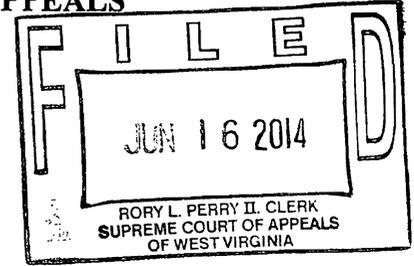


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 14-0587



STATE OF WEST VIRGINIA, EX REL.
PATRICK MORRISEY, ATTORNEY GENERAL OF
WEST VIRGINIA,

Petitioner,

v.

WEST VIRGINIA OFFICE OF DISCIPLINARY COUNSEL,
WEST VIRGINIA LAWYER DISCIPLINARY BOARD,

Respondents.

PETITION FOR WRIT OF PROHIBITION

PATRICK MORRISEY
ATTORNEY GENERAL

Elbert Lin (WV State Bar # 12171)
Solicitor General

J. Zak Ritchie (WV State Bar # 11705)
Assistant Attorney General

State Capitol Building 1, Room 26-E
Charleston, West Virginia 25305
Telephone: (304) 558-2021
E-mail: elbert.lin@wvago.gov

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

QUESTION PRESENTED 2

STATEMENT OF THE CASE..... 2

 I. The Request For Prosecutorial Assistance From Mingo County 2

 II. The Board’s Informal Opinion..... 3

 III. The Request For Assistance From The Preston County Prosecuting Attorney 4

SUMMARY OF ARGUMENT 5

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 7

ARGUMENT..... 8

 I. STANDARD OF REVIEW 8

 II. THE BOARD’S OPINION IS CLEARLY ERRONEOUS. 9

 A. Rule 8.4(d) Does Not Bar Lawyers Who Work For The Attorney General From
 Assisting County Prosecutors With Criminal Prosecutions..... 9

 1. The Board’s interpretation of Rule 8.4(d) is overbroad..... 10

 2. The Attorney General possesses common law authority to assist county
 prosecutors with criminal prosecutions. 12

 B. Rule 1.7 Also Does Not Bar Lawyers Employed By The Attorney General From
 Assisting County Prosecutors With Criminal Prosecutions..... 16

 1. Assisting a county prosecutor in a criminal prosecution is unlikely to create a
 conflict of interest under Rule 1.7(b) for a deputy or assistant attorney general..... 16

 2. To the extent a conflict of interest arises from the appointment of a deputy or
 assistant attorney general as a special assistant prosecutor on a criminal matter,
 an ethical screen would be sufficient to address the issue. 19

 III. THE BOARD’S OPINION PRESENTS BOTH A QUESTION OF FIRST
 IMPRESSION AND ONE OF PURE LAW. 23

 IV. THE ATTORNEY GENERAL HAS NO OTHER ADEQUATE MEANS FOR
 RELIEF. 24

CONCLUSION..... 25

VERIFICATION..... 26

TABLE OF AUTHORITIES

CASES

<i>Coal & Coke Ry. Co. v. Conley</i> , 67 W. Va. 129, 67 S.E. 613 (1910).....	13, 15
<i>Committee on Legal Ethics of the W. Va. State Bar v. McCorkle</i> , 192 W. Va. 286, 452 S.E. 2d 377 (1994).....	9
<i>Commonwealth v. Koslowsky</i> , 131 N.E. 207 (Mass. 1921)	14
<i>Covington v. Smith</i> , 213 W. Va. 309, 582 S.E.2d 75 (2003)	19
<i>Daily Gazette Co., Inc. v. Committee on Legal Ethics of the W. Va. State Bar</i> , 174 W. Va. 359, 326 S.E. 2d 705 (1984).....	9
<i>Denham v. Robinson</i> , 72 W. Va. 243, 77 S.E. 970 (1913)	13, 14, 15
<i>Eames v. Rudman</i> , 333 A.2d 157 (N.H. 1975)	14
<i>Fieger v. Cox</i> , 734 N.W.2d 602 (Mich. App. 2007).....	14
<i>Gum v. Dudley</i> , 202 W. Va. 477, 505 S.E.2d 391 (1997).....	19
<i>In re B. Turecamo Contracting Co.</i> , 260 A.D. 253 (N.Y. App. 1940)	14
<i>Lawyer Disciplinary Bd. v. Kupec</i> , 202 W. Va. 556, 505 S.E.2d 619 (1998)	9, 10, 11
<i>Lawyer Disciplinary Bd. v. Lakin</i> , 217 W. Va. 134, 617 S.E.2d 484 (2005)	9
<i>Lawyer Disciplinary Bd. v. Scott</i> , 213 W. Va. 209, 579 S.E.2d 550 (2003).....	23
<i>Lawyer Disciplinary Board v. McGraw</i> , 194 W. Va. 788, 461 S.E.2d 850 (1995).....	4
<i>Manchin v. Browning</i> , 170 W. Va. 779, 296 S.E.2d 909 (1982)	12, 20, 22
<i>Martin v. W. Virginia Div. of Labor Contractor Licensing Bd.</i> , 199 W. Va. 613, 486 S.E.2d 782 (1997).....	11
<i>ose ex rel. Rose v. St. Paul Fire & Marine Ins. Co.</i> , 215 W. Va. 250, 599 S.E.2d 673 (2004)....	19
<i>People v. Buffalo Confectionary Co.</i> , 401 N.E.2d 546 (Ill. 1980).....	14
<i>People v. Waterstone</i> , 783 N.W. 314 (Mich. 2010).....	21
<i>Pub. Utility Comm'n of Tex. v. Cofer</i> , 754 S.W.2d 121 (Tex. 1988)	21
<i>State ex rel. Bagley v. Blankenship</i> , 161 W. Va. 630, 246 S.E.2d 99 (1978)	11
<i>State ex rel. Bailey v. Facemire</i> , 186 W. Va. 528, 413 S.E.2d 183 (1991)	22
<i>State ex rel. Bluestone Coal Corp. v. Mazzone</i> , 226 W. Va. 148, 697 S.E.2d 740 (2010).....	23
<i>State ex rel. Clifford v. W. Va. Office of Disciplinary Counsel</i> , 231 W. Va. 334, 745 S.E.2d 225 (2013).....	8, 23
<i>State ex rel. Hoover v. Berger</i> , 199 W. Va. 12, 483 S.E.2d 12 (1996).....	8, 9, 23, 24

