6 permit and encourage and allow a lawyer at the investigatory stage to be candid, open and complete in their written response. The same promotes a more efficient handling of disciplinary complaints and at times, a complete detailed response from the lawyer is all that is necessary to move towards disposition of the complaint in a timely manner.

However, the response to a disciplinary complaint may contain references to lawyers' clients, their partners, their employees, their spouses, their children, their physical and mental health and other attenuated circumstances that may provide an understanding for the defense of the allegations lodged against the lawyer. The responses may also include medical records, psychological evaluations, partnership agreements, guardian *ad litem* reports, attorney work product, and other sensitive and perhaps not otherwise discoverable or confidential materials. Moreover, as oftentimes the complaint is filed by a client of the lawyer, the lawyer's response is laced with confidential attorney-client information that if

allowed to later be accessed by an extraordinary *writ* could have an chilling effect on the public's willingness to file complaints against lawyers.⁴

West Virginia jurisprudence is full of other examples where records of evidence and proceedings are sealed and otherwise kept confidential, including certain juvenile proceedings [W.Va. Code §49-5-18]; family court proceedings [Rule 6 of the Rules of Practice and Procedure for Family Court]; and adoption proceedings [W.Va. Code §48-22-702]. Moreover, there are numerous civil actions wherein the parties agree to keep certain records sealed and confidential in order to protect privacy matters, trade secrets, financial data, confidential settlements, all of which allow for the advancement and/or the settlement of litigation coupled with protection of matters deemed sensitive, private or confidential.

In addition to the rules governing the confidentiality of disciplinary files, there are no rules that permit ODC to destroy evidence tendered in the investigation or any other aspect of a disciplinary file.⁵ Similar to the Courts, including this Honorable Court, ODC securely maintains disciplinary files in perpetuity. In each of the aforementioned subject matters where records are maintained confidentially, such records are kept, maintained and are subject to inspection by Court personnel. The rationale for the Courts maintaining sealed and/or confidential records is equally applicable to ODC and Petitioner has not demonstrated any reason why ODC cannot continue to operate under the same degree of trust as do the

⁴Rule 1.6(b) of the Rules of Professional Conduct states in pertinent part that “[a] lawyer may reveal such information to the extent the lawyer reasonably believes necessary: to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.... or to respond to allegations in any proceeding concerning the lawyer’s representation of a client.”

⁵The public file system of lawyers is maintained despite a lawyer’s license status and the only time a lawyer’s public file is removed from the public filing system is upon the lawyer’s death.

Courts who protect and maintain equally sensitive records. In fact, by Petitioner's own admission, by adhering to the Rules promulgated by this Court, ODC was able to protect Petitioner's privacy by ensuring the confidentiality of the disciplinary process.

Additionally, Petitioner erroneously contends that ODC has exceeded its jurisdiction and contends that the February 21, 2008 disposition letter supports this conclusion. Upon the filing of a second complaint against his wife, Disciplinary Counsel reviewed the enclosures and closed the complaint without an investigation. On the face of the complaint, Petitioner advised that the issue of whether the tape recorder and the cassette were "stolen" or "left behind in the marital residence" was set for hearing before the Family Court of Kanawha County, West Virginia. It is clear that this type of factual and legal finding about whether certain property was marital or personal, whether the subject property was stolen or left in the marital home and any determination as to a subsequent return of the subject property should be made by the Family Court, not the ODC. Clearly, Petitioner believed the same to be true as he initially pursued the issue before the appropriate Court.

Finally, Petitioner further contends that Disciplinary Counsel is acting in a manner that is lacking in integrity, that is violative of criminal law⁶, that is violative of the Rules of Lawyer Disciplinary Procedure and is not otherwise fulfilling its primary purpose, which is to protect the public. Disciplinary Counsel's adherence to the applicable Rules of Lawyer

⁶Inexplicably, Petitioner suggests that ODC's actions in the investigation of his complaint are violative of W.Va. Code §61-3-18. This claim is wholly without merit as there is no evidence, judicial finding or even a police report to support Petitioner's claim that the property in question was stolen. In fact, all evidence supports Mrs. Potter's contention that the subject property was marital property. Regardless, the language utilized in the September 29, 2009 letter continued to protect the confidential nature of the materials lodged in a closed disciplinary file.

Disciplinary Procedure, not only protects the public, but protects the integrity of the disciplinary system and protects the administration of justice.

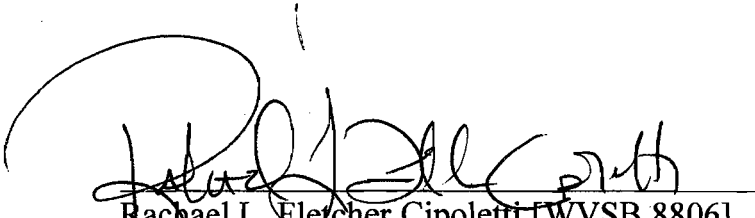
Candidly, Petitioner's motivation for filing this *writ* of prohibition is immaterial, but the chilling effect of a lawyer requesting Disciplinary Counsel and subsequently this Honorable Court to destroy evidence obtained in a disciplinary investigation harms the overall integrity of the disciplinary system. Self-regulation is a privilege, and an effective discipline system which requires a Bar that is both committed to the process and trusts that ODC will uniformly uphold the Rules governing the process. In that respect, ODC strives to maintain a working cooperative relationship with the Bar that fosters public confidence in the disciplinary process. The public's perception of Disciplinary Counsel standing over a paper shredder destroying evidence would cause irreparable damage to the public's belief in the integrity of the disciplinary process. Moreover, if the public is permitted to invade, inspect and otherwise alter closed disciplinary files in this manner, the detriment to the disciplinary process would be irreparable.

Petitioner has not alleged that ODC has taken any action in the investigation of the complaints he filed that would be in violation of his right to privacy. ODC complied with the Rules of Lawyer Disciplinary Procedure in the investigation and disposition of the complaints filed by Petitioner against other members of the Bar. The Rules promulgated by this Court are vested in sound public policy and further the stated goals of the lawyer disciplinary system. Petitioner's Petition for *Writ* of Prohibition is without merit and clearly fails to meet the requisite standard for such an extraordinary remedy as required by West Virginia Code § 53-1-1 and as set forth by this Court in State ex rel. Scales v. Committee on

Legal Ethics, 191 W.Va. 507, 446 S.E.2d 729 (1994) and State ex rel. Hoover v. Bergh, 199 W.Va. 12, 483 S.E.2d 12 (1996).

Accordingly, Disciplinary Counsel respectfully requests that the Rule not issue, that this matter be dismissed and subsequently be stricken from the Court's docket.

Respectfully submitted,
The Office of Disciplinary Counsel,

A handwritten signature in black ink, appearing to read 'Rachael L. Fletcher Cipoletti', is written over a horizontal line.

Rachael L. Fletcher Cipoletti [WVSB 8806]
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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 Disciplinary Counsel, have this day, the 28th day of December, 2009, served a true copy of the foregoing **RESPONSE TO PETITION FOR WRIT OF PROHIBITION** upon Jay M. Potter, Esquire by mailing the same, United States Mail with sufficient postage, to the following address:

Jay M. Potter, Esquire (2949)
Francis, Nelson & Brison, PLLC
Post Office Box 3029
Charleston, West Virginia 25331



Rachael L. Fletcher Cipoletti

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE