

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 14-0587

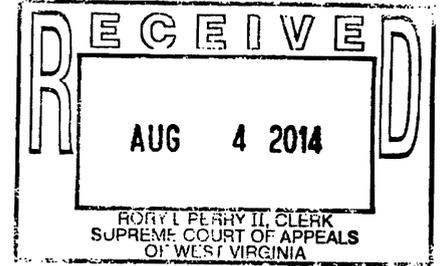
STATE OF WEST VIRGINIA, EX REL.
PATRICK MORRISEY, ATTORNEY GENERAL OF
WEST VIRGINIA,

Petitioner,

v.

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

Respondents.



REPLY IN SUPPORT OF
PETITION FOR WRIT OF PROHIBITION

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INTRODUCTION

According to Respondents, the Lawyer Disciplinary Board (the “Board”) and the Office of Disciplinary Counsel (“ODC”), and their proposed amicus, the West Virginia Prosecuting Attorneys Association (the “Association”), this matter concerns an effort by the Attorney General to “expand his duties and powers,” Response 18, and to “assume the powers of county prosecutors” and “initiate criminal prosecutions without the Prosecuting Attorney,” Amicus Br. 7, 12-13. That completely misstates the question at hand. The issue is far narrower: Whether the Rules of Professional Conduct prohibit a deputy or assistant attorney general from accepting an appointment by a prosecutor, who *voluntarily* chooses to make the appointment pursuant to his or her authority under West Virginia Code § 7-7-8, to work on criminal matters under the *supervision* of that prosecutor.

In fact, contrary to the assertions of Respondents and the Association, this case is principally about the proper scope of *Respondents’* duties. Respondents have claimed the authority under the Rules of Professional Conduct to police what they assert are the bounds of the Attorney General’s powers. But it is well settled that the rule on which they rely—Rule 8.4(d)—is not a roving mandate for either the Board or ODC to label as unethical any actions by an attorney that they think are unlawful. In delegating certain powers to Respondents, this Court did not grant general law enforcement responsibilities. Thus, while this Court undoubtedly could reaffirm that the Attorney General has the common law authority to assist prosecutors who desire his help, it need not do so. It need only recognize that *Respondents* have exceeded *their* authority by attempting to make the Attorney General’s powers a question of legal ethics.

Moreover, Respondents further claim that there are no possible circumstances under which this Court may review a Board opinion interpreting the Rules of Professional Conduct. In

their view, an attorney cannot seek judicial intervention until disciplinary action has been initiated, even where, as here, a Board opinion concludes that certain acts “*would be a violation*” of the Rules of Professional Conduct. Pet. App. 9 (emphasis added). But that would render Board opinions effectively unreviewable because few attorneys, if any, will be willing to suffer the lasting consequences of disciplinary action. Even if a complaint or formal charges are ultimately dismissed or expunged, an attorney nonetheless will often have to report that the complaint or charges were filed.

Respondents and the Association contend that a decision for the Attorney General would have far-reaching and negative consequences. They have it exactly backwards. A decision for Respondents would give Respondents an unprecedented amount of authority over the meaning of the Rules of Professional Conduct, the powers of the Attorney General, and any other area of law they deem relevant to legal ethics.

ARGUMENT

I. THIS CASE PRESENTS A NARROW LEGAL ISSUE.

Despite Respondents and the Association’s attempt to confuse the issue, this case presents a narrow and straightforward question: Whether the Rules of Professional Conduct prohibit a deputy or assistant attorney general from accepting an appointment offered by a county prosecutor under West Virginia Code § 7-7-8 to work on criminal matters under the supervision of that prosecutor. *See* Pet. 2. The Attorney General is committed to doing what he can to solve the State’s problems. To that end, he has made his Office available to assist county prosecutors who lack resources, *if they desire such assistance*. This case has arisen only because Respondent Board has issued an opinion informing the Attorney General that it believes such assistance “*would be a violation*” of the Rules of Professional Conduct. Pet. App. 9. The

Attorney General would accept Prosecutor Snyder's request for help with sexual assault, drug, and public corruption cases, but he is prevented from doing so by Respondents' threat of disciplinary action against him and any attorney that he allows to work for Prosecutor Snyder. That is the extent of what this case is about.