<i>State ex rel. Kucera v. City of Wheeling</i> , 153 W. Va. 538, 539, 170 S.E.2d 367, 367 (1969).....	8
<i>State ex rel. McGraw v. Burton</i> , 212 W. Va. 23, 569 S.E.2d 99 (2002).....	20, 21, 22
<i>State ex rel. McGraw v. Telecheck Servs., Inc.</i> , 213 W. Va. 438, 582 S.E.2d 885 (2003).....	11
<i>State ex rel. Morgan Stanley & Co. v. MacQueen</i> , 187 W. Va. 97, 416 S.E.2d 55 (1992).....	22
<i>State ex rel. Scales v. Committee of Legal Ethics of the W. Va. State Bar</i> , 191 W. Va. 507, 446 S.E.2d 729 (1994).....	8, 23
<i>State ex rel. Tyler v. MacQueen</i> , 191 W. Va. 597, 447 S.E.2d 289 (1994).....	19
<i>State ex rel. Williams v. Karston</i> , 187 S.W.2d 327 (Ark. 1945).....	14
<i>State ex rel. Wiseman v. Henning</i> , 212 W. Va. 128, 569 S.E.2d 204 (2002).....	25
<i>State ex rel. York v. W. Va. Office of Disciplinary Counsel</i> , 231 W. Va. 183, 744 S.E.2d 293 (2013).....	8
<i>State v. Angell</i> , 216 W. Va. 626, 609 S.E.2d 887 (2004).....	17, 18
<i>State v. Ehrlick</i> , 65 W. Va. 700, 64 S.E. 935 (1909).....	12, 13, 15
<i>State v. Jiminez</i> , 588 P.2d 707 (Utah 1978).....	14
<i>State v. Robinson</i> , 112 N.W. 269 (Minn. 1907).....	14
<i>State v. Thompson</i> , 10 N.C. 613 (1825).....	14
<i>Stephan v. Reynolds</i> , 673 P.2d 1188 (Kan. 1984).....	14

STATUTES

W. Va. Code § 5-3-2.....	4, 10, 15, 17
W. Va. Code § 7-7-8.....	<i>passim</i>

OTHER AUTHORITIES

Brief of Amicus Curiae Ohio Attorney General Michael DeWine, <i>Susan B. Anthony List v. Driehaus</i> , No. 13-193, 2014 WL 880938 (Mar. 3, 2014).....	21
Brief of State Respondents, <i>Susan B. Anthony List v. Driehaus</i> , No. 13-193, 2014 WL 1260424 (Mar. 26, 2014).....	21
W. Va. Comm. on Legal Ethics, L.E.I. 85-02 (1985).....	20
W. Va. Comm. on Legal Ethics, L.E.I. 92-0 (1992).....	19

RULES

Code of Judicial Conduct Canon 3D(2).....	19
W. Va. R. App. Pro. 20.....	7
W. Va. R. of Lawyer Disciplinary Pro. 2.16.....	3
W. Va. R. Prof'l. Conduct, Scope.....	11, 22
W. Va. R. Prof'l. Conduct 1.11	19
W. Va. R. Prof'l. Conduct 1.7	<i>passim</i>
W. Va. R. Prof'l. Conduct 8.3	18
W. Va. R. Prof'l. Conduct 8.4	<i>passim</i>

TREATISES

Wayne R. LaFave, et al., 4 <i>Criminal Procedure</i> § 13.3(e) (3d ed.).....	14
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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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PATRICK MORRISEY, ATTORNEY GENERAL OF
WEST VIRGINIA,

Petitioner,

v.

WEST VIRGINIA OFFICE OF DISCIPLINARY COUNSEL,
WEST VIRGINIA LAWYER DISCIPLINARY BOARD,

Respondents.

PETITION FOR WRIT OF PROHIBITION

This petition concerns an opinion of the Lawyer Disciplinary Board (the “Board”) that exceeds the Board’s authority and is preventing the Office of Attorney General from accepting a request from a county prosecutor who seeks assistance with a backlog of sexual assault, drug, and public corruption cases. Under West Virginia Code § 7-7-8, a county prosecutor is permitted to appoint *any* “practicing attorney[]” to “assist him in the discharge of his official duties.” W. Va. Code § 7-7-8. There is no exception or carve-out for attorneys employed by the Attorney General. The Board, however, has issued an informal opinion informing the Attorney General that it would violate the Rules of Professional Conduct for any deputy or assistant attorney general to accept such an appointment and would trigger immediate disciplinary action. As this petition explains, the Board’s opinion is legally incorrect, exceeds the scope of the rules, and misunderstands the authority of the Attorney General’s Office. Lacking any other adequate

remedy, the Attorney General requests a writ issue to prohibit the Board and the Office of Disciplinary Counsel (“ODC”) from enforcing the Board’s legal opinion. Through the writ, the Office simply seeks to remove a deterrent to answering the request of resource-strapped county prosecutors who need help combatting sexual assault, child abuse, corruption, drug abuse, and other crimes throughout the State.

QUESTION PRESENTED

Whether under the West Virginia Rules of Professional Conduct a deputy or assistant attorney general may ethically accept appointment, pursuant to West Virginia Code § 7-7-8, as a special assistant prosecuting attorney to work on criminal matters under the supervision of a county prosecutor.

STATEMENT OF THE CASE

I. THE REQUEST FOR PROSECUTORIAL ASSISTANCE FROM MINGO COUNTY

On October 9, 2013, Mingo County Commissioner Greg “Hootie” Smith telephoned the Office of Attorney General seeking counsel regarding the administration of justice in Mingo County. As this Court is well aware, leading county officials—including the prosecutor and circuit judge—were at that time made subject to federal corruption charges. Public confidence in the Mingo County judicial system was crumbling. Commissioner Smith sought to determine whether the Office of Attorney General could help restore that confidence by sending an experienced attorney—free from Mingo County politics—to act on an interim basis as the prosecuting attorney and potentially accept a full-time position as the prosecutor.

Out of an abundance of caution, and before providing Commissioner Smith an answer, the deputy attorney general in charge of the Office of Attorney General’s Public Integrity,

Safety, & Enforcement Division placed a call to ODC's Chief Lawyer Disciplinary Counsel. The deputy asked the chief counsel whether she believed that a deputy or assistant attorney general who accepted appointment as the Mingo County prosecutor would need to resign from the Office of Attorney General or take a leave of absence. The chief counsel replied that *under no circumstances* could a deputy or assistant attorney general accept such an appointment without triggering disciplinary action due to an inherent conflict of interest.

In an effort to provide *some* assistance to Mingo County and to Commissioner Smith, the deputy attorney general telephoned the ODC's chief counsel the next day with a different proposition. He asked whether a deputy or assistant attorney general could ethically accept appointment as a special *assistant* prosecutor supervised by a prosecuting attorney. Although the Office of Attorney General did not believe there would be an ethical bar to such an appointment, the deputy attorney general sought the advice of ODC's chief counsel because of their previous discussion. The chief counsel again claimed that the Rules of Professional Conduct categorically bar such an appointment. Anyone who accepts such an appointment, ODC made clear, would draw immediate disciplinary action. Accordingly, the Office of Attorney General did not assist Mingo County.

