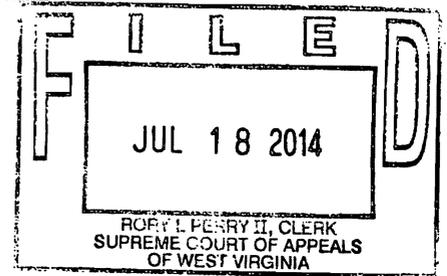


IN THE SUPREME COURT OF APPEALS OF THE  
STATE OF WEST VIRGINIA

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



**Petitioner,**

v.

**No. 14-0587**

**WEST VIRGINIA OFFICE OF DISCIPLINARY COUNSEL and  
WEST VIRGINIA LAWYER DISCIPLINARY BOARD**

**Respondents.**

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**RESPONSE TO PETITIONER'S  
PETITION FOR A *WRIT* OF PROHIBITION**

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## I. INTRODUCTION

At the request of this Honorable Court, pursuant to Rule 16(g) of the Revised Rules of Appellate Procedure, Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel, and Renée N. Frymyer, Lawyer Disciplinary Counsel, submit this Response to Petitioner's Petition for a *Writ* of Prohibition on behalf of the West Virginia Office of Lawyer Disciplinary Counsel and the West Virginia Lawyer Disciplinary Board, Respondents herein.

## II. QUESTIONS PRESENTED

1. Should this Court issue a *writ* of prohibition creating a non-existent right to appeal an advisory opinion issued by the Lawyer Disciplinary Board at the request of Petitioner?
2. Should this Court issue a *writ* of prohibition permitting Petitioner to evade the Rules of Lawyer Disciplinary Procedure and/or the Rules of Professional Conduct?
3. Should this Court issue a *writ* of prohibition that permits Petitioner to circumvent the legislative branch of government and confer upon Petitioner duties that exceed his statutory authority?

## III. STATEMENT OF THE CASE

Respondents take issue with Petitioner's characterization of some of facts in his Petition. In or about August 2013, Petitioner initially sought input from the Office of Lawyer Disciplinary Counsel ("ODC") regarding his ability to accept the appointment as the constitutional officer of the Mingo County Prosecutor, and Chief Lawyer Disciplinary Counsel advised that she did not believe the same was permissible by law. Petitioner subsequently amended his request not to occupy the statutory position of prosecutor, but to instead have assistant attorney generals serve as appointed assistants to the county prosecutor. Counsel advised Petitioner informally that the same was rife with

potential conflict and she was not aware of any constitutional or statutory authority permitting the same. Dissatisfied with the position of the ODC, Petitioner requested the full Lawyer Disciplinary Board address the issue. By letter dated October 17, 2013, Petitioner represented to the Board that he had received “multiple requests” from prosecutors to accept appointments. [Pet. App. 1.] However, the Board noted in its January 24, 2014 informal advisory opinion that to its knowledge neither the West Virginia Prosecuting Attorney’s Institute, nor any prosecuting attorney had actually made such request of the Attorney General. [Pet. App. 9.] The Board’s letter went on to state that there appeared to be no authority, constitutional, statutory, or otherwise, for the Attorney General to assist county prosecutors outside of what was contemplated in W.Va. Code § 5-3-2 (concerning the prosecution of criminal proceedings arising from extraordinary circumstances existing at state institutions of corrections) and, therefore, opined that such conduct would exceed the legitimate powers of the Attorney General as defined by the Constitution and the statutory law, and be viewed as a violation of Rule 8.4(d) of the Rules of Professional Conduct [regarding conduct prejudicial to the administration of justice] and a potential violation of Rule 1.7(b) of the Rules of Professional Conduct [regarding conflict of interest]. Id. The Board’s letter did not say that for any deputy or assistant attorney general to accept such an appointment would trigger immediate disciplinary action, nor did the Board advise Petitioner to refrain from consulting with or advising any prosecutor as prescribed by the Constitution or other state law. The Board’s letter also clearly stated that an informal advisory opinion is not binding on the Hearing Panel of the Lawyer Disciplinary Board or the Supreme Court of Appeals but shall be admissible in any subsequent disciplinary proceeding involving the requesting lawyer, pursuant to Rule 2.15 of the Rules of Lawyer Disciplinary Procedure. Id.

