

STATE OF WEST VIRGINIA
THIRTEENTH JUDICIAL CIRCUIT
KANAWHA COUNTY JUDICIAL ANNEX
III COURT STREET, ROOM 425
CHARLESTON, WEST VIRGINIA 25301

CHARLES E. KING, JR.
JUDGE



TELEPHONE
304/357-0367

August 15, 2014

Chief Justice Robin J. Davis
West Virginia Supreme Court of Appeals
Capitol Complex
Building 1, Room E-301
Charleston, West Virginia 25305

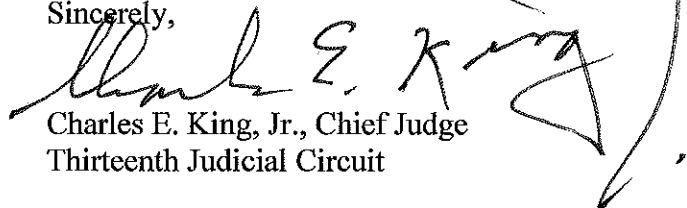
RE: In re: Mark S. Plants, Prosecuting Attorney for Kanawha County,
West Virginia
Kanawha County Case No. 14-P-430
Petition To Remove Mark S. Plants From The Office of Prosecuting Attorney

Dear Chief Justice Davis,

In accordance with West Virginia Code §6-6-7(c), I am forwarding to you a copy of the "Petition to Remove Mark S. Plants From the Office of Prosecuting Attorney" which was filed on August 15, 2014, in the Circuit Court of Kanawha County, West Virginia. Pursuant to West Virginia Code §6-6-7(c), I am asking the Supreme Court to impanel or convene a three-judge court to handle the above-referenced case. I have also enclosed a copy of the Order entered on August 15, 2014, which directs that clerk of the circuit court enter the petition of record and issue summons thereon.

Your prompt handling of this issue will be greatly appreciated. If you have any questions or need additional information, please feel free to contact me.

Sincerely,


Charles E. King, Jr., Chief Judge
Thirteenth Judicial Circuit

cc: Circuit Clerk w/o enclosure
Melissa Bird Foster, Esq., w/o enclosure
Mark S. Plants, Esq., Kanawha County Prosecuting Attorney w/o enclosure
James M. Cagle, Esq., w/o enclosure

Enclosure

FILED
IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

In re: Mark S. Plants,
Prosecuting Attorney for
Kanawha County, West Virginia

7/14 AUG 15 AM 9:46
CATHY S. GATSON, CLERK
K. COUNTY CIRCUIT COURT
Civil Action No. 14-P-430

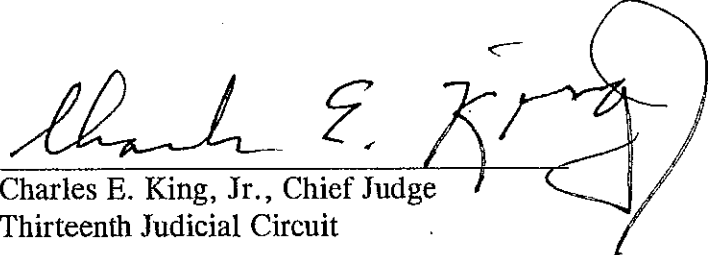
ORDER

On the 15th day of August, 2014, came the Petitioner, The County Commission of Kanawha County, West Virginia, by counsel, and presented a written and duly verified **Petition to Remove Mark Plants as Prosecuting Attorney of Kanawha County**. Said Petition is made pursuant to Chapter 6, Article 6, Section 7 of the West Virginia Code.

WHEREFORE it is Ordered that the written and verified **Petition to Remove Mark Plants as Prosecuting Attorney of Kanawha County** be entered of record and a Summons be issued thereupon by the Circuit Clerk of Kanawha County and be served upon the Respondent by personal service, the costs assessed to the Petitioner.

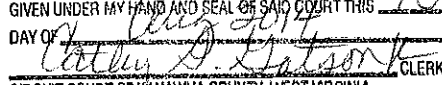
The Clerk is ordered to send a certified copy of this Order to all parties and counsel of record.

Entered this 15TH day of August, 2014.


Charles E. King, Jr., Chief Judge
Thirteenth Judicial Circuit


Prepared By:

Melissa Foster Bird (WV Bar #6588)
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(304)526-3503
(304)526-3543 facsimile
**COUNSEL FOR PETITIONER,
THE COUNTY COMMISSION OF
KANAWHA COUNTY WEST VIRGINIA**

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 12
DAY OF Aug 2014

CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

In re: Mark S. Plants,
Prosecuting Attorney for
Kanawha County, West Virginia

2014 AUG 15 AM 9:50
CATHY S. CATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Civil Action No. 14-P-430

**PETITION TO REMOVE MARK S. PLANTS
FROM THE OFFICE OF PROSECUTING ATTORNEY**

Mark Plants must be removed as the Prosecuting Attorney of Kanawha County. Mark Plants has committed misconduct in office, malfeasance in office, neglected his duties as Prosecutor and violated the Orders entered by the Courts of Kanawha County, the Rules of Professional Conduct and the Constitution of the State of West Virginia. Pursuant to West Virginia Code Chapter 6, Article 6, Section 7, the Kanawha County Commission petitions this Court for the immediate removal of Mark Plants as Prosecutor of Kanawha County.