II. THE BOARD'S INFORMAL OPINION

Persuaded that ODC was mistaken, however, the Attorney General in his official capacity sent a letter to ODC on October 17, 2013, explaining his view that the rules of professional conduct do not bar lawyers in his Office from accepting an appointment pursuant to West Virginia Code § 7-7-8. Pursuant to Rule 2.16 of the Rules of Lawyer Disciplinary Procedure, the Attorney General requested a formal opinion addressing this question:

Whether under the West Virginia Rules of Professional Conduct a deputy or assistant attorney general may ethically accept appointment as a special assistant prosecutor by a county prosecutor pursuant to West Virginia Code § 7-7-8?

Pet. App. 1. The letter outlined over seven pages why the Board should answer “Yes,” and included dozens of citations to controlling legal authorities. *Id.* at 1–7.

In a letter from ODC dated January 24, 2014, the Board refused the Attorney General’s request for a formal opinion and instead issued an informal opinion holding that any deputy or assistant attorney general who accepts appointment as a special assistant prosecutor would violate the Rules of Professional Conduct. *See* Pet. App. 8–9. The substance of the Board’s analysis of the rules and the law was set forth in one paragraph:

[T]he Lawyer Disciplinary Board determined that there currently exists in West Virginia no authority, constitutional, statutory or otherwise, for the Attorney General to assist county prosecutors with criminal prosecutions outside of what is contemplated in W. Va. Code § 5-3-2 (concerning the prosecution of criminal proceedings arising from extraordinary circumstances existing at state institutions of corrections). Thus, it was the opinion of the Lawyer Disciplinary Board that to assist a county prosecutor in the criminal prosecutions contemplated in your request would be a violation of Rule 8.4(d) of the Rules of Professional Conduct and, as was previously discussed, a potential violation of Rule 1.7(b) of the Rules of Professional Conduct. It is further noted that is not likely a waivable conflict because of the state actors. *See generally, Lawyer Disciplinary Board v. McGraw*, 194 W. Va. 788, 461 S.E.2d 850 (1995).

Pet. App. 9. In short, the Board determined that it would in most circumstances be “a violation of Rule 8.4(d)” and “a potential violation of Rule 1.7(b)” for a lawyer working in the Attorney General’s Office to assist a county prosecutor with a criminal prosecution. *Id.* The Board did not address any of the arguments advanced by the Attorney General.

III. THE REQUEST FOR ASSISTANCE FROM THE PRESTON COUNTY PROSECUTING ATTORNEY

On June 2, 2014, the Prosecuting Attorney for Preston County, Mel Snyder, sent a letter by facsimile to the Attorney General, requesting “any support your office can provide to me with

regard to both prosecutions and investigations.” Pet. App. 10. According to the letter, Prosecutor Snyder’s office “has been overwhelmed with an ever increasing workload for over a year now.” *Id.* He explained that he had “heard that [the Attorney General] ha[s] Assistant’s [sic] with prosecution experience who could provide such help.” *Id.* Under West Virginia Code § 7-7-8, the prosecuting attorney of each county may “appoint practicing attorneys to assist him in the discharge of his official duties during his term of office,” each of whom “shall serve at the will and pleasure” of the prosecuting attorney. W. Va. Code § 7-7-8.

In particular, Prosecutor Snyder sought assistance with prosecutions for sexual assault, drug crimes, and public corruption. Pet. App. 10. “Illegal drug activity,” he explained, “is always increasing and seems to permeate almost all of the cases in my Office including Child Abuse and Neglect and Juvenile cases.” *Id.* Sexual assault crimes “are also increasing and . . . take extra resources and expertise to investigate and prosecute.” *Id.* Finally, Prosecutor Snyder sought “help with investigation resources” because his county “is very large and simply has too few law enforcement officers to deal with all of the crimes that occur.” *Id.*

Prosecutor Snyder requested a meeting with the Attorney General to “talk about a specific plan” to “provide assistance” to his Office. *Id.* Due to the Board’s opinion, however, the Attorney General has not yet committed to the prosecutor’s request.

SUMMARY OF ARGUMENT

The Board’s opinion and the specter of enforcement action by ODC are precisely the kinds of extraordinary action that a writ of prohibition is intended to address. The longstanding factors that guide this Court plainly weigh in favor of the writ: the Board’s opinion is clearly erroneous as a matter of law, the opinion raises novel and purely legal issues, and the Attorney General has no other adequate means of relief.

First, the Board’s opinion is clearly erroneous as a matter of law. The Board contends that it would violate Rule 8.4(d) for lawyers in the Office of Attorney General to assist county prosecutors with criminal prosecutions because such assistance exceeds the Office’s authority. This is clearly wrong for at least two reasons. To begin with, Rule 8.4(d), like all the rules of professional conduct, is intended to ensure the ethical practice of law, not to provide the Board a vehicle to police the bounds of the Attorney General’s authority. Moreover, even if Rule 8.4(d) applies in the manner that the Board suggests, the Board’s conclusion about the scope of the Attorney General’s powers is incorrect in light of this Court’s decision in *State ex rel. Discover Financial Services v. Nibert*, , which returned common law authority to the Office of Attorney General. Syl. Pt. 4–5, 231 W. Va. 227, 744 S.E.2d 625 (2013).

The Board’s opinion is also clearly erroneous because it would *not* be “a potential violation of Rule 1.7(b)” for a deputy or assistant attorney general to assist a county prosecutor with a criminal prosecution. As a threshold matter, such assistance is unlikely to create a conflict of interest within the meaning of the rule because the Office of Attorney General and its state clients are rarely adverse to a county prosecutor’s office. In fact, in the context of criminal prosecutions, the Office ordinarily assumes the prosecutor’s role on appeal. To the extent a conflict of interest arises in a particular case from the appointment of a deputy or assistant attorney general as a special assistant prosecutor, however, an ethical screen is sufficient to resolve the conflict.

Second, the writ is further warranted because the Board’s opinion presents novel and purely legal issues. No authority—including the Board itself—has ever before endorsed the categorical disqualification of a state attorney general’s office from assisting a local prosecutor

on professional conduct grounds. Moreover, this is the type of purely legal ethics question that this Court has previously considered on a writ.

Third, the Attorney General has no adequate means of relief absent a writ. The Board’s opinion effectively bans every deputy and assistant attorney general from assisting county prosecutors with criminal prosecutions. This infringement on the Attorney General’s authority causes an ongoing and irreparable harm to the Office—and limits the Office’s ability to help counties fight the State’s drug abuse epidemic, battle corruption, and combat child abuse and sexual assault. Furthermore, the only other route to challenge the Board’s prohibition would be for a deputy or assistant attorney general to willfully violate the Board’s rule, thereby triggering harmful, unnecessary, and costly disciplinary proceedings.