This case does *not* concern many of the matters that Respondents and the Association raise in their briefs. It is *not* about whether, as a matter of policy, county commissions or the Office of Attorney General are better positioned to help overworked and under-staffed county prosecutors. *See* Response 6; Amicus Br. 5-9. It is *not* about whether the Attorney General is subject at all to the Rules of Professional Conduct. *See* Response 14. It is *not* about whether other county prosecutors want the Attorney General's assistance. *See* Amicus Br. 24. And it is certainly *not* about whether Mingo County still needs prosecutorial assistance. *See id.* at 2-5.¹

Perhaps most important, this case is *not* about whether the Attorney General may independently "initiate" criminal prosecutions, whether prosecutors and the Attorney General have overlapping or distinct powers, or whether the Attorney General is a "law enforcement officer." Response 15; Amicus Br. 7, 11-21. As Prosecutor Snyder observes in a letter he recently sent to all parties and to the proposed amicus, "[I]t appears to me that the real issue here is concern by some of my colleagues that the Attorney General is attempting to usurp the authority of Prosecuting Attorneys." *See* Exh. A (Prosecutor Snyder's second letter). But, as he correctly goes on to observe, that is not what this case is about. *Id.* ("It was not my perception in discussing this issue with the Attorney General that he wanted to take over my Office but only that he could offer legal help *if I needed it and requested it.*") (emphasis added).

¹ It bears noting, however, that Respondents incorrectly assert that the Attorney General himself was to be appointed the Prosecuting Attorney of Mingo County. Response 1.

As shown below, once these straw men are swept away, it is clear the writ should issue.

II. THE BOARD'S OPINION IS CLEARLY ERRONEOUS.

Respondents and the Association fail to rebut the most “substantial” factor in favor of the writ—that the Board’s opinion is clearly erroneous as a matter of law. Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). They principally argue that the Office of Attorney General lacks the authority to assist with criminal matters under a county prosecutor’s supervision. This is plainly incorrect under a proper application of *State ex rel. Discover Financial Services v. Nibert*, 231 W. Va. 227, 744 S.E.2d 625 (2013), but this Court need not even reach that issue. The Board’s opinion fails as a threshold matter because the Rules of Professional Conduct do not turn every dispute over the Attorney General’s powers into a question of legal ethics and professional discipline.

A. The Requested Assistance Would Not Violate Rule 8.4(d).

1. Rule 8.4(d) is not a license for Respondents to police what they believe to be the bounds of the Attorney General’s authority.

Rule 8.4(d) has the potential to be exceedingly broad in application, but this Court has followed other jurisdictions in requiring the rule to be “considered in light of the traditions of the legal profession and its established practices.” *Lawyer Disciplinary Bd. v. Kupec*, 202 W. Va. 556, 572, 505 S.E.2d 619, 635 (1998). On its face, the rule vaguely makes it “professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.” W. Va. R. Prof’l. Conduct 8.4(d). As this Court has explained, however, the language is not unconstitutionally vague if it is narrowly understood as a rule “written by and for lawyers” that enforces well-understood norms. *Id.*

A leading treatise on legal ethics offers a similar view of Rule 8.4(d) of the Model Rules of Professional Conduct—on which West Virginia Rule 8.4(d) is based. “Model Rule 8.4 is an

integrating ‘master rule’ that requires lawyers to obey professional norms.” 2 Hazard & Hodes, *The Law of Lawyering* 65-3 (3d ed. 2014). This interpretation of the rule tracks “[t]he debate leading to the adoption of Rule 8.4(d) by the ABA House of Delegates,” which “made clear that it was intended to address violations of well-understood norms and conventions of practice only.” *Id.* at 65-16. Moreover, any other interpretation risks the “danger[s]” of an “open-ended rule,” raising “the specter of a disciplinary authority creating new offenses, and perhaps harassing an unpopular lawyer through selective enforcement of the new standard.” *Id.*; *see also id.* (advising tribunals to “be circumspect in avoiding overbroad readings or resorting to standards other than those fairly encompassed within an applicable lawyer code”).