#### IV. SUMMARY OF ARGUMENT

Petitioner is not entitled to extraordinary relief from this Court because he is dissatisfied with an informal advisory opinion of the Lawyer Disciplinary Board. As a preliminary matter, this Court does not have jurisdiction of review at this juncture because Petitioner is not a party to an actual controversy or an aggrieved party legally entitled to relief. The subject informal advisory opinion was rendered by the Lawyer Disciplinary Board pursuant to Petitioner's request about contemplated conduct and its compliance with the Rules of Professional Conduct. The opinion has no connection to a pending disciplinary proceeding. No formal charges have been filed against Petitioner, nor is there even the existence of a complaint or investigation involving Petitioner and the contemplated conduct. There is no actual controversy existing between the parties to this action and the Petition should be dismissed as a result. Petitioner is not entitled to create an "appeal" of a non-binding advisory opinion by way of an extraordinary remedy from this Court for the purpose of seeking immunity from the Rules of Lawyer Disciplinary Procedure or the Rules of Professional Conduct, nor is Petitioner entitled to obtain extraordinary relief from this Court to bypass the express limitation of powers imposed upon his office by the legislative branch of government.

In addition, Petitioner's request must fail because it does not meet any of the five criteria set forth by this Honorable Court in the case of State ex rel. Hoover v. Berger, *infra*. Respondents clearly have not exceeded their legitimate powers or significantly abused their discretion in interpreting and applying the issues presented by Petitioner, upon his request, and concluding that the plain language of W.Va. § 5-3-2 amounted to an express restriction of the common law authority of Petitioner and precluded the ability of his assistants to ethically accept appointments as assistant prosecuting attorneys under W.Va. Code § 7-7-8, nor was the informal advisory opinion of the Board

clearly erroneous, as such is a reasonable and correct interpretation of the statutes at issue. Accordingly, a *writ* of prohibition should not issue in this matter and the instant Petition should be dismissed forthwith.

## V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents do not object to oral argument in this matter. However, Respondents believe that this Court can properly issue a ruling pursuant to the written arguments submitted by the parties.

## VI. ARGUMENT

### A. Standard of Review

In addressing its obligations in response to a request for a *writ* of prohibition, this Court has explained, “[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W.Va. Code 53-1-1.” Syl. Pt. 1, State ex rel. York v. West Virginia Office of Disciplinary Counsel, 231 W.Va. 183, 744 S.E.2d 293 (2013), Syl. Pt. 2, State ex rel. Peacher v. Sencindiver, 160 W.Va. 314, 233 S.E.2d 425 (1977). A *writ* of prohibition “lies as a matter of right whenever the inferior court (a) has not jurisdiction or (b) has jurisdiction but exceeds its legitimate powers and it matters not if the aggrieved party has some other remedy adequate or inadequate.” State ex rel. Valley Distrib., Inc. v. Oakley, 153 W.Va. 94, 99, 168 S.E.2d 532, 535 (1969).

This Court is “restrictive in its use of prohibition as a remedy.” State ex rel. West Virginia Fire & Cas. Co. v. Karl, 199 W. Va. 678, 683, 487 S.E.2d 336, 341 (1997). Thus, “[a] writ of prohibition . . . will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers.” Syl. Pt. 1, State ex rel. Westbrook Health Servs., Inc. v. Hill, 209 W. Va. 668, 550 S.E.2d 646 (2001); Syl. Pt. 2, State ex rel. Peacher v. Sencindiver, *supra*.

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ had 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. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996).

**B. Petitioner lacks standing to request extraordinary relief from the Court.**

To obtain an appeal or *writ* of error from this Honorable Court, Petitioner must be a party to a controversy in the lower court and aggrieved by the judgment rendered. W.Va. Code § 58-5-1 (1998) (Repl. Vol. 2012); See, also, Matter of City of Morgantown, 226 S.E.2d 900, 159 W.Va. 788 (1976), citing Williamson v. Hays, 25 W.Va. 609 (1885). The Court's jurisdiction of review in this matter, therefore, is dependent upon whether Petitioner is an aggrieved party legally entitled to relief.