For all these reasons, the writ should be granted.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Attorney General requests oral argument pursuant to West Virginia Rule of Appellate Procedure 20 because this petition raises a matter of first impression and issues of fundamental public importance to the administration of criminal justice in West Virginia, and directly implicates the Attorney General’s common law and statutory authority.

ARGUMENT

I. STANDARD OF REVIEW

In determining whether to grant a writ of prohibition in the context of lawyer disciplinary matters, this Court has applied the same familiar standard it applies to all petitions for a writ of prohibition. *See State ex rel. Clifford v. W. Va. Office of Disciplinary Counsel*, 231 W. Va. 334, 338, 745 S.E.2d 225, 229 (2013); *State ex rel. Scales v. Committee of Legal Ethics of the W. Va. State Bar*, 191 W. Va. 507, 512, 446 S.E.2d 729, 734 (1994). That standard involves the consideration of five “general guidelines”:

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

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). All five factors need not be satisfied, but “the existence of clear error as a matter of law . . . should be given substantial weight.” *Id.*¹

¹ Prohibition is appropriate against the Board because it is a quasi-judicial tribunal. *See State ex rel. York v. W. Va. Office of Disciplinary Counsel*, 231 W. Va. 183, 187 n.5, 744 S.E.2d 293, 297 n.5 (2013). On the other hand, mandamus is the proper form of relief against ODC because it does not possess “quasi-judicial authority.” *Id.* This Court should therefore consider the petition against ODC as a request to compel it not to initiate disciplinary action against attorneys in the Office of Attorney General regarding the issue presented in this case. *See e.g., id.* (“[T]his Court will address the petitioner’s requests as a petition for a writ of mandamus to compel the ODC to cease further investigation and a petition for a writ of prohibition to prevent the [Board] from prosecuting the alleged violations.”). For purposes of this case, the reasons for issuing the writ of prohibition also warrant a writ of mandamus. *See Syl Pt. 2, State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969) (mandamus standard).

In addition, this Court reviews *de novo* any legal conclusions by the Board. As this Court has explained, it is the “ultimate authority with regard to legal ethics matters in this State.” *Lawyer Disciplinary Bd. v. Lakin*, 217 W. Va. 134, 138, 617 S.E.2d 484, 488 (2005). The Board is “an administrative arm” of the Court and “subject to the [Court’s] exclusive control and supervision.” Syl. Pt. 2, *Daily Gazette Co., Inc. v. Committee on Legal Ethics of the W. Va. State Bar*, 174 W. Va. 359, 326 S.E. 2d 705 (1984). This Court “retains the power to approve or disapprove any regulation or practice adopted by the Board, inquire into the merits of any disciplinary proceeding, and to take any action the Court sees fit in such matters.” *Lawyer Disciplinary Bd. v. Kupec*, 202 W. Va. 556, 564, 505 S.E.2d 619, 627 (1998); *see also* Syl. Pt. 3, *Committee on Legal Ethics of the W. Va. State Bar v. McCorkle*, 192 W. Va. 286, 452 S.E. 2d 377 (1994) (“[T]his Court gives respectful consideration to the Committee’s recommendations while ultimately exercising its own independent judgment.”).

II. THE BOARD’S OPINION IS CLEARLY ERRONEOUS.

Above all, the writ should issue because the Board’s legal opinion is clearly erroneous as a matter of law. *See* Syl. Pt. 4, *Hoover*, 199 W. Va. 12, 483 S.E.2d 12. In the Board’s view, it would in most circumstances be “a violation of Rule 8.4(d)” and “a potential violation of Rule 1.7(b)” for a lawyer working in the Attorney General’s Office to assist a county prosecutor with a criminal prosecution. But as discussed below, neither of these conclusions is correct.

A. Rule 8.4(d) Does Not Bar Lawyers Who Work For The Attorney General From Assisting County Prosecutors With Criminal Prosecutions.

The Board concludes that, outside of certain narrow circumstances, it “would be a violation of Rule 8.4(d)” for a lawyer in the Attorney General’s Office to assist a county prosecutor with a criminal prosecution. According to the Board, this is because “there currently

exists in West Virginia no authority, constitutional, statutory, or otherwise, for the Attorney General to assist county prosecutors with criminal prosecutions outside of what is contemplated in W. Va. Code § 5-3-2.” Pet. App. 9. Section 5-3-2, the Board asserts, permits such assistance only in “the prosecution of criminal proceedings arising from extraordinary circumstances existing at state institutions of corrections.” *Id.*

The Board is wrong for at least two reasons. *First*, the Board has improperly applied Rule 8.4(d)—which makes it “professional misconduct” to “engage in conduct that is prejudicial to the administration of justice”—to a dispute over the Attorney General’s powers. The Board’s overly broad interpretation of Rule 8.4(d) exceeds the scope of the rules, which is to ensure the ethical practice of law, not to inject the specter of professional discipline into every debate over a statewide constitutional officer’s authority. *Second*, the Board’s understanding of the Attorney General’s powers is, in any event, incorrect. Approximately a year ago, this Court recognized that the Attorney General has common law powers, which includes the general authority to assist prosecutors with criminal prosecutions.

1. The Board’s interpretation of Rule 8.4(d) is overbroad.

Rule 8.4(d) is intended to hold lawyers to a certain “tradition[.]” of professional conduct. *Lawyer Disciplinary Bd. v. Kupec*, 202 W. Va. 556, 572, 505 S.E.2d 619, 635 (1998). The standard in the rule—a prohibition on “conduct that is prejudicial to the administration of justice”—has been held *not* to be unconstitutionally vague because it is a standard that all lawyers are expected to understand. *Id.* It is a rule “written by and for lawyers” that captures “the traditions of the legal profession and its established practices.” *Id.* The rule thus prohibits “conduct which interferes with civil or criminal litigation processes.” *Id.* at 571, 505 S.E.2d at 634. Examples of such conduct include giving false information to a jury, offering to reduce

legal fees in exchange for sex, and using client trust funds to pay for unrelated litigation expenses. *Id.* at 572, 505 S.E.2d at 635.

The rule is not, as the informal opinion suggests, a means for the Board to police the bounds of the Attorney General's powers. As this Court has recently explained, "the authority of the Office of Attorney General 'comes from three sources—the constitution of this state; the legislature; and the common law.'" *State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 231 W. Va. 227, 249, 744 S.E.2d 625, 647 (2013) (quoting *State ex rel. McGraw v. Telecheck Servs., Inc.*, 213 W. Va. 438, 443, 582 S.E.2d 885, 890 (2003)). Whether the Attorney General or his subordinates have complied with those specific laws is a question completely different from whether the ethical "traditions of the legal profession and its established practices" have been followed. *Kupec*, 202 W. Va. at 572, 505 S.E.2d at 635.