To support their actions, however, Respondents must advance a far broader reading of Rule 8.4(d). In their view, Rule 8.4(d) applies to any behavior by “a lawyer in an official or governmental position” that *Respondents* believe to be in violation of “the Constitution” or “proper procedures, rules, or laws.” Response 15. This would make every dispute over the Attorney General’s authority—and, indeed, the authority of *any* government official who happens to be a lawyer—a question for the Board and ODC.

Such an expansive view of the rule—which would effectively arrogate to Respondents the core duty of the judiciary to “say what the law is,” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)—finds no support in the law. Tellingly, Respondents do not even attempt to square their interpretation with *Kupec* or any other decision of this Court applying Rule 8.4(d). In fact, Respondents cite *no authority whatsoever*—from this Court or any other—even though a version of Rule 8.4(d) has been adopted in almost every State in the union. *See* Am. Bar. Assoc., Model Rules of Prof’l. Conduct, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html. Their use of Rule 8.4(d) is

unprecedented, contravenes the universal understanding of the rule, and should be rejected by this Court.

2. The Legislature has not expressly abrogated the Attorney General's common law authority to provide assistance in criminal matters when requested by a county prosecutor.

a. Even if Rule 8.4(d) can be read as broadly as Respondents allege, they and the Association are incorrect in asserting that the Attorney General has been stripped of his common law power to assist a county prosecutor with a criminal matter. As even Respondents and the Association must admit, this Court has made clear that the Attorney General retains all common law powers unless the Legislature has “plainly manifested” an intent to “expressly repeal specific aspects” of those powers. *Discover Financial Services*, 231 W. Va. at 249, 744 S.E.2d at 647 (quotation marks omitted); *see also* Response 10 (“[T]he Attorney General retains inherent common law powers *when not expressly restricted or limited by statute.*”); Amicus Br. 20 (“[T]he Attorney General possesses certain common law powers, unless those powers are expressly restricted or limited by statute”). In *Discover Financial Services*, for example, this Court found for the Attorney General because it “d[id] not find any language in the statute which *expressly* prohibit[ed]” the Attorney General’s exercise of common law authority. 231 W. Va. at 250-51, 744 S.E.2d at 648-49 (emphasis added). The same is true here.

Under this clear-statement rule, the mere fact that county prosecutors exist apart from the Office of Attorney General, *see* W. Va. Const. art. 9, § 1; W. Va. Code § 7-4-1, is not enough to abrogate the Attorney General’s inherent power to assist county prosecutors. That is the lesson of *State v. Ehrlick*, 65 W. Va. 700, 64 S.E.2d 935 (1909). In that case, this Court recognized that “the office of prosecuting attorney has been carved out of that of Attorney General and made an independent office, having exclusive control, to some extent, of business of the state, arising within the county.” *Id.* at 936. As such, “the two offices [are] separate and distinct” and the

Attorney General cannot “displace” a county prosecutor, but this Court also had “[n]o doubt” that the Attorney General retained his 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.* (emphasis added).² This last statement by the *Ehrlick* Court is all but ignored by Respondents and the Association.³

Respondents and the Association mention three other statutes—West Virginia Code §§ 5-3-2, 7-4-6, and 7-7-8—but none of these statutes constitutes the *express* abrogation of the Attorney General’s common law power to assist prosecutors that this Court has said is required:

Section 5-3-2 does not deprive the Attorney General of any power to assist a prosecutor, but rather *requires* him or her to exercise that power when there are extraordinary conditions at a state prison. It nowhere states that those are the only circumstances in which the Attorney General may assist a prosecutor, as Respondents and the Association suggest; it merely reflects the Legislature’s desire to remove the Attorney General’s discretion to *decline* to provide assistance under those particular circumstances.