INTRODUCTION

An attorney who is a public official is bestowed a unique duty: he or she must uphold the integrity of the legal profession while simultaneously safeguarding the public trust. Justifiably, any attorney holding a public office is held to the highest possible standard of conduct. Mark Plants, the elected prosecuting attorney of Kanawha County, has repeatedly engaged in wrongful conduct that betrays this higher standard. As a result, the law of West Virginia mandates Mark Plants's immediate removal from his public office.

The removal of Mark Plants as the Prosecutor of Kanawha County is necessary. He has committed misconduct in office, malfeasance in office and he has violated the Orders entered by Courts of Kanawha County, the Rules of Professional Conduct and the Constitution of the State of West Virginia. Further, Mark Plants has committed neglect of duty because he has agreed to an indefinite disqualification that precludes him from performing indispensable

and statutorily required duties of an elected Prosecutor. To that end, Mr. Plants's disqualification has, as of the date of this Petition, cost Kanawha County in excess of \$100,000.00. The Kanawha County Commission has determined that such ongoing and irreparable financial harm to the taxpayers of Kanawha County must not be allowed to continue.

FACTS

1. Mark Plants became the elected Prosecutor of Kanawha County, West Virginia on January 1, 2009, and began his second term on January 1, 2013. See, The Official Kanawha County, WV Web Site and Election Results from Secretary of State of West Virginia, attached collectively hereto as Exhibit A.
2. On February 26, 2014, the ex-wife of Mark Plants, contacted the West Virginia State Police and complained that Mr. Plants had caused significant injury to their son by whipping him with a belt. Criminal Complaint in Case No. 14M-2174, attached here as Exhibit B.
3. On February 27, 2014, Mr. Plants's ex-wife filed a Domestic Violence Petition with the Magistrate Court of Kanawha County, West Virginia alleging that Mr. Plants had admitted spanking his minor child "on his back thigh-leaving...bruises...." Domestic Violence Petition, Case No. 14D-260; The Domestic Violence Petition is not a document of public record, however, this quote is taken from Agreed Order of Disqualification at ¶ 5, attached as Exhibit P, *infra*.
4. Based upon the Domestic Violence Petition, the Magistrate Court issued an Emergency Protective Order against Mr. Plants ordering: (1) Mr. Plants "shall refrain from

abusing, harassing stalking, threatening, intimidating or engaging in conduct that places the Petitioner and/or the...children... in reasonable fear of bodily injury;" (2) Mr. Plants "shall refrain from contacting, telephoning, communicating with, harassing, or verbally abusing the Petitioner;" (3) Mr. Plants "shall refrain from entering any school, business, or place of employment of the Petitioner or other person named herein for the purpose of violating this Order;" (4) Mr. Plants "shall refrain from entering or being present in the immediate environs of the Petitioner's residence;" and (5) Mr. Plants's ex-wife "shall receive temporary custody" of the two children. Emergency Protective Order at 3-6, Case No. 14D-260, entered on February 27, 2014, attached hereto as Exhibit C.

5. On March 18, 2014, Mr. Plants was charged with violating the Emergency Protective Order by allegedly having impermissible contact with his family members and entered into a Criminal Bail Agreement which set bail of \$2,000.00. He was released on his own recognizance. Criminal Complaint dated March 17, 2014, Case No. 14M-1818, attached hereto as Exhibit D and Criminal Bail Agreement attached hereto as Exhibit E.
6. Family Court Judge Patricia Keller determined that Mark Plants violated the Emergency Protective Order. ("In addition to the violation of the Emergency Protective Order that occurred on March 17, 2014, at the Fruth Pharmacy parking lot.....) *See*, Domestic Violence Protective Order, signed June 19, 2014, and entered on June 23, 2014, attached hereto as Exhibit F.
7. Following a series of continuances, an Agreed Order for the Continuation of Emergency Protective Order which continued in full force and effect the Emergency Protective Order of February 27, 2014, yet modified the parenting time permitted to

allow Mr. Plants supervised visitation of his children, prevented overnight visitation, and prohibited "discussions with the children about the incident that took place, nor should there be any discussions in front of the children unless it is in a counseling session." Order Continuing Hearing and Emergency Protective Order entered March 24, 2014, in Cases No 14-D-260 and 14-DV-249, attached hereto as Exhibit G.