Petitioner is clearly not the potentially aggrieved party in the underlying matter. The primary basis for the instant Petition is a June 2, 2014 letter in which the Prosecuting Attorney of Preston County indicates that he is overwhelmed with the weight of an increasing caseload and would appreciate assistance with prosecutions. [Pet. App. 10.] Petitioner asserts that due to the Board's informal advisory opinion he had "not yet committed to the prosecutor's request." [Pet. p. 5.] Thus, in this instance it is the Prosecuting Attorney of Preston County, and not Petitioner, that would

appear to suffer the potential prejudice, if any, if Petitioner does not provide his assistants for use as special assistant prosecuting attorneys.

However, not only is Petitioner not aggrieved by Respondents in this matter, there is no indication that any other party is aggrieved. If a county prosecutor is unable to receive the assistance from Petitioner to prosecute or investigate cases, he or she has other ways to obtain such assistance. The Prosecuting Attorney of Preston County's situation, while unfortunate, is not uncommon. He may seek additional resources for his office from the county. By legislative mandate, it is the respective county commission that is vested with the authority and discretion to determine the compensation for its county prosecutor's office, as such compensation is mandated to be paid out of the county treasury. W.Va. Code § 7-7-4 (2006) (Repl. Vol. 2010); W.Va. Code § 7-7-8 (1987) (Repl. Vol. 2010). Petitioner himself is unable to demonstrate any actual and/or irreparable harm or prejudice any person will suffer if the Court does not intervene in this matter and, as such, is not entitled to any relief.

**C. The issue is not ripe for the Court's review.**

Petitioner acknowledges that he is essentially seeking to establish an appeal from an informal advisory opinion. [Pet. p. 24.] Section 3, Article 8, of our Constitution provides that the Supreme Court of Appeals "shall have appellate jurisdiction in civil cases where the matter in controversy, exclusive of costs, is of greater value or amount than one hundred dollars; in controversies concerning the title or boundaries of land, the probate of wills, the appointment or qualification of a personal representative, guardian, committee or curator; or concerning a mill, road, way, ferry or landing; or the right of a corporation or county to levy tolls or taxes." "The general rule, subject to certain exceptions, is that appeals will be dismissed where there is no actual controversy existing

between the parties at the time of the hearing.” Syl. Gilmore v. West Virginia State Dept. of Educ., 191 W.Va. 227, 445 S.E.2d 168 (1994); Syl. Pt. 1, West Virginia Bd. of Dental Examiners v. Storch, 146 W.Va. 662, 122 S.E.2d 295 (1961). As there is no controversy existing between parties at this time, this matter should be dismissed.

The subject Petition has no connection to a disciplinary proceeding. There are no formal charges pending against Petitioner, nor is there even the existence of a complaint or investigation involving Petitioner and the contemplated conduct. The Board issued an informal advisory opinion written pursuant to Petitioner’s request, about contemplated conduct and its compliance with the Rules of Professional Conduct. The Board’s opinion is not an Order, nor does it relate to any matter of controversy between the above-captioned parties. It is not appropriate for this Court to create a right of appeal of advisory opinions and/or ethics advice. Indeed, such would have far-reaching consequences for a multitude of state agencies that provide informal and formal advisory opinions, including Petitioner. A *writ* should not issue in a case such as this; otherwise, the Court will be inviting parties to abuse this extraordinary remedy in the future.

Petitioner’s reference in his Petition to “the specter of enforcement action by ODC” is purely speculative. [Pet. p. 5.] In addition, the remedy Petitioner is seeking from this Court to “issue a writ prohibiting enforcement of Respondents’ ethics opinion” is vague. [Pet. p. 25.] Petitioner is not entitled to seek immunity from the Rules of Lawyer Disciplinary Procedure or the Rules of Professional Conduct by way of an Order from this Court. Petitioner is likewise not entitled to use an extraordinary remedy in order to seek a reversal of a non-binding informal advisory opinion of which he disagrees. “Whenever the Court believes that a prohibition petition is interposed for the purpose of delay or to confuse and confound the legitimate workings of the criminal or civil process

in the lower courts, a rule will be denied.” Hinkle v. Black, 164 W.Va. 112, 119, 62 S.E.2d 744, 748 (1979).