Indeed, the Board's use of Rule 8.4(d) goes well beyond the scope of the Rules of Professional Conduct. The rules are promulgated specifically pursuant to this Court's constitutional authority to "regulate and control the practice of law in West Virginia," *id.* at 563, 505 S.E.2d at 626 (internal quotations omitted), and they are intended to "simply provide a framework for the ethical practice of law," W. Va. R. Prof'l. Conduct, Scope. The Board's use of Rule 8.4(d), however, exceeds those purposes. It arrogates to the Board this Court's entirely separate responsibility to interpret and apply the laws of this State. *See, e.g., State ex rel. Bagley v. Blankenship*, 161 W. Va. 630, 643, 246 S.E.2d 99, 107 (1978) ("The Court is empowered to construe, interpret and apply provisions of the Constitution."); *Martin v. W. Virginia Div. of Labor Contractor Licensing Bd.*, 199 W. Va. 613, 618 n.12, 486 S.E.2d 782, 787 n.12 (1997) ("The legislature possesses the power to make the laws of this state, and it is this Court's duty to interpret such laws.").

2. The Attorney General possesses common law authority to assist county prosecutors with criminal prosecutions.

Even if Rule 8.4(d) applies in the manner that the Board suggests, the Board's conclusion about the scope of the Attorney General's powers is incorrect in light of this Court's recent decision in *Discover Financial Services*, 231 W. Va. 227, 744 S.E.2d 625 (2013). In that case, this Court returned common law authority to the Office of Attorney General, overruling in part its previous decision in *Manchin v. Browning*, 170 W. Va. 779, 296 S.E.2d 909 (1982), and bringing this State in line with the majority of jurisdictions in the country. *See Discover Financial Services*, 231 W. Va. at 247 n.47, 744 S.E.2d at 645 n.47 (noting that "[a] majority of jurisdictions also have held that the Office of Attorney General retains inherent common law powers"). "We make clear and once again expressly hold that the Office of Attorney General retains inherent common law powers, when not expressly restricted or limited by statute." *Id.* at 247, 744 S.E.2d at 645. This Court found "serious judicial error," *id.* at 248; 744 S.E.2d at 646 (internal quotation omitted), with the *Manchin* decision's attempt to "expressly nullif[y] . . . the common law powers of the Office [of Attorney General]," *id.* at 247, 744 S.E.2d at 645. It explained that the Attorney General's common law powers can only be abrogated by a "plainly manifested" express declaration of the Legislature. *Id.* at 249, 744 S.E.2d at 647 (internal quotations omitted).

One of the consequences of *Discover Financial Services* is the revival of several pre-*Manchin* cases—beginning with *State v. Ehrlick*, 65 W. Va. 700, 64 S.E. 935 (1909)—in which this Court expressed its understanding that the Legislature has *not* abrogated the common law power of the Office of Attorney General to assist county prosecutors with criminal prosecutions. *Ehrlick* involved a dispute between a county prosecutor and the Attorney General over which

official possessed the authority to restrain illegal gambling activity. *Id.* at 936. In deciding that question, this Court explained that prosecuting attorneys and the Attorney General “are engaged in the same branch or department of the public business.” *Id.* That business once belonged entirely to the Attorney General—an office “of very ancient origin [with] powers . . . recognized by the common law”—but has since “been divided [by the Legislature] between the two offices for purposes of convenience.” *Id.* Although that division of power means that the Attorney General cannot “displace” a prosecutor while state criminal business is in a particular county, this Court had “[n]o doubt” that the Legislature left to the Attorney General the common law power to “assist the prosecuting attorney in the prosecution of such business, or perform it himself, in case of the nonaction of the prosecuting attorney.” *Id.*

Two decisions closely following *Ehrlick* illustrate similar acknowledgment by this Court of the Attorney General’s inherent power to work on criminal matters. One year after *Ehrlick*, this Court considered in *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 67 S.E. 613 (1910), an effort to enjoin both the Attorney General and the Kanawha County prosecuting attorney from enforcing a penal statute. This Court found it irrelevant that the law “d[id] not expressly and specifically charge the Attorney General of the state and the prosecuting attorneys of the several counties with the duty of enforcing its provisions, or *the prosecution of indictments for its violation.*” *Id.* at 621 (emphasis added). Instead, this Court recognized that both officials had “by virtue of [their] office[s] . . . some connection with the enforcement of the act.” *Id.* at 620 (internal quotation marks omitted).

Another three years later, this Court addressed in *Denham v. Robinson*, 72 W. Va. 243, 77 S.E. 970 (1913), the power of the Attorney General under the common law to cease prosecuting a criminal matter after having obtained an indictment. The specific issue was the

legal effect of the Attorney General joining with a county prosecutor in entering a *nolle prosequi*—a declaration by the prosecutor that he will proceed no further—in a criminal case. The Court determined that the Attorney General’s involvement contributed “no additional force” to the *nolle prosequi*, reasoning that an Attorney General participating in a criminal prosecution has no greater powers than the county prosecutor. *Id.* at 973.

Revitalized by *Discover Financial Services*, these cases reflect that this State is now consistent with the majority of jurisdictions throughout the country, in which state attorneys general have, at a minimum, the common law power to assist with criminal prosecutions. For example, courts in other states have upheld the inherent common law power of a state attorney general to assist a county prosecutor upon request, *see, e.g., State ex rel. Stephan v. Reynolds*, 673 P.2d 1188, 1192 (Kan. 1984); investigate criminal acts and sign indictments, *see, e.g., Commonwealth v. Koslowsky*, 131 N.E. 207, 210, 211–12 (Mass. 1921); and, institute or intervene in prosecutions, *see, e.g., State v. Robinson*, 112 N.W. 269, 272–73 (Minn. 1907); *State v. Thompson*, 10 N.C. 613, 614 (1825).² As the leading criminal procedure treatise summarizes: “In most jurisdictions the state Attorney General may initiate local prosecutions in at least some circumstances In addition, most states allow the Attorney General to intervene in a local prosecution.” Wayne R. LaFave, et al., 4 *Criminal Procedure* § 13.3(e) (3d ed.).

² *See also Fieger v. Cox*, 734 N.W.2d 602, 611-12 (Mich. App. 2007); *People v. Buffalo Confectionary Co.*, 401 N.E.2d 546, 549 (Ill. 1980); *State v. Jiminez*, 588 P.2d 707, 709 (Utah 1978); *Eames v. Rudman*, 333 A.2d 157, 158 (N.H. 1975); *State ex rel. Williams v. Karston*, 187 S.W.2d 327, 329 (Ark. 1945); *In re B. Turecamo Contracting Co.*, 260 A.D. 253, 257 (N.Y. App. 1940).