8. At some time prior to the entry of the Final Domestic Violence Protective Order, Mr. Plants had violations of the Agreed Continuance of the Emergency Protective Order. ("Mark Plants has engaged in certain behaviors since the Agreed Order that constitute civil violations of the protective provisions contained in the Agreed Order Continuing the Emergency Protective Order.") Exhibit F.
9. The Domestic Violence Protective Order was entered on June 23, 2014, and found that Mr. Plants's ex-wife had proven by a preponderance of the evidence that Mr. Plants "attempted to cause or intentionally, knowingly or recklessly caused physical harm to [Allison Plants, ex wife] or [minor children] with or without dangerous or deadly weapons. Exhibit F.
10. The Domestic Violence Protective Order prohibited Mr. Plants from: 1) abusing, harassing, stalking, threatening, intimidating or engaging in conduct that places [Allison Plants, ex wife and children] in reasonable fear of bodily injury; 2) contacting, telephoning, communicating with, harassing, or verbally abusing [Allison Plants] or other persons named. Exhibit F.
11. The Domestic Violence Protective Order awarded temporary custody to [Allison Plants] and allowed Mr. Plants limited daytime visitation, but no overnight visitation, with his minor children. Exhibit F.

12. As recently as July 21, 2014, Family Court Judge Keller denied two motions to modify the Final Domestic Protective Order: 1) because an oral Motion by Mr. Plants to restrict his ex-wife's parenting time had no basis; and, 2) a denial of unsupervised vacation time which was requested by Mr. Plants because a "recent incident ...shows that Mark Plants is not ready to have less restrictive access to his children." Order Denying Petition to Modify a Protective Order issued on July 17, 2014 and filed on July 21, 2014, attached hereto as Exhibit H.
13. On March 31, 2014, the West Virginia State Police filed a Criminal Complaint in the Magistrate Court of Kanawha County, West Virginia against Mr. Plants charging him with domestic battery in violation of West Virginia Code Section 61-2-28(a) and alleging that on February 22, 2014, Mr. Plants "did unlawfully and intentionally make physical contact of an insulting and provoking nature with his family and household member ... and intentionally cause physical harm to such family member." Criminal Complaint filed on March 31, 2014, attached hereto as Exhibit I.
14. A warrant was issued for Mr. Plants's arrest on March 31, 2014. Warrant for Arrest executed on March 31, 2014, attached hereto as Exhibit J.
15. After an appearance in the Magistrate Court of Kanawha County, West Virginia bail was set in the amount of \$1,000.00 and Mr. Plants was released on his own personal recognizance. Criminal Bail Agreement, signed on March 31, 2014, attached hereto as Exhibit K.
16. A special prosecutor, Sidney Bell, was appointed to prosecute the charges against Mr. Plants. Mr. Bell was sworn in on March 18, 2014. Letter from Sidney Bell, Esq. to Kanawha County Commission of March 19, 2014, attached hereto as Exhibit L.

17. On April 11, 2014 the Office of Disciplinary Counsel filed a Petition with the Supreme Court of Appeals of West Virginia titled, Petition Seeking Immediate Suspension of Respondent and/or Disqualification of Respondent and the Kanawha County Prosecuting Attorney's Office from Instituting and Prosecuting Allegations of Domestic Violence Involving a Parent or Guardian and Minor Child. *See*, Petition Seeking Immediate Suspension of Respondent and/or Disqualification of Respondent and the Kanawha County Prosecuting Attorney's Office from Instituting and Prosecuting Allegations of Domestic Violence involving a Parent or Guardian and Minor Child Pursuant to Rule 3.27 of the Rules of Lawyer Disciplinary Procedure, attached hereto as Exhibit M.
18. On April 14, 2014, the City of Charleston and the Charleston Police Department filed a Writ of Prohibition with the Circuit Court of Kanawha County alleging Mr. Plants should be disqualified and prohibited from prosecuting criminal matters pertaining to domestic violence between parents and minor children based on the criminal charges pending against Mr. Plants. Petition for Writ of Prohibition filed on April 14, 2014, Case Number 14-P-189, attached hereto as Exhibit N.
19. In response to the Writ filed by the City and the Police Department, Mr. Plants first argued that there was no conflict, then argued that if there was a conflict it was limited to cases only involving corporal punishment and that the Assistant Prosecutors that reported to him could handle the cases. Respondent's Answer to Petition for a Writ of Prohibition, Case No. 14-P-189, filed April 18, 2014, attached hereto as Exhibit O.
20. In disposition of the Writ of Prohibition filed by the City and the Charleston Police Department, the parties, including Mr. Plants, entered an Agreed Order of

Disqualification that found, "it is in the public interest that child abuse and neglect, violent crimes against children by their parent, guardian, or custodian, and criminal violations of protective orders be prosecuted impartially without any appearance of impropriety." Agreed Order of Disqualification, Case No. 14-P-189, signed by all parties and entered by the Court on April 23, 2014, attached hereto as Exhibit P.