**D. Respondents have not exceeded their legitimate powers.**

Respondents are vested with the authority to issue formal and informal advisory opinions, upon inquiry from a lawyer, as to whether certain specific actions may constitute a violation of the Rules of Professional Conduct pursuant to Rules 2.15 and 2.16 of the Rules of Lawyer Disciplinary Procedure. Such advisory opinions are intended to assist members of the Bar and are a valued service provided by Respondents that clearly furthers the sound public policy goals of the Rules of Professional Conduct and the Rules of Lawyer Disciplinary Procedure.

Pursuant to Rule 2.14(d), an informal advisory opinion or memorialized ethics advice is not binding on the Hearing Panel of the Lawyer Disciplinary Board or any Court, but shall be admissible in any subsequent disciplinary proceedings involving the requesting lawyer. See, also, State ex rel. Nationwide Mut. Ins. Co. v. Karl, 222 W.Va. 326, 331, 664 S.E.2d 667, 672 (2008). In a disciplinary proceeding initiated by the Office of Lawyer Disciplinary Counsel, the charges contained in the complaint must be proven by clear and convincing evidence. Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. See, also, Syl. Pt. 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995); Syl. Pt. 1, Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987). Ethics advice or opinions rendered by Respondents are simply something that may hold evidentiary value in a disciplinary proceeding involving the requesting lawyer. The evidentiary weight that an opinion is given in any such proceeding is what the Hearing Panel Subcommittee deems appropriate per Rule 2.16(d) of the Rules of Lawyer Disciplinary Procedure.

Respondents clearly did not significantly abuse their discretion in interpreting and applying the issues presented by Petitioner and subsequently rendering a non-binding advisory opinion that the actions contemplated by Petitioner could result in a finding of a violation of the Rules of Professional Conduct. Petitioner has absolutely not been barred or prohibited from exercising all of his common law or statutory authority to provide counsel to state officials and entities, including prosecuting attorneys. Indeed, no entity, including the legislature, can define the powers and duties of the Attorney General so as to deprive the office of the inherent functions and purposes thereof. State ex rel. McGraw v. Burton, 212 W.Va. 23, 569 S.E.2d 99 (2002). Respondents have not done any such thing in regards to the advisory opinion. Therefore, Petitioner's Petition should be denied.

**E. The Board's opinion is not clearly erroneous.**

**1. The statute at issue is unambiguous.**

The statute at issue, W.Va. Code § 5-3-2 (1987) (Repl. Vol. 2013), is clear. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 2, State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968). The Board interpreted the plain meaning of the statute at issue and concluded that the type of desired prosecutorial authority Petitioner set forth in his letter of October 17, 2013, went beyond the authority as delineated by the statute.

W.Va. Code § 5-3-2 sets forth the duties of the Attorney General. With regard to duties and powers of the Attorney General as to prosecuting attorneys, the statute states as follows, in relevant portion:

[H]e shall, when requested by the prosecuting attorney of a county wherein a state institution of correction is located, provide attorneys for appointment as special prosecuting attorneys to assist the prosecuting attorney of said county in the prosecution of criminal

proceedings when, in the opinion of the circuit judge of said county, or a justice of the West Virginia supreme court of appeals, extraordinary circumstances exist at said institution which render the financial resources of the office of the prosecuting attorney inadequate to prosecute said cases; he may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office, and may require a written report from them of the state and condition of the several causes, in which the state is a party, pending in the courts of their respective counties; he may require the several prosecuting attorneys to perform, within the respective counties in which they are elected, any of the legal duties required to be performed by the attorney general which are not inconsistent with the duties of the prosecuting attorneys as the legal representatives of their respective counties; when the performance of any such duties by the prosecuting attorney conflicts with his duties as the legal representative of his county, or for any reason any prosecuting attorney is disqualified from performing such duties, the attorney general may require the prosecuting attorney of any other county to perform such duties in any county other than that in which such prosecuting attorney is elected[.]