The Board's opinion offers no persuasive response to *Discover Financial Services*, *Ehrlick*, *Conley*, or *Denham*. Though all four cases were cited and discussed in the Attorney General's letter requesting the opinion, none is addressed by the Board. In fact, the Board fails (or refuses) even to acknowledge that this Court has restored to the Office of Attorney General those common law powers that have not been abrogated by the Legislature. *See* Pet. App. 9 (describing Attorney General's powers as "constitutional, statutory or otherwise").

Moreover, to the extent the Board suggests that West Virginia Code § 5-3-2 expressly limits the common law authority of the Office of Attorney General to assist prosecutors with criminal cases, the Board has it exactly backwards. Far from indicating an intent to limit or abrogate the Attorney General's common law power to assist county prosecutors, Section 5-3-2 affirmatively reflects a desire by the Legislature that the Office of Attorney General offer help to prosecutors. In one provision—which the Board entirely ignores—the statute sets forth the general rule that the Attorney General "*may* consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office." W. Va. Code § 5-3-2. Then in a second provision—which the Board does cite but plainly misunderstands—the statute goes further and actually *requires* the Office of Attorney General to come to the aid of county prosecutors in certain circumstances. *See id.* (stating that the Attorney General "shall . . . provide attorneys for appointment as special prosecuting attorneys to assist [a] prosecuting attorney . . . in the prosecution of criminal proceedings" when "extraordinary circumstances" at a state correctional institution "render the financial resources of the office of the [local] prosecuting attorney inadequate to prosecute said cases"). These provisions are the opposite of the "plainly manifested" legislative expression necessary to strip the Office of Attorney General

of its common law powers to assist prosecutors with criminal matters. *Discover Financial Services*, 231 W. Va. at 249, 744 S.E.2d at 647 (internal quotations omitted).

Consistent with these provisions, West Virginia Code § 7-7-8 authorizes both county prosecutors and circuit courts to appoint any attorney to assist with or act as the county prosecutor. Specifically, the law authorizes a county prosecutor to appoint *any* “practicing attorney[]” to “assist him in the discharge of his official duties.” W. Va. Code § 7-7-8. Moreover, where “the prosecuting attorney and his assistants are unable to act,” a circuit court shall “appoint *some* competent practicing attorney to act in that case.” *Id.* In neither instance is there an exception or carve-out for attorneys employed by the Attorney General.

B. Rule 1.7 Also Does Not Bar Lawyers Employed By The Attorney General From Assisting County Prosecutors With Criminal Prosecutions.

The Board is also wrong, for several reasons, in concluding that it would be “a potential violation of Rule 1.7(b)” for a deputy or assistant attorney general to assist a county prosecutor with a criminal prosecution. Pet. App. 9. *First*, such assistance is unlikely to create a conflict of interest within the meaning of the rule. *Second*, to the extent a conflict of interest arises, an ethical screen would be sufficient to address the issue.

1. Assisting a county prosecutor in a criminal prosecution is unlikely to create a conflict of interest under Rule 1.7(b) for a deputy or assistant attorney general.

Contrary to the Board’s opinion, it is not likely that the conflict contemplated by Rule 1.7(b) will arise from the appointment of a deputy or assistant attorney general as a special assistant prosecutor working under the prosecutor’s supervision on a criminal matter. Under Rule 1.7(b), a lawyer “shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the

lawyer's own interests," subject to certain exceptions. This situation is not probable because as a general rule, the Attorney General's Office and its state clients are rarely adverse to a county prosecutor's office. And in the context of criminal prosecutions in particular, the Attorney General's Office is not only unlikely to be adverse, it ordinarily *assumes the prosecutor's role* on appeal. See W. Va. Code § 5-3-2 ("The attorney general shall appear as counsel for the state in all causes pending in the supreme court of appeals . . . in which the state is interested.").

Moreover, this Court has previously concluded in an analogous situation that the appointment of a state agency attorney as a special assistant prosecutor supervised by a county prosecutor presents no inherent conflict of interest. In *State v. Angell*, 216 W. Va. 626, 609 S.E.2d 887 (2004), this Court held that two full-time agency attorneys employed and paid by the West Virginia Worker's Compensation Commission ("WCC") fraud unit could criminally prosecute workers compensation fraud cases as assistant prosecuting attorneys appointed pursuant to West Virginia Code § 7-7-8 and acting under the supervision of the prosecutor. *Angell*, 216 W. Va. at 627–28, 609 S.E.2d at 888–89; see *id.* Syl. Pt. 2. This Court unanimously reversed the circuit court, which had concluded that the lawyers' dual employment created an inherent conflict of interest, dismissed the indictment, and disqualified the WCC attorneys on due process grounds.

This Court endorsed the State's view that "it is not improper for an agency attorney to simultaneously be employed by the agency and be appointed and act as an assistant prosecuting attorney." *Id.* at 631, 609 S.E.2d at 892. The agency attorneys' dual employment did not present an inherent conflict of interest, this Court reasoned, because the lawyers acting as special prosecutors "act on behalf of the public interest in the same manner as the elected prosecutor, taking the same oath as the elected prosecutor[,] and are subject to removal from the position of

assistant for the same reasons as the prosecutor.” *Id.* at 632, 609 S.E.2d at 893. Like any full-time assistant prosecutor, attorneys specially appointed to “act[] in the capacity of assistant prosecutors are subject to the supervision, direction and control of the county prosecutor and are held to the same standards as all prosecutors, including effectuating the primary prosecutorial responsibility of seeking justice—a responsibility that implicitly carries the affirmative duty to treat an accused fairly.” *Id.* (emphasis added). This Court was not troubled by the fact that the attorneys had investigated the matter in their WCC capacities because that simply follows “the common practice . . . of local prosecutors appointing assistants . . . who have special expertise in a particular field to prosecute specific types of crime.” *Id.* This Court recognized that conflicts might exist on a case-by-case basis, but declined to impose a categorical bar on WCC attorneys serving in dual capacities as agency attorneys and special assistant prosecutors. *Id.* (acknowledging the possibility of “some particularized showing of bias [or] personal interest”).

The assistance offered here would be no different from that in *Angell*. Pursuant to his authority under West Virginia Code § 7-7-8, Prosecutor Snyder would appoint one or more deputy or assistant attorneys general as special assistant prosecuting attorneys to assist him with “both prosecutions and investigations.” Pet. App. 10. These attorneys would be “subject to the supervision, direction and control of the county prosecutor and [be] held to the same standards as all prosecutors, including effectuating the primary prosecutorial responsibility of seeking justice.” *Angell*, 216 W. Va. at 632, 609 S.E.2d at 893. But, like the attorneys in *Angell* who remained employed and paid by the WCC, these attorneys would remain employed and paid by the Office of Attorney General.