21. The Agreed Order of Disqualification additionally found that Mr. Plants's assertions that he did not commit domestic battery and did not violate the Emergency Protective Order "appear to materially limit the ability of the Kanawha County Prosecuting Attorney's Office to properly prosecute certain cases" involving crimes of violence by a parent, guardian, or custodian against a child; abuse and neglect cases under Chapter 49 of the West Virginia Code; and criminal violations of domestic violence protection orders. Exhibit P at p. 8.
22. The Supreme Court of Appeals of West Virginia found that the Circuit Court's April 23, 2014, Agreed Order of Disqualification temporarily resolved any potential conflict of interest and suspension of Mr. Plants's license was not necessary at that time. *Office of Lawyer Disciplinary Counsel v. Plants*, 759 S.E.2d 220 (W. Va. 2014) (per curium). Per Curium Decision of Supreme Court of Appeals of West Virginia, No 14-0348, filed May 28, 2014, attached hereto as Exhibit Q.
23. On April 24, 2014, an Order Appointing Special Prosecutors was entered naming Donald P. Morris as Chief Special Prosecutor and appointing Rocky Holmes, Amy Bird and Adam Petry as Assistant Special Prosecutors due to the disqualification of Mr. Plants as Prosecutor of the categories of matters addressed in the Agreed Order of

Disqualification. Order Appointing Special Prosecutors, Civil Action No. 14-P-189, entered April 24, 2014, attached hereto as Exhibit R.

24. Pursuant to the Order Appointing Special Prosecutors, Chief Special Prosecutor Donald P. Morris is being paid a rate of \$200.00 per hour as agreed upon by Chief Special Prosecutor Morris and the Kanawha County Commission. *See*, Agenda of Kanawha County Commission dated May 6, 2014, at 4, attached hereto as Exhibit S.

25. Following Chief Special Prosecutor Morris's appointment Mr. Plants, by counsel, publicly attacked the fee as being "grossly excessive" and falsely stated that the fee was "inconsistent with the Order of the Court" of Kanawha County. Motion for Relief from Order Appointing Special Prosecutors, Case No 14-P-189, filed May 29, 2014, attached hereto as Exhibit T.

26. Mr. Plants has also publicly and openly attacked payment to the Special Prosecutors as a waste of Kanawha County's money. *See*, Rusty Marks, County Commission Votes to Start Removal Proceedings Against Plants, Charleston Gazette, July 25, 2014, attached hereto as Exhibit U.

27. As agreed by Mr. Plants, however, Chief Special Prosecutor Morris is an able, qualified and extraordinarily ethical Special Prosecutor whose work ethic, value and ethics are impeccable. The fee of \$200.00 an hour was found by the Kanawha County Circuit Court Judge Bloom as "not inequitable" and that "the County Commission was entirely proper in setting the fee." Transcript of Hearing on Motion for Relief from Order Appointing Special Prosecutor held June 5, 2014, Civil Action No. 14-P-189, at 3-11, attached hereto as Exhibit V.

28. As a direct result of Mr. Plants's disqualification, the Special Chief Prosecutor and his assistants must handle all cases involving crimes of violence by a parent, guardian or custodian against a child; all criminal violations of domestic violence protective orders; and all felony abuse and neglect cases. Exhibit P.
29. As of July 24, 2014, the Special Chief Prosecutor and Special Prosecutor Sid Bell, have been paid in excess of \$93,000.00, to handle the matters from which Mr. Plants has been disqualified as well as the criminal investigation and prosecution of Mr. Plants's criminal charges. See invoices of Don Morris and the Akers Law Office and the invoices of Sidney Bell, attached collectively hereto as Exhibit W.
30. Pursuant to the May 28, 2014, decision by the Supreme Court of Appeals of West Virginia in *Office of Disciplinary Counsel v. Mark Plants*, Case No. 14-0348, and the April 23, 2014, Agreed Order of Disqualification Mr. Plants will be disqualified from handling 100% of the abuse and neglect cases, violations of protective orders and felony cases involving violence by a parent or guardian against a child until his criminal charges are resolved. Exhibits P and Q.
31. As agreed by Mr. Plants the cases that must now be handled by the Special Prosecutor are "far more complicated, far more important [than certain civil cases]. We have the lives of innocent victims, we have the constitutional protections and guarantees of a fair trial of the defendants in this case, and it's very complicated law, and it is a very sophisticated level of expertise for Mr. Morris." Exhibit V at 5.
32. As instructed by the Supreme Court of Appeals of West Virginia, "[d]ue to the expense of maintaining a special prosecutor during the pendency of these actions, the

proceedings against [Mr. Plants] should continue to resolution as expeditiously as possible." Exhibit Q at 24.