Syllabus Point 3, of State ex rel. Discover Fin. Servs., Inc v. Nibert, 231 W.Va. 227, 744 S.E.2d 625 (2013), recognizes that the Attorney General retains inherent common law powers *when not expressly restricted or limited by statute* [emphasis added]. The Court's holding in Discover also stated that the extent of those common law powers is to be determined on a case-by-case basis. Id. W.Va. Code § 7-7-8 describes the appointment of assistant prosecuting attorneys by a prosecuting attorney or Court.<sup>1</sup> The Board has opined that W.Va. Code § 7-7-8, when read in *para materia* with

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<sup>1</sup> W.Va. Code § 7-7-8. Assistant prosecuting attorneys; appointment and compensation; when court may appoint attorney to prosecute.

The prosecuting attorney of each county may, in accordance with and limited by the provisions of section seven of this article, appoint practicing attorneys to assist him in the discharge of his official duties during his term of office. Any attorney so appointed shall be classified as an assistant prosecuting attorney and shall take the same oath and may perform the same duties as his principal. Each assistant shall serve at the will and pleasure of his principal and may be removed from office by the circuit court of the county in which he is appointed for any cause for which his principal might be removed.

If, in any case, the prosecuting attorney and his assistants are unable to act, or if in the opinion of the court it would be improper for him or his assistants to act, the court shall appoint some

W.Va. Code § 5-3-2, amounts to an express limitation of the common law powers of Petitioner and, therefore, precludes his office's ability to ethically accept appointments as assistant county prosecutors. In other words, while "any attorney" may be appointed to serve as an assistant prosecuting attorney under W.Va. Code § 7-7-8, Respondents believe that Petitioner, as the Attorney General, is limited to providing attorneys for appointment to the express circumstances as prescribed in W.Va. Code § 5-3-2. This is a fair and reasonable interpretation of the aforementioned statutes.

**2. W.Va. Code § 5-3-2 clearly limits Petitioner's prosecutorial authority.**

Article VII, Section 1 of the West Virginia Constitution establishes the creation of the Office of Attorney General. As noted by this Court in Discover, "The last clause of Article VII, Section 1, 'shall perform such duties as may be prescribed by law,' expressly authorizes the Legislature to establish duties of the Attorney General's office." *Supra* at 243, 641. Thus, the Court recognizes that the Attorney General should have all the common law powers recognized as belonging to the office, *except so far as those powers limited by statute. Id.*, Syl. Pt. 3 [emphasis added].

In enacting the current W.Va. Code § 5-3-2, the Legislature carved out a small exception for when the Attorney General may assist prosecutors with criminal prosecutions. *Expressio unius est exclusio alterius* is the canon of statutory interpretation meaning, "[T]o express or include one thing implies the exclusion of the other." Black's Law Dictionary (7th ed.1999). See, also, Bevins v. West

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competent practicing attorney to act in that case. The court shall certify to the county commission the performance of that service when completed and recommend to the county commission a reasonable compensation for the attorney for his service, and the compensation, when allowed by the county commission, shall be paid out of the county treasury. No provision of this section shall be construed to prohibit the employment by any person of a practicing attorney to assist in the prosecution of any person or corporation charged with a crime.

The compensation to be paid to an assistant prosecuting attorney shall include compensation provided by law for any services he renders as attorney for any administrative board or officer of his county

Virginia Office of Ins. Comm’r, 227 W.Va. 315, 327, 708 S.E.2d 509, 521 (2010) (quoting State ex rel. Roy Allen S. v. Stone, 196 W.Va. 624, 630 n. 11, 474 S.E.2d 554, 560 n. 11 (1996)). If the West Virginia Legislature had intended for the Attorney General to have broad authority to assist county prosecutors in the prosecution of criminal matters at the trial level, the statute would have no need to specify that the Attorney General is permitted to assist county prosecutors with criminal prosecutions arising from extraordinary circumstances existing in state institutions of corrections, which notably first requires approval of a Circuit Court Judge of said county, or the approval of a Supreme Court Justice. The plain language of 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.

Petitioner cites to cases from other jurisdictions to support his position that attorney generals in other states generally have the common law power to assist with criminal prosecutions.<sup>2</sup> What Petitioner fails to point out is that the jurisdictions cited do not appear to have statutes which, as in West Virginia, specifically limit those common law powers.<sup>3</sup> Petitioner also believes that the

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<sup>2</sup> State ex rel. Stephan v. Reynolds, 673 P.2d 1188 (Kan. 1984); Commonwealth v. Koslowsky, 131 N.E.207 (Mass. 1921); State v. Robinson, 112 N.W. 269 (Minn. 1907).