The Association contends that Section 7-4-6 is a “legislative[] mandate[]” that “[t]he

² *State ex rel. Matko v. Ziegler*, 154 W. Va. 872, 179 S.E.2d 735 (1971)—which is cited by the Association but not Respondents—is fully consistent with *Ehrlick*. In *Matko*, this Court determined that the “indictment and prosecution” of an individual “were not duties which the attorney general was *required* to perform.” *Id.* at 885, 179 S.E.2d at 743 (emphasis added). It was not asked to, and did not, decide whether the Attorney General could have assisted with the criminal proceedings.

³ See Response 15 (asserting that *Ehrlick* held “that the powers of the attorney general and prosecuting attorney are independent and distinct”). The Association claims that the *Ehrlick* Court did not define the “business” with which the Attorney General retains the power to assist. Amicus Br. 17. But it is clear from the text of the opinion that the Court was referring to all of the “business of the state” to which county prosecutors attend, including the business of criminal prosecution. *Ehrlick*, 65 W. Va. 700, 64 S.E. at 936.

appointment of special prosecuting attorneys . . . be made from the pool of the fifty-five elected Prosecuting Attorneys and their assistants.” Amicus Br. 15. For several reasons, that is simply incorrect. *First*, Section 7-4-6 concerns only the appointment of special prosecuting attorneys by the West Virginia Prosecuting Attorneys Institute in a few specific circumstances, such as cases “where the prosecutor for that county or his or her office has been disqualified from participating in a particular criminal case.” W. Va. Code § 7-4-6(e). It does not address the appointment of special *assistant* prosecutors in situations where county prosecutors merely require help. *Second*, even with respect to the specific circumstances at issue, Section 7-4-6 does not limit appointments to elected prosecutors and their staff. Rather, the statute quite plainly states that “appointment[s] may be *any* attorney with a license in good standing in this state.” *Id.* § 7-4-6(d)(1) (emphasis added).

Finally, Section 7-7-8 is a broad grant of power to prosecuting attorneys and says nothing about the Attorney General’s common law authority. That statute permits a county prosecutor to appoint any “practicing attorney[]” to “assist him in the discharge of his official duties.” *Id.* § 7-7-8. There is no exception that would exclude attorneys employed by the Office of Attorney General.

b. Perhaps recognizing the lack of any *express* legislative abrogation of the Attorney General’s common law power, Respondents and the Association improperly attempt to change the nature of the inquiry. They contend that: (1) the Legislature has not affirmatively granted the Attorney General the power to assist county prosecutors with criminal prosecutions; and (2) the Legislature has implicitly abrogated the Attorney General’s common law power to assist prosecutors. Neither argument can be squared with the clear-statement rule set forth in *Discover Financial Services*.

First, the Association repeatedly asserts that the Legislature has never explicitly “authorize[d] the Attorney General to assist county Prosecuting Attorneys in criminal prosecutions.” Amicus Br. 12; *see also id.* at 7 (“[T]he statute does not grant the attorney general the right to assume the powers of county prosecutors.”); *id.* at 13 (noting the “lack of . . . statutory authorization”); *id.* at 17 (asserting that the Attorney General cannot “assum[e] any power of criminal prosecution not specifically authorized by statute”); *cf.* Response 12 (“W. Va. Code § 5-3-2 simply does not give Petitioner a blank check to assist with the prosecution of all state criminal cases at the trial court level.”).

When the Attorney General’s common law power is at issue, however, the question is not whether the Legislature has *granted* new authority but whether it has *expressly abrogated* existing authority inherent to the Office. The argument advanced by the Association—that the Attorney General possesses only those powers granted by the Legislature—has now been repeatedly repudiated by this Court. *See, e.g., Discover Financial Services*, 231 W. Va. at 248, 744 S.E.2d at 646 (rejecting the view that “the only powers the Office of Attorney General possessed were those expressly granted by the Legislature”).