33. Mr. Plants's criminal charges for domestic violence against a minor and for violation of a Court's Emergency Restraining Order have been placed on a Pretrial Monitoring Agreement as a Condition of Bond. *See*, Pretrial Monitoring Agreement as a Condition of Bond, *State of West Virginia v. Mark Steven Plants*, Case No 14M-1818, 14M-2174, signed on July 14, 2014, attached hereto as Exhibit X.
34. The current Pretrial Monitoring Agreement as a Condition of Bond is the third iteration of a Pretrial Diversion Order in Cases 14M-1818 and 14M-2174. The first two Pretrial Diversion Orders signed by Mr. Plants were found to be noncompliant with the law and were set aside. *See*, Pretrial Diversion Order signed on May 21, 2014, Motion to Correct or Set Aside Pretrial Diversion Order filed on May 23, 2014, Pretrial Monitoring Agreement as a Condition of Bond filed on June 24, 2014, article by Ryan Quinn, Putnam Prosecutor Believes Plants Deal Remains Illegal, Charleston Gazette, June 25, 2014, attached hereto collectively as Exhibit Y.
35. As a part of the current Pretrial Monitoring Agreement as a Condition of Bond, Mr. Plants has agreed to enroll in a Batterer's Intervention Prevention Program (BIPPs) class at the Putnam County Day Report Center. Exhibit X at ¶ 13.
36. The Batterer's Intervention Prevention Program was established as part of the Perpetrator Intervention Program Licensure and is 32 weeks long. W.Va. Code St. R. §191-3-3.10a (2010).

37. As of the date of the filing of this Petition, Mr. Plants has not registered for the Batterer's Intervention Prevention Program pursuant to the Pretrial Monitoring as a Condition of Bond that he signed on July 14, 2014.
38. Pursuant to the Pretrial Monitoring Agreement as a Condition of Bond, Mr. Plants is required to complete the Batterer's Intervention Prevention Program and the other conditions of the agreement and the Kanawha County Special Prosecuting Attorney may consider the completion prior to a final compliance hearing. Exhibit X at ¶ 13.
39. Completion of the Batterer's Intervention Prevention Program and the other conditions of the Pretrial Monitoring Agreement as a Condition of Bond do not guarantee the outcome of the criminal charges against Mr. Plants. Exhibit X at ¶ 13.
40. At minimum it will be an additional 32 weeks from the time Mr. Plants registers for the Batterer's Intervention Prevention Program for the final compliance hearing on the Pretrial Monitoring Agreement as to the criminal charges pending against him. Exhibit X at ¶ 13.
41. Adding further confusion, lack of certainty and lack of expedience to this matter, on August 11, 2014, Mr. Plants asked the Magistrate Court for trial dates because he wants to "return to square one." Letter from J. Cagle to Magistrate Flannigan and Special Prosecutor Bell dated August 11, 2014, attached hereto as Exhibit Z.
42. In response to Mr. Plants's effort to "return to square one" Special Prosecutor Bell indicated that he does not agree to simply set aside the Pretrial Monitoring Agreement as a Condition of Bond that was agreed and signed by Mr. Plants. See, Kate White, Plants Asks for Trial; Prosecutor Against Idea, Charleston Gazette, August 11, 2014, attached hereto as Exhibit AA.

43. Previously entered Court Orders indicate that the next hearing on Mr. Plants's criminal charges is not set until August 27, 2014. Exhibit X.

44. The disqualification of Mr. Plants is indefinite. There is no guarantee that a completion of the Batterer's Intervention Prevention Program or even a resolution of the criminal charges will resolve the conflict which causes Mr. Plants to be unable to do his full job and fulfill his statutorily required duties as a prosecutor. Exhibit P at DECISION on 9.

LAW

45. "It shall be the duty of the prosecuting attorney to attend to the criminal business of the State in the county in which he is elected and qualified, and when he has information of the violation of any penal law committed within such county, he shall institute an prosecute all necessary and proper proceedings against the offender, and may in such case issue or cause to be issued a summons for any witness he may deem material." W. Va. Code § 7-4-1 (2014).

46. "One who accepts a public office does so *cum onere*, that is, he assumes the burdens and the obligations of the office as well as its benefits, subjects himself to all constitutional and legislative provisions relating to the office and undertakes to perform all duties imposed on its occupant; and while he remains in office he must perform all such duties. If he gets the check, he must do the job. Failure of the prosecutor to perform the duties imposed by W.Va. Code Section 7-4-1 would make him liable under W.Va. Constitution. Art. 9, Section 4, W.Va. Code Section 6-6-7, and W.Va. Code Section 11-1-5." Syl. Pt. 5, *State ex rel Skinner v. Dostert*, 278 S.E.2d 624, 627 (W. Va. 1981)