<sup>3</sup> See, e.g., Kan. Stat. Ann. § 75-702: “The attorney general shall appear for the state, and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court, in which the state shall be interested or a party, and shall also, when required by the governor or either branch of the legislature, appear for the state and prosecute or defend, in any other court or before any officer, in any cause or matter, civil or criminal, in which this state may be a party or interested or when the constitutionality of any law of this state is at issue and when so directed shall seek final resolution of such issue in the supreme court of the state of Kansas. The attorney general shall have authority to prosecute any matter related to a violation of K.S.A. 12-189 or 75-5133, and amendment thereto, related to unlawful acts when the offender is an officer or employee of a city or county.”

Mass. Gen. Laws 12 § 3: “The attorney general shall appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called in question, in all the courts of the commonwealth, except upon criminal recognizances and bail bonds, and in such suits and proceedings before any other tribunal, including the prosecution of claims of the commonwealth against the United States, when requested by the governor or by the general court or

decisions in Coal & Coke Ry. Co. v. Conley, 67 W.Va. 129, 67 S.E. 613 (1910), and Denham v. Robinson, 72 W.Va. 243, 77 S.E.2d 970 (1913), support his position. [Pet. pp. 12-13.] However, both of those cases relate to a former statute that outlined the powers and duties of the Attorney General in West Virginia, which did not include the criminal law limitations as contained in the current statute, enacted in 1987.<sup>4</sup> Furthermore, the Denham Court held:

So far as the attorney general may undertake to exercise or control the powers and duties of prosecuting attorneys we think he is limited by the same rules of practice that control them. . . . Who is the legal authority of the taxing body of the county? Is he not the prosecuting attorney, under chapter 120, Code 1906? Section 6 of that chapter, we think, makes him so. Section 5 of the same chapter imposes upon the attorney general none of the specific duties imposed upon the prosecuting attorney by the sixth section”

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either branch thereof. All such suits and proceedings shall be prosecuted or defended by him or under his direction. Writs, summonses or other processes served upon such officers shall be forthwith transmitted by them to him. All legal services required by such departments, officers, commissions and commissioners of pilots for districts 1 to 4, inclusive, in matters relating to their official duties shall, except as otherwise provided, be rendered by the attorney general or under his direction.”

Minn. Stat. § 8.03: “The attorney general shall cause to be prosecuted all assessors and other officials for such delinquencies in connection with revenue laws as may become known; also all bonds of officers and others upon which any liability to the state has accrued. When any corporation shall have offended against the laws of the state, or misused, surrendered, abandoned, or forfeited its corporate authority, or any of its franchises or privileges, the attorney general shall cause proceedings to be instituted against it.”

<sup>4</sup> Acts of the Legislature of West Virginia (1909), ch. 48, sec. 2: “He shall appear as counsel for the state in all causes pending in the supreme court of appeals, or in any federal court in which the state is interested; he shall appear in any cause in which the state is interested that is pending in any other court in the state upon the written request of the governor, and when such appearance is entered he shall take charge of and have control of such cause; he shall defend all actions and proceedings against any state officer in his official capacity in any of the courts of this state or any of the federal court, when the state is not interested in such cause against such officer, but should the state be interested against such officer, he shall appear for the state; he shall institute and prosecute all civil actions and proceedings in favor of or for the use of the state which may be necessary in the execution of the official duties of any state officer he may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office, and may require a written report from them of the state and condition of several causes in which the state is a party, pending in the courts of their respective counties; he shall keep, in proper books, a register of all causes prosecuted or defended by him in behalf of the state or its officers and of the proceedings had in relation thereto, and deliver the same to his successor in office; he shall preserve in his office all his official opinions and publish the same in his biennial report.”

Id., at 972-973. Thus, it has long been the law in West Virginia that the Attorney General possesses all common law powers except those powers which have been given by statute to the local prosecuting officials.

Petitioner is seeking to broaden his prosecutorial powers and is clearly frustrated that the Board issued an advisory opinion that was inconsistent with his intentions. Petitioner's frustrations are misplaced. If Petitioner is dissatisfied with the express statutory limitations of his common law powers, his remedy is through the Legislature, not through extraordinary relief before this Court.