Second, Respondents argue that Section 5-3-2 *implicitly* abrogated the Attorney General’s common law power to assist county prosecutors. Invoking the doctrine of *expressio unius est exclusio alterius*, Respondents contend that the Legislature’s decision to require the Attorney General to assist county prosecutors in certain circumstances “*implies* the exclusion of [all] other” circumstances. Response 11 (internal quotations omitted and emphasis added); *see also State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 128, 464 S.E.2d 763, 770 (1995) (“*Expressio unius est exclusio alterius* (express mention of one thing *implies* exclusion of all others) is a well-accepted canon of statutory construction.” (emphasis added)).

This Court, however, has specifically rejected the notion that the Legislature may impliedly abrogate the common law. In *Discover Financial Services*, this Court explained that the abrogation of common law cannot be “cavalier[ly]” inferred. 231 W. Va. at 249, 744 S.E.2d at 647. “The ‘common law is not to be construed as altered or changed by statute, unless legislative intent to do so be *plainly manifested*.’” *Id.* (quoting *State ex rel. Van Nguyen v. Berger*, 199 W.Va. 71, 75, 483 S.E.2d 71, 75 (1996)) (emphasis added). In short, Respondents’ argument that Section 5-3-2’s requirement of assistance in one circumstance *impliedly* abrogates the Attorney General’s common law authority is directly contrary to this Court’s clear instruction.

B. The Requested Assistance Is Not Likely To Violate Rule 1.7(b).

Respondents devote little of their brief to defending the Opinion’s second conclusion—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. As the Attorney General has explained, this conclusion is wrong for two reasons. *First*, the requested assistance is unlikely to create a conflict of interest. In *State v. Angell*, 216 W. Va. 626, 609 S.E.2d 887 (2004), this Court held that the appointment of a state agency attorney as a special assistant prosecutor supervised by a county prosecutor presented no inherent conflict of interest. There is even less risk here, because the Attorney General’s Office ordinarily *assumes the prosecutor’s role* on appeal. *Second*, in the unlikely event that a conflict arises, the deputy or assistant attorney general in question could be screened from the conflicted matter, in the same way that the Office routinely screens attorneys who represent two state adverse state agencies in the same case.

Respondents largely fail to respond to any of these points. They do not contest that the Attorney General’s Office ordinarily becomes the prosecutor in criminal appeals. Nor do they address in any way the notion of screening as a solution to conflicts that do arise. Indeed,

Respondents appear to have abandoned the Opinion’s position that any conflict “is not likely a waivable conflict because of the state actors.” Pet. App. 9.

Respondents’ principal response is that “[n]o man can serve two masters.” Response 16. But Respondents offer no answer to *Angell*, in which this Court endorsed the 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.” 216 W. Va. at 631, 609 S.E.2d at 892. Respondents assert that “the allegiance of th[e] dual employee could be to the entity where his or her paycheck derives . . . and not to the county prosecutor.” Response 16. In *Angell*, however, this Court rejected that concern, reasoning that 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.” 216 W. Va. at 632, 609 S.E.2d at 893.

III. THE ATTORNEY GENERAL HAS STANDING AND NO OTHER ADEQUATE MEANS FOR RELIEF.

Unable to muster much on the merits, Respondents and the Association rely heavily on the notion that this case is somehow inappropriate for review. Their arguments take several forms, but ultimately reduce to the assertion that the Attorney General lacks standing at this time and should not be able to seek judicial intervention unless and until Respondents have initiated disciplinary proceedings. If anyone has standing, they assert, it is Prosecutor Snyder.

These arguments are wrong for at least three reasons. *First*, that Prosecutor Snyder has suffered harm is irrelevant. The fact that he has been harmed by the inability to receive help from the Attorney General’s Office has no bearing on whether the Attorney General has standing. Both could have standing to challenge the Opinion.