47. Any person holding any county office, the term of which is fixed by law, may be removed from such office for official misconduct, malfeasance in office, neglect of duty or gross immorality or for any of the causes or on any of the grounds provided by any other statute. W. Va. Code § 6-6-7(a).
48. The procedure for removal of county officers, such as the Prosecuting Attorney, requires that the County Commission file a Petition verified by at least one of the members which charges the Prosecuting Attorney with violation of the grounds outlined in West Virginia Code Section 6-6-7. W. Va. Code §§ 6-6-7(a), (b)(1), and (c).
49. Removal of a public officer from office is a drastic remedy and the statutory provision regarding removal is given strict construction. Syl. Pt. 1, *Matter of Boso*, 231 S.E.2d 715 (W. Va. 1977).
50. Official misconduct is defined as "any unlawful behavior by a public officer, in relation to the duties of his office, willful in character." Syl. Pt. 3, *Daugherty v. Day*, 116 S.E.2d 131 (W. Va. 1960).
51. "Malfeasance in office has been defined as 'the doing of some act which is positively unlawful or wrongful or an act which the actor has no legal right to do, or as any wrongful conduct which affects, interrupts or interferes with the performance of an official duty'." *In re Sims*, 253 S.E.2d 273, 281 (W. Va. 1999), quoting *Daugherty v. Ellis*, 97 S.E.2d 33 (W. Va. 1956). See also *Kemp v. Boyd*, 275 S.E.2d 297, 306-07 (W. Va. 1981).
52. "[W]hen charges of official misconduct, malfeasance in office, incompetence, neglect of duty or gross immorality are proved by clear and convincing evidence against a

person holding a county office, W.Va. Code Section 6-6-7 (1985) mandates removal from office." *Sims*, 253 S.E.2d at 281.

53. Conduct that violates the West Virginia Rules of Professional Conduct "is unlawful behavior even though it violates the Rules of Professional Conduct rather than a statute. Article VIII, Section 3 of the West Virginia Constitution states in part, 'The [supreme] court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to...practice and procedure, which shall have the force and effect of law.'" *Id.* at 282, n. 6.

54. A lawyer may not represent a client if the representation is materially limited by the lawyer's own interests. Rule 1.7 of the West Virginia Rules of Professional Conduct.

55. The State of West Virginia, as the client of the Kanawha County Prosecutor, cannot consent to waive a conflict of interest because the public interest is involved. *State ex rel Morgan Stanley & Co., Inc. v. MacQueen*, 416 S.E.2d 55, 56 (W. Va. 1992).

56. The inability for the State of West Virginia to consent to a conflict has been explained as follows, "[t]he rationale underlying this rule is quite simple: 'It is essential that the public have absolute confidence in the integrity and impartiality of our system of justice.' Implicit within this ideal is the ethical requirement that attorneys must 'avoid, as much as possible, the appearance of impropriety.'" (Internal citations omitted). *MacQueen*, 416 S.E.2d at 60 (W. Va. 1992), quoting *Graf v. Frame*, 352 S.E.2d 31, 38 (W. Va. 1986).

57. Under W. Va. Const. Art. IX, § 11, and West Virginia Code Section 7-1-3, County Commissions are the political body charged with "the superintendence and administration of the internal police and fiscal affairs of their counties." *See* W. Va.

Const. Art. IX, § 11 and W. Va. Code § 7-1-3. Clearly, the Kanawha County Commission has a fiduciary duty, mandated by the Constitution of the West Virginia, to manage the fiscal affairs of the County in a prudent and responsible manner.

58. An "attorney who is a public official is held to a higher standard of conduct because of his or her (1) professional and (2) public trustee responsibilities." *Committee on Legal Ethics of West Virginia State Bar v. Roark*, 382 S.E.2d 313, 318 (W. Va. 1989)(quoting *Graf*, 352 S.E.2d at 156).

59. Because of the "enormous amount of trust that the public places in its lawyers" the public's interests must be protected and the integrity of the legal profession must be maintained. See, *Office of Disciplinary Counsel v. Albers*, 585 S.E.2d 11, 13 (W. Va. 2003).

60. "Ethical violations by a lawyer holding a public office are viewed as more egregious because of the betrayal of the public trust attached to the office." Syl. Pt. 3, *Roark*, 382 S.E.2d at 314.

61. "A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminate by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." Rule 3.6(a) of the West Virginia Rules of Professional Conduct.

62. It is a special responsibility of a Prosecutor to prevent persons associated with him from making extrajudicial statements that have a substantial likelihood of materially prejudicing an adjudicative proceeding. Rule 3.8 of the West Virginia Rules of Professional Conduct.

63. "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer...." Rule 8.2 of the Rules of Professional Conduct.
64. A prosecutor should not engage in patterns of making improper and extrajudicial public statements about pending cases or about potential cases. *Sims*, 253 S.E.2d at 281.
65. Under the authority granted in West Virginia Code Section 6-6-7, the Kanawha County Commission petitions for the removal of Mark Plants as the Kanawha County Prosecutor for neglect of duty, malfeasance in office and violation of the statutes, Rules of Professional Conduct and Constitution of the State of West Virginia.

CHARGES

66. "[I]t can be difficult to pigeon-hole specific offences into the broad categories provided in [W.Va. Code Section 6-6-7]" however, the inability to pigeon-hole the offences do not make them less violative of Section 6-6-7. *In re Sims*, 253 S.E.2d at 281.
67. Mr. Plants has committed malfeasance in office and misconduct in office as his positively unlawful and wrongful acts have affected, interrupted and interfered with his official duty as Prosecutor.
- a. Mr. Plants has been charged with the crimes of domestic battery and violation of an Emergency Protective Order.
 - b. Mr. Plants has agreed that he has an apparent conflict of interest in prosecuting cases of domestic violence in a parent/guardian and child relationship, violations of domestic protective orders and felony abuse and neglect.