**3. The Board made the correct analysis with regard to the Rules of Professional Conduct.**

The conclusion by the Board that Petitioner did not have power to prosecute except that specifically given to him by Constitution or statute and, therefore, if Petitioner exceeded his legitimate powers as currently defined by West Virginia law, the same should be considered conduct that is prejudicial to the administration of justice, and a violation of Rule 8.4(d) of the Rules of Professional Conduct, and a potential conflict of interest, in violation of Rule 1.7(b) of the Rules of Professional Conduct, is proper. The Attorney General has the duty to conform his conduct to that prescribed by rules of professional ethics, and is subject to rules of the Supreme Court of Appeals governing the practice of law and conduct of lawyers, which have force and effect of law. Syl. Pts. 4 and 5, Manchin v. Browning, 170 W.Va. 779, 296 S.E.2d 909 (1982) (overruled in part on other grounds by Discover, *supra.*). Indeed, a lawyer who holds public office is held to a higher ethical standard simply because of his position of public trust. Syl. Pt. 3, Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Committee on Legal Ethics of W.Va. State Bar v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993).

As officers of the Court, the duties of all lawyers, not just lawyers holding public office, include maintaining the public trust. The community expects lawyers to exhibit the highest standards of honesty and integrity, and lawyers therefore have a duty not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice. When a lawyer in an official or governmental position willfully violates the Constitution or fails to follow proper procedures, rules, or laws, such conduct violates the public trust and engages in conduct that clearly calls into question the fair or efficient administration of justice. Moreover, as W.Va. Code § 5-3-2 clearly defines a class and circumstance wherein the Attorney General may assist a prosecutor with prosecution, if that statutory authority was exceeded arguably any and all prosecutions involved would be tainted and issues involving jeopardy, appeal or *habeas* could be costly to the system. Such conduct would clearly implicate Rule 8.4 of the Rules of Professional Conduct.

W.Va. Code § 5-3-2 states that the Attorney General may consult with and advise prosecutors in matters relating to the official duties of their office. However, it has been long held that the powers of the attorney general and prosecuting attorney are independent and distinct. “There would be no individual responsibility, if the powers of the Attorney General and prosecuting attorney were coextensive and concurrent.” State v. Ehrlick, 65 W.Va. 700, 64 S.E. 935, 937 (1909). “Concurrence would produce interference, conflict, and friction in many instances, delaying the disposition of business to the detriment of the state.” Id.

The duties of prosecuting attorneys are set forth in W.Va. Code § 7-4-1 (1971) (Repl. Vol. 2010). Under the statute, it is the duty of the prosecuting attorney to attend to the criminal business of the State in the county in which he is elected. W.Va. Code § 7-7-8 allows a county prosecuting attorney to appoint paid assistants whom, when appointed, take the same oath as the prosecutor and,

importantly, “perform the same duties as his principal.” The arrangement Petitioner contemplates wherein an employee of the Attorney General would also serve as an assistant prosecuting attorney would mean that an individual would hold two public positions and be under the direction, supervision and control of two distinct elected individuals. The phrase “No man can serve two masters,” a principle that dates more than two thousand years comes to mind. Such an arrangement could reasonably be seen as raising the appearance of a conflict of interest pursuant to Rule 1.7(b) of the Rules of Professional Conduct, which prohibits a lawyer from representing a client if such representation may be materially limited by the lawyer’s responsibilities to another client or *to a third person, or by the lawyer’s own interests* [emphasis added].

Petitioner contends that the special assistant prosecuting attorneys in the arrangement he proposes would remain employed and paid by the Office of Attorney General. [Pet. p. 18.] It is not unreasonable to conclude that the allegiance of this dual employee could be to the entity where his or her paycheck derives which, in this case, would be Petitioner, and not to the county prosecutor or the voters of the county that elected him or her, which also suggests a potential violation of Rule 1.7(b). In addition, as elected officials, the Attorney General and the county prosecutor owe their allegiance to different constituencies. One could presume that these allegiances may carry over to their assistants as well, leading citizens to question the loyalty of these public servants with overlapping powers. Lawyers holding public office have a heightened responsibility to assure the public as to the integrity of attorneys and that their actions are not committed in furtherance of self-interested concerns.