Although the *Angell* Court did not expressly address the Rules of Professional Conduct, its decision not to refer the matter to ODC is instructive. Pursuant to Rule 8.3(a) and Canon

3D(2) of the Code of Judicial Conduct, this Court has acknowledged its duty to refer matters to ODC when the Court determines that the case before it “presents the appearance of conduct that does not comport with [the West Virginia Rules of Professional Conduct].” *Gum v. Dudley*, 202 W. Va. 477, 491, 505 S.E.2d 391, 405 (1997). This Court has done so on several occasions—including around the time of the *Angell* decision. *See, e.g., id.*; *Rose ex rel. Rose v. St. Paul Fire & Marine Ins. Co.*, 215 W. Va. 250, 258, 599 S.E.2d 673, 681 (2004); *Covington v. Smith*, 213 W. Va. 309, 325, 582 S.E.2d 756, 772 (2003). Had this Court perceived an ethical violation in *Angell*, its practice would have been to refer the matter to ODC. It did not.

2. **To the extent a conflict of interest arises from the appointment of a deputy or assistant attorney general as a special assistant prosecutor on a criminal matter, an ethical screen would be sufficient to address the issue.**

In the unlikely event that the appointment of a deputy or assistant attorney general as a special assistant prosecutor creates a conflict of interest for that attorney, the attorney could simply be screened from the conflicted matter. The West Virginia Rules of Professional Conduct, this Court, and prior advisory opinions of the Board all hold that an ethical screen can effectively resolve a government attorney’s conflict. *See* Syl. Pt. 2, *State ex rel. Tyler v. MacQueen*, 191 W. Va. 597, 447 S.E.2d 289 (1994) (“Pursuant to Rule 1.11 of the West Virginia Rules of Professional Conduct, the fact that an assistant prosecuting attorney previously represented a criminal defendant while in private practice does not preclude the prosecutor’s office as a whole from participation in further prosecution of criminal charges against the defendant, provided that the circuit court has . . . determined that the assistant prosecutor has effectively and completely been screened from involvement, active or indirect, in the case.”); *see also* W. Va. Comm. on Legal Ethics, L.E.I. 92-01 at 3-4 (1992) (“When an assistant is

disqualified for any reason, he/she may be screened from participation in the matter, and other assistants . . . may represent the State.”); W. Va. Comm. on Legal Ethics, L.E.I. 85-02 (1985) (same). That is precisely what would be used here. If a conflict arose, the deputy or assistant attorney general who has been appointed a special assistant prosecutor would be screened from the matter in the Attorney General’s Office with which he or she is conflicted.

This approach is exactly what the Office undertakes—and this Court has sanctioned—in circumstances where assistant attorneys general represent two state agencies adverse to each other. These cases include disputes between: the Office of Administrative Hearings and the Department of Motor Vehicles; the Coal Mine Safety Board of Appeals and the West Virginia Office of Miners’ Health, Safety and Training; and the Human Rights Commission and any number of state agencies.

As this Court has expressly recognized, the fact that two client agencies have adverse positions does not disqualify the Attorney General’s Office from representing those agencies. Rather, the Attorney General’s Office may ethically represent two agencies on opposite sides of *the same litigation* provided that a wall of client confidentiality is maintained between the various subordinate attorneys in the Office. *See Manchin*, 170 W. Va. at 792, 296 S.E.2d at 922, *overruled on other grounds by Discover*, 231 W. Va. 227, 744 S.E.2d 625. “Where two or more such state entities assert differing or opposing views in the same litigation, and request representation by the Office of the Attorney General, that office has the option of providing assistant attorneys general to such entities or any of them.” *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 39 n.24, 569 S.E.2d 99, 115 n.24 (2002). This Court noted that “on occasion, the Attorney General . . . may be required to allow representation of a State agency by private

counsel or by assistants between whom a wall of client confidentiality must be erected.” *Id.* at 40, 569 S.E.2d at 116 (emphasis added).

As courts around the country have explained, this approach recognizes that “the Attorney General’s unique status requires accommodation,” *People v. Waterstone*, 783 N.W.2d 314, 314 (Mich. 2010)(internal quotations omitted), and is the accepted rule in most jurisdictions, *see, e.g., Pub. Utility Comm’n of Tex. v. Cofer*, 754 S.W.2d 121, 123–24 (Tex. 1988) (noting cases that “appear to establish a majority rule that such ‘dual representation’ does not constitute an impermissible conflict of interest”); *State ex rel. Allain v. Mississippi Public Serv. Comm’n*, 418 So.2d 779, 782 (Miss. 1982) (recognizing that the attorney general “will be confronted with many instances where he must, through his office, furnish legal counsel to two or more agencies with conflicting interest or views”); *Attorney General v. Mich. Public Serv. Comm’n*, 625 N.W.2d 16, 29 (Mich. Ct. App. 2001) (noting the “majority rule that, in most instances, an attorney general may represent adverse state agencies in intragovernmental disputes”). Indeed, during the current term of the United States Supreme Court, the Ohio Attorney General appeared on two briefs representing adverse positions in the same case. *Compare* Brief of State Respondents, *Susan B. Anthony List v. Driehaus*, No. 13-193, 2014 WL 1260424 (Mar. 26, 2014), *with* Brief of Amicus Curiae Ohio Attorney General Michael DeWine, *Susan B. Anthony List v. Driehaus*, No. 13-193, 2014 WL 880938 (Mar. 3, 2014)(hereinafter DeWine Driehaus Br.). General DeWine represented that counsel on the two briefs were screened from having contact with each other. *See* DeWine Driehaus Br. at *1 n.2.

A different rule that disallowed screening and simply required the disqualification of the Attorney General’s Office would raise serious separation-of-powers concerns. Here in particular, disqualification would amount to an infringement on the common law powers of the

Office of Attorney General. But as this Court made very clear in *Discover Financial Services*, only the Legislature has the authority to abrogate the Attorney General’s common law powers. 231 W. Va. at 249, 744 S.E.2d at 647. The Rules of Professional Conduct—which are not an enactment of the Legislature but rather promulgated by this Court—cannot be interpreted to contravene the common law authority of the Attorney General. To do so would commit “serious error” no different from that committed in the *Manchin* decision and soundly reversed just last year. Indeed, the Rules appear to acknowledge that limitation; in the statement of scope, the Rules expressly state that they “do not abrogate” certain authorities granted by “constitutional, statutory[, or] common law” to “government lawyers.” W. Va. R. Prof’l. Conduct, Scope.