- c. Mr. Plants has agreed that he is disqualified from prosecuting cases of domestic violence in a parent/guardian and child relationship, violations of domestic protective orders and felony abuse and neglect .
- d. Mr. Plants's acts have interfered with, affected and interrupted his official duties to attend to the criminal business of the State of West Virginia and Kanawha County.
- e. Mr. Plants has committed malfeasance in office and should be removed as the Prosecutor of Kanawha County pursuant to West Virginia Code Section 6-6-7.

68. Mr. Plants has committed official misconduct in office and malfeasance in office as his positively unlawful behavior was willful in character and has interrupted and interfered with his duties as a Prosecutor.

- a. An Emergency Protective Order was entered which prevented contact between Mr. Plants and his children.
- b. Mr. Plants has been found to have violated the Emergency Protective Order.
- c. An Agreed Order Continuing the Emergency Protective Order was entered which prohibiting Mr. Plants from certain conduct and contact with his minor children.
- d. Mr. Plants engaged in certain behaviors which constituted civil violations for the protective provisions contained in the Agreed Order Continuing Emergency Protective Order.
- e. A Final Protective Order was entered which prevented Mr. Plants from abusing, harassing, stalking, threatening, intimidating or engaging in conduct that places his ex-wife and children in reasonable fear of bodily injury.

- f. As recently as July 21, 2014, Mr. Plants continued to engage in behavior in contravention to the Final Protective Order that demonstrated his inability to have more custodial access to his children.
- g. Violation of a Court's Order is improper on its face but even more egregious given the higher level of conduct required by a lawyer holding a public office.
- h. The alleged criminal conduct by the very lawyer sworn to uphold the criminal business in the State of West Virginia and in Kanawha County is direct misconduct in office.
- i. Mr. Plants's willful violations of the Protection Orders have interfered with and interrupted his ability to carry out his duties as a Prosecutor.
- j. Mr. Plants has committed misconduct in office and should be removed as Prosecutor of Kanawha County pursuant to West Virginia Code Section 6-6-7.

69. Mr. Plants has neglected his duties as a Prosecutor.

- a. Mr. Plants has agreed that he is disqualified from handling entire categories of cases including domestic violence involving parent/guardian and child, violations of protective orders, felony abuse and neglect matters.
- b. Mr. Plants agreed to the indefinite disqualification on April 23, 2014.
- c. Mr. Plants's disqualification required Kanawha County to hire a Chief Special Prosecutor.
- d. The equitable fee for the experience, knowledgeable, ethical Special Prosecutor is/was \$200.00 per hour.
- e. The Kanawha County Commission acted entirely properly in setting the fees for the Special Prosecutor.

- f. As a direct result of Mr. Plants's agreed disqualification, the Kanawha County Commission has already paid fees totaling in excess of \$93,000.00 to the Chief Special Prosecutor and Special Prosecutor Sidney Bell.
- g. The disqualification of Mr. Plants is indefinite and not necessarily cured even if the criminal charges against him are resolved.
- h. Mr. Plants's disqualification has directly resulted in the citizens of Kanawha County bearing the burden of the expense of hiring two special prosecutors, in essence a second Prosecutor's office, for an indefinite, and possibly unending, period of time.
- i. The Kanawha County Commission, as the Constitutional entity charged with the supervision of the fiscal affairs of Kanawha County, has determined that the continuing, unbudgeted expense resulting from Prosecuting Attorney Mark Plants's indefinite disqualification has caused unacceptable financial harm to the county treasury and the taxpayers of Kanawha County.
- j. Mr. Plants's inability to carry out his full duties as Prosecutor due to the criminal charges pending against him and his responses to those charges, and the expense created for the citizens of Kanawha County because of his disqualification as the Prosecutor constitute a neglect of the office of Prosecutor whose official role is to attend to criminal business of the State and county.
- k. Mr. Plants has neglected his duties as prosecutor, has failed to perform the full duties of attending to the criminal matters of the State of West Virginia and his own acts have caused waste of the funds of Kanawha County citizens. Mr.

Plants should be removed as Prosecutor of Kanawha County pursuant to West Virginia Code Section 6-6-7.

70. Mr. Plants has violated the Rules of Professional Conduct. These violations have interfered with his duties as a prosecutor, have violated the higher standard of conduct to which public officials are responsible, have violated the Orders of the Court, have insulted and have undermined the office of Prosecutor.