Second, the Attorney General has standing under well-settled precedent permitting pre-

enforcement review. In a long line of cases, the U.S. Supreme Court has repeatedly approved pre-enforcement challenges.⁴ Indeed, the Court unanimously reaffirmed that principle this past Term in *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014). “When an individual is subject to [the threatened enforcement of the law],” the Court explained, “an actual arrest, prosecution, or other enforcement action is *not a prerequisite* to challenging the law.” *Id.* at 2342 (emphasis added). In that case, it was enough that two entities wanted to act in a way that a state agency had found probable cause to believe *would* break the law.

This Court has taken a similar view. For example, this Court has rejected the notion that a party seeking a declaratory judgment must first “violate the statute and . . . be arrested in order to have a determination of his rights, duties and responsibilities under the statute.” *Kisner v. City of Fairmont*, 166 W. Va. 145, 149, 272 S.E.2d 673, 675-76 (1980). It is enough that “the defendant has made evident his purpose to enforce provisions of the statute and that such enforcement will directly and materially affect the rights of the plaintiff.” *Farley v. Graney*, 146 W. Va. 22, 30, 119 S.E.2d 833, 838 (1960). Consistent with these cases, the “general rule” is that “*any* person who will be affected or injured by the proceeding which he seeks to prohibit is

⁴ See *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-129 (2007) (“[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat”); *Virginia v. Am. Booksellers Ass’n Inc.*, 484 U.S. 383, 393 (1988) (“pre-enforcement nature” of plaintiffs’ suit was not “troubl[ing]” because plaintiffs “alleged an actual and well-founded fear that the law will be enforced against them”); *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) (plaintiff could bring a pre-enforcement suit when he “has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder”); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (“[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights”); see also *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010) (plaintiffs faced a “credible threat” of enforcement and “should not be required to await and undergo a criminal prosecution as the sole means of seeking relief”).

entitled to apply for a writ of prohibition.” Syl. Pt. 2, *State ex rel. Goodwin v. Cook*, 162 W. Va. 161, 248 S.E.2d 602 (1978) (emphasis added).

This matter comes well within these precedents. The Attorney General would like to provide Prosecutor Snyder the requested assistance, *see* Pet. 1, 5, but the Opinion makes clear that Respondents will bring disciplinary action if the Attorney General accepts the request and permits a member of his staff to be appointed by Prosecutor Snyder, *see* Pet. App. 9 (stating that the requested assistance “would be a violation” of Rule 8.4(d)). Moreover, disciplinary action has immediate and permanent consequences for an attorney’s career. For example, even if an investigation or a complaint is ultimately dismissed or expunged, every bar application that is publicly accessible (a total of 42 jurisdictions) requires either: (1) an affirmative disclosure of whether disciplinary action (formal or informal) has ever been taken against the applicant; or (2) a privacy release authorizing officials to inquire into whether such action has ever been taken against the applicant. *See* Exh. B.⁵ In turn, the National Conference of Bar Examiners and the ABA Section of Legal Education & Admissions to the Bar recommend that “[t]he revelation or discovery of” a “disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction” “should be treated as *cause for further inquiry* before the bar examining authority decides whether the applicant possesses the character and fitness to practice law.” *See* Standard 13, Code of Recommended Standards for Bar Examiners, p. viii, *available at* http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf (emphasis

⁵ West Virginia uses the National Conference of Bar Examiners for Character & Fitness investigations, which requires the self-reporting of all disciplinary action ever taken against an attorney. *See* Nat’l Conf. of Bar Examiners, Standard Form for the Application to the West Virginia Bar at Question 10-B (“Have you ever been the subject of any charges, complaints, or grievances (formal or informal) concerning your conduct as an attorney, including any now pending?”).

added).

Respondents and the Association do not contest that any form of disciplinary action will have immediate and lasting consequences; instead, Respondents contend that they have not actually threatened disciplinary action. That position is difficult to square with Respondents' repeated and definitive claim that the Board "would" view the requested assistance as a "violation" of the Rules of Professional Conduct. Pet. App. 9; *see also* Response to Motion to Expedite 4-5 ("the Board would view [assisting a prosecutor] as a violation of the Rules of Professional Conduct."); Response 2 ("such conduct would exceed the legitimate powers of the Attorney General . . . and be viewed as a violation of Rule 8.4(d)"). Given their statements in this matter to date, it is hard to believe that Respondents would not open an investigation were they to learn of behavior that they have so definitively declared a violation of the Rules.