The Board’s assertion that any conflict “is not likely a waivable conflict because of the state actors,” Pet. App. 9, is a red herring. To be sure, this Court has held that the State or a state agency cannot consent to being represented by counsel who is, at the same time, representing individuals or entities with adverse interests. *See, e.g., State ex rel. Morgan Stanley & Co. v. MacQueen*, 187 W. Va. 97, 102, 416 S.E.2d 55, 60 (1992) (“[T]he State cannot consent to a dual representation which involves such adversity of interests as to raise even the appearance of such impropriety”); *State ex rel. Bailey v. Facemire*, 186 W. Va. 528, 535, 413 S.E.2d 183, 190 (1991) (concluding that prosecutors cannot simultaneously represent the State and individuals with interests adverse to the State). But as described above, the State would not be *waiving* a conflict that arises. No state officer, agency, or entity would be consenting to representation by a lawyer who is also representing an adverse party. Rather, as contemplated in both *Manchin* and *Burton*, the conflicted attorney or attorneys would be screened by a “wall of client confidentiality” from working on one of the cases—in accordance with commonly accepted ethical practices. *Burton*, 212 W. Va. at 40, 569 S.E.2d at 116.

III. THE BOARD'S OPINION PRESENTS BOTH A QUESTION OF FIRST IMPRESSION AND ONE OF PURE LAW.

In addition to the Board's clear error, the writ is also warranted because the opinion "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. This appears to be the first time that any disciplinary board in the country has erected an absolute barrier preventing an Attorney General's Office from exercising its common law or statutory authority to assist a local prosecutor. In its opinion, the Board points to no rule, treatise, or case from this State or anywhere else that supports its categorical prohibition on a deputy or assistant state attorney general providing assistance to a prosecutor on a criminal matter.

Moreover, this is the type of purely legal ethics question that this Court has previously considered on a writ. The relevant facts are undisputed, and there is no doubt about the Board's commitment to its position. Further administrative proceedings would be unnecessary, duplicative, and costly. See *Clifford*, 231 W. Va. at 334, 745 S.E.2d at 235 ("Allowing the respondents to proceed when the charges are without merit would needlessly duplicate the efforts and costs of the parties and would not promote judicial economy."); *Scales*, 191 W. Va. at 512, 446 S.E.2d at 734 (same). Indeed, recognizing its role as the "final arbiter of legal ethics problems," *Lawyer Disciplinary Bd. v. Scott*, 213 W. Va. 209, 213, 579 S.E.2d 550, 554 (2003) (internal quotations omitted), this Court has long-favored writs of prohibition as a way to resolve questions of attorney disqualification as soon as practicable, see Syl. Pt. 1, *State ex rel. Bluestone Coal Corp. v. Mazzone*, 226 W. Va. 148, 697 S.E.2d 740 (2010); see also *id.* at 154, 697 S.E.2d at 746 (deferred review of disqualification decision will "result in a duplication of efforts, thereby imposing undue costs and delay" (internal quotations omitted)).

IV. THE ATTORNEY GENERAL HAS NO OTHER ADEQUATE MEANS FOR RELIEF.

Finally, the writ should issue because the Attorney General “will be damaged or prejudiced in a way that is not correctable on appeal” if the writ does not issue. Syl. Pt. 4, *Hoover*, 199 W. Va. 12, 483 S.E.2d 12 (1996). The informal opinion makes clear that the Board “would” find it a violation of Rule 8.4(d) (and “potential[ly]” a violation of Rule 1.7(b)) if the Attorney General’s Office provides Prosecutor Snyder the requested assistance. Pet. App. 9. Because the Attorney General will not direct his employees to take actions that are certain to result in a disciplinary complaint, he will be forced to decline Prosecutor Snyder’s request unless this writ issues against the Board and ODC. If he must so decline, the Attorney General’s inherent authority will be denigrated in a way that cannot be remedied. *Cf. Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998) (“a prospective violation of a constitutional right constitutes irreparable injury”).

Furthermore, beyond the writ, there is “no other adequate means” to challenge the Board’s conclusions. No procedure exists to appeal a Board’s informal opinion. Other than filing this petition for the writ, the only way to obtain judicial review of a Board opinion is to draw a disciplinary complaint that is based upon the conclusions in the opinion. That is hardly an “adequate” alternative. It comes at a far greater expense—in terms of financial cost, time, and reputation, of course. The reputational harm cannot be underestimated, but the greater financial cost and time required are significant, as well. Prosecutor Snyder indicates that he is “overwhelmed with an ever increasing workload.” Pet. App. 10. In the time it would take for a complaint and the subsequent disciplinary process to play itself out, Prosecutor Snyder may fall further and further behind in his investigation and prosecution of “sexual assault, drug crimes,

and public corruption” cases. *Id.* As this Court has explained, a writ of prohibition is appropriate in precisely these circumstances, where the “petitioner has no plain, speedy, and adequate remedy in the ordinary course of law.” *State ex rel. Wiseman v. Henning*, 212 W. Va. 128, 132, 569 S.E.2d 204, 208 (2002). The writ is the only adequate means to ensure that Prosecutor Snyder—and other county prosecutors who may seek assistance from the Attorney General’s Office—can timely obtain the help they need in their fight against crime throughout the State.

CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests this Court issue a writ prohibiting enforcement of Respondents’ ethics opinion.

Respectfully submitted,

STATE OF WEST VIRGINIA ex rel.
PATRICK MORRISEY, Attorney General
of West Virginia

Petitioner

By counsel



Elbert Lin (WV State Bar # 12171)
Solicitor General

J. Zak Ritchie (WV State Bar # 11705)
Assistant Attorney General

State Capitol
Building 1, Room 26-E
Charleston, West Virginia 25305
Telephone: (304) 558-2021
E-mail: elbert.lin@wvago.gov

Counsel for Petitioner

VERIFICATION

I, Elbert Lin, counsel for the petitioner, State of West Virginia ex. rel. Patrick Morrisey, Attorney General of West Virginia, verify that the statements contained in this Petition for Writ of Prohibition and Appendix are true to the best of my knowledge.



Elbert Lin

CERTIFICATE OF SERVICE

I, Elbert Lin, Solicitor General and counsel for Petitioner, verify that I have served a copy of the Petition for Writ of Prohibition on counsel for Respondents by electronic mail and United States mail on June 16, 2014, addressed as follows:

To: rfcipoletti@wvdc.org

Rachael L. Cipoletti
Chief Lawyer Disciplinary Counsel
West Virginia Office of Disciplinary Counsel
City Center East
4700 MacCorkle Avenue SE, Suite 1200C
Charleston, WV 25304



Elbert Lin