- a. Although Rule 1.7 of the Rules of Professional Conduct disqualify the assistant prosecutors reporting to Mr. Plants, at the same time he was disqualified, Mr. Plants did not seek a special prosecutor and, instead, tried to take actions within his own office to manufacture an appearance of conflict resolution.
- b. In violation of Rule 8.2 of the Rules of Professional Conduct, Mr. Plants falsely represented that the fees being paid to the Chief Special Prosecutor were 'inconsistent with the Order of the Court' of Kanawha County, when, in fact, he knew that the Kanawha County Circuit Court does not set the fees of the Special Prosecutor.
- c. Mr. Plants violated Rule 3.6 of the Rules of Professional Conduct by publicly undermining the credibility and professionalism and the independence of the Chief Special Prosecutor's office when he publicly called into controversy the fees being paid to the Chief Special Prosecutor.
- d. Mr. Plants has violated the higher standard of conduct required by a lawyer elected as a public official and has called into question the integrity of the legal system and public trust.

- i. Mr. Plants has been arrested and charged with domestic battery and has entered into a diversion agreement in order to delay or avoid trial on his criminal charges.
 - ii. On multiple occasions Mr. Plants has violated Protective Orders (Emergency, Continued and Final) issued in his own personal domestic violence case.
 - iii. Mr. Plants continued to violate the terms of the Final Protective Order and was denied increased visitation with his children as recently as July 21, 2014.
 - iv. Mr. Plants has agreed to enter a Batterer's Intervention Prevention Program but has not enrolled in the Batterer's Intervention Prevention Program although the Pretrial Monitoring Agreement was signed over a month ago.
 - v. Mr. Plants has failed to follow the instruction of the West Virginia Supreme Court to resolve these issues expeditiously.
- e. Mr. Plants has engaged in a continuing pattern of making improper public statements about his own criminal cases, the retention of a Special Prosecutor, the cost of the Special Prosecutor, the Kanawha County Commission and Commissioners and their motives for utilizing the only procedure that the Kanawha Commission is afforded to deal with this situation under West Virginia Law.

71. Mr. Plants's continued disrespect of the Courts of the State of West Virginia, violations of the Rules of Professional Conduct and the office of Prosecutor, justify his removal as Prosecutor of Kanawha County pursuant to the authority in West Virginia Code Section 6-6-7. Failure of the prosecutor to perform the duties imposed by West Virginia Code Section 7-4-1 makes him liable under the West Virginia Constitution and West Virginia Code Section 6-6-7. Mr. Plants has agreed to an indefinite disqualification which precludes him from performing indispensable and statutorily required duties of a Prosecutor and therefore, he must immediately be removed as the Prosecutor of Kanawha County pursuant to West Virginia Code Section 6-6-7.

CONCLUSION

72. The law requires that while Mr. Plants remains in office, he must perform all such duties of the job.
73. Mark Plants has agreed to disqualify himself from doing his full job as the Prosecutor of Kanawha County by the apparent conflict created by his response to the criminal charges against him.
74. Mark Plants has repeatedly violated the Orders of a Court of the State of West Virginia.
75. Mark Plants has violated the Rules of Professional Conduct by publicly undermining the credibility, professionalism and independence of the Special Prosecutor, who was appointed because of Mr. Plants's agreed disqualification.
76. Mark Plants has committed misconduct in office, malfeasance in office and neglect of the office of Prosecutor of Kanawha County in violation of West Virginia Code Section 6-6-7.

77. Pursuant to West Virginia Code Section 6-6-7, Mr. Plants should be removed as the
Prosecutor of Kanawha County.

**THE COUNTY COMMISSION OF
KANAWHA COUNTY WEST VIRGINIA**

By: 

Of Counsel

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**COUNSEL FOR PETITIONER, THE
COUNTY COMMISSION OF
KANAWHA COUNTY WEST VIRGINIA**

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

In re: Mark S. Plants,
Prosecuting Attorney for
Kanawha County, West Virginia

Civil Action No. _____

VERIFICATION

This day came W. Kent Carper, President, Henry C. Shores, Commissioner and David J. Hardy, Commissioner and after being first duly sworn on oath respectfully state that they are elected members of The County Commission of Kanawha County West Virginia and further verify that the allegations contained in the foregoing Petition are true and accurate to the best of the belief of each.

THE COUNTY COMMISSION OF KANAWHA
COUNTY WEST VIRGINIA

W. KENT CARPER, PRESIDENT

HENRY C. SHORES, COMMISSIONER

DAVID J. HARDY, COMMISSIONER

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

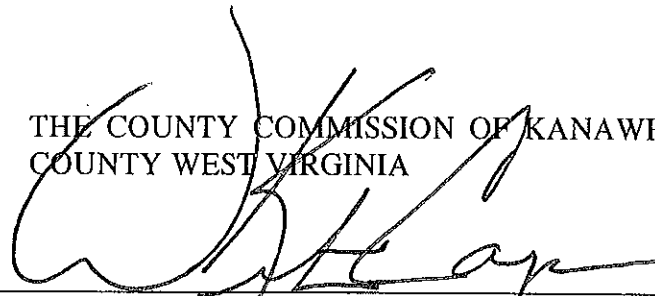
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THE COUNTY COMMISSION OF KANAWHA
COUNTY WEST VIRGINIA



W. KENT CARPER, PRESIDENT



HENRY C. SHORES, COMMISSIONER



DAVID J. HARDY, COMMISSIONER