Moreover, pursuant to W.Va. Code § 5-3-1 (1994) (Repl. Vol. 2013), the Attorney General shall provide written opinions and advice upon questions of law. Arguably, Petitioner’s ability to

offer objective opinions regarding the conduct of a prosecutor is compromised if that prosecutor is also his own employee. There is also no question that Petitioner's duty to defend original jurisdiction prohibition and *mandamus* petitions filed with the Court in criminal cases is rife with potential conflict if such petition needs to be filed against the sitting judge by one of Petitioner's assistants who is serving as an assistant prosecutor. The conclusions set forth heretofore are consistent with the Board's references to Rule 8.4(d) and Rule 1.7(b) of the Rules of Professional Conduct in its advisory opinion.

In rendering its informal advisory opinion, the Board did not, as Petitioner claims, interpret the Rules of Professional Conduct to contravene the common law authority of the Attorney General. Instead, the Board determined that if Petitioner acted outside of the express limits of W.Va. Code § 5-3-2, such would implicate certain Rules of Professional Conduct. Not only did the Lawyer Disciplinary Board not flagrantly exceed its legitimate powers by a clearly erroneous interpretation and application of the statute as a matter of law, the Lawyer Disciplinary Board correctly interpreted the instant issues.

"A *writ* of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers." W. Va. Code § 53-1-1 (1923) (Repl. Vol. 2008). Syl. Pt. 2, State ex rel. Peacher v. Sencindiver, *supra*. Respondents did not abuse their discretion in this matter and Petitioner's *writ* should not lie.

## VII. CONCLUSION

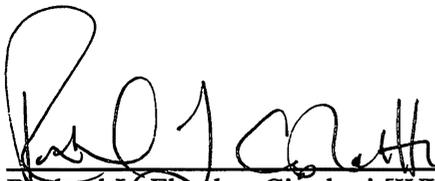
Petitioner fails to meet any of the five criteria set forth by this Court in State ex rel. Hoover v. Berger, *supra*, to be granted the relief he requests. There exist legitimate means to seek the power

Petitioner desires, and that is through legislative action by amending the statute and/or the Constitution to expand his duties and powers under W.Va. Code § 5-3-2. The potentially aggrieved party, which is a county prosecutor and not Petitioner, can seek additional resources from his county. In addition, there is no injury actual or perceived to Petitioner caused by an informal opinion of the Lawyer Disciplinary Board. Damages that are purely speculative are not proper grounds for a rare extraordinary remedy. The relief Petitioner is requesting is also vague and unprecedented. The instant Petition is simply not ripe for the intervention of this Court.

Most importantly, Respondents have not acted in a way that is clearly erroneous as a matter of law nor have their actions manifested a persistent disregard for either procedural or substantive law. The informal advisory opinion of the Board was rendered pursuant to its legitimate powers vested to it by this Court and the opinion was reasonable and correct. There are absolutely no grounds upon which Petitioner can legitimately claim that he is entitled to extraordinary relief from this Court. Accordingly, Respondents respectfully request that the instant Petition for *Writ* of Prohibition not be granted but be dismissed and subsequently be stricken from the Court's docket.

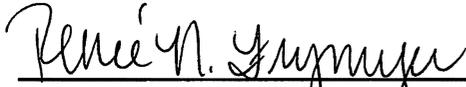
*Respectfully submitted,*

The West Virginia Office of Lawyer Disciplinary  
Counsel and the West Virginia Lawyer Disciplinary  
Board, by counsel



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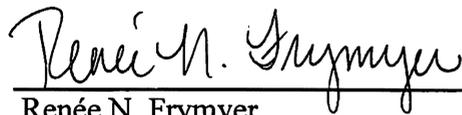
**CERTIFICATE OF SERVICE**

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This is to certify that I, Renée N. Frymyer, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 18<sup>th</sup> day of July, 2014, served a true copy of the foregoing **“Response to Petitioner’s Petition for a *Writ* of Prohibition”** upon Elbert Lin, Esquire and J. Zak Ritchie, Esquire by mailing the same via electronic mail and United States Mail, with sufficient postage, to the following address:

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Renée N. Frymyer