Third, the Attorney General also has standing because the Opinion is currently barring him from exercising his inherent authority. The immediate and lasting consequences of any form of disciplinary action make it virtually impossible for the Attorney General to accept Prosecutor Snyder's request. Even if the Attorney General were willing to personally suffer the consequences, he would also have to identify a qualified deputy or assistant attorney general who is willing to incur disciplinary action. As such, the Attorney General is effectively prohibited from exercising certain powers of his Office, which is clearly a justiciable injury. *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"). Respondents and the Association obviously disagree that the Attorney General even has such authority, *see, e.g.*, Amicus Br. 23 ("He will not be *injured* by being ethically prohibited from performing the duties of another Constitutional official"), but that simply shows that the merits of this case cannot be separated from the

question of standing.

IV. A RULING FOR THE ATTORNEY GENERAL WOULD NOT HAVE FAR-REACHING AND NEGATIVE CONSEQUENCES.

As a final fallback, Respondents suggest that issuing the writ in this case would have far-reaching and negative consequences. They assert that a decision in the Attorney General's favor would "create a right of appeal of advisory opinions" that would impact "a multitude of state agencies that provide informal and formal advisory opinions, including Petitioner." Response 7. This is a vast overstatement. Opinions issued by the Board differ significantly from those issued by the Office of Attorney General (and many other agencies) in ways that justify immediate appeal of the former but not the latter. Most important, those issued by the Board carry the threat of sanctions and possible disbarment, while Attorney General Opinions do not. *See Hoover v. Blankenship*, 199 W. Va. 670, 674, 487 S.E.2d 328, 332 (1997) ("opinions of the attorney general are not precedential or binding upon this Court").

Respondents also contend that a ruling in favor of the Attorney General will "invit[e] parties to abuse this extraordinary remedy in the future." Response 7. That is, again, an unwarranted fear. This is an unusual case, involving an unprecedented effort by Respondents to use the Rules of Professional Conduct to assert authority over the scope of a constitutional officer's powers. It is precisely the sort of extraordinary and rare occasion for which a writ of prohibition is justified. Nothing about this case will change the standards that this Court has always applied to petitions seeking extraordinary writs or alter the significant discretion that this Court has always had to efficiently deny petitions that obviously fail to satisfy those rigorous standards.

In fact, Respondents have it exactly backwards, as there are strong policy reasons that support the issuance of the writ in this case. To begin with, allowing for pre-enforcement review

of Board opinions would incentive lawyers to carefully consider and resolve ethical issues *before* they act. This is a feature to the advisory opinion process that should be embraced, not a bug to be avoided. After all, the Rules of Professional Conduct are intended to encourage ethical behavior, not to be a trap waiting to be sprung by Respondents. *See* W. Va. R. Prof'l. Conduct, Scope (the rules are intended to “simply provide a framework for the ethical practice of law”).

Perhaps more important, a decision requiring the Attorney General to suffer disciplinary action before bringing suit will in effect insulate Board opinions from judicial review. In light of the immediate and lasting consequences of disciplinary action, there are few attorneys, if any, who will be willing to incur disciplinary action in order to challenge the conclusions in a Board opinion. The far more likely result is that Board opinions will go unchallenged, making Respondents—and not this Court—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).

The same is true of the distinction that Respondents purport to draw between an informal Board opinion—like that issued here—and a formal Board opinion. *See* Response 2, 7. Respondents suggest that only formal opinions should be appealable, but they fail to mention that the label assigned to an opinion is entirely within the Board’s discretion. In this case, the Attorney General requested a formal opinion but was given an informal opinion. If Respondents’ view prevails, the Board will have unchecked power to pick and choose which opinions that it wishes to allow this Court to review.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the requested writ should issue.

Respectfully submitted,

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