

ADVISORY OPINION NO. 89-27

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON NOVEMBER 2, 1989

GOVERNMENTAL BODY SEEKING OPINION

A part-time prosecuting attorney on behalf of himself and others

OPINION SOUGHT

1. a) "Whether or not we may use our office location, whether in the County Courthouse or otherwise, to perform our duties as Prosecuting Attorneys and also conduct our private law practices?"
b) "In the event that this section is interpreted as precluding us from practicing law from the same physical location as we are performing our duties as Prosecutors, then to that extent we would ask for an exemption?"
2. "May a Prosecuting Attorney or Assistant act as a Fiduciary Commissioner in the County where he serves as Prosecutor?"
3. "May a Prosecuting Attorney or Assistant serve as the Executor of an estate or serve as counsel for the fiduciary of an estate in the County where he serves as Prosecutor?"
4. "May a Prosecuting Attorney or Assistant appear before the County Commission representing a petitioner requesting a Committee appointment for an incompetent in the County where he serves as Prosecutor?"
5. "May a Prosecuting Attorney serve as a member of a Board of Directors of a financial institution designated as a County Depository when the Prosecutor is also a minor stockholder?"
6. "May a Prosecuting Attorney or Assistant serve as counsel for a Public Service District within the County where he serves as Prosecutor?"
7. "May an Assistant Prosecuting Attorney serve as an appointed member without compensation to a Park and Recreation Commission within the County where he serves as Prosecutor?"
8. "May a Prosecuting Attorney or Assistant represent a client in a personal injury case involving a claim against the West Virginia Department of Highways where a claim arises from an alleged failure of the West Virginia Department of Highways to adequately maintain a highway or culvert?"

9. "May a Prosecuting Attorney or Assistant appear before a State agency such as the Worker's Compensation Commission representing a client requesting benefits?"

10. "May a Prosecuting Attorney or Assistant serve as a City Attorney for municipality within the same County where he serves as Prosecutor?"

11. "May a Prosecuting Attorney or Assistant represent an entity before the West Virginia Public Service Commission?"

12. "May a Prosecuting Attorney or Assistant represent individuals or organizations concerned with mining and timbering interests before various Department of Energy and Department of Natural Resource Boards?"

OTHER FACTS RELIED UPON BY THE COMMISSION

Of the 55 elected Prosecuting Attorneys in West Virginia, 14 are considered full time. The other 41 are considered part-time and are allowed to practice law in addition to fulfilling their obligations as prosecutors. The vast majority of assistant prosecuting attorneys in this state are part-time and also have private law practices.

Many prosecutors and assistants have offices in the County Courthouse. There are many situations where the county owns part of the furniture and the prosecutors own part. In addition, many of the secretaries employed by the prosecutor are paid in part by the county and by the private practice.

Many prosecutors have tried to maintain separate offices but due to the constant calls, interruptions, problems, and concerns raised that must be dealt with this is completely unworkable.

STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(b)(1) states a public official or public employee may not intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. The performance of usual and customary constituent services, without compensation, does not constitute the use of prestige of office for private gain.

West Virginia Code Section 6B-2-5(b)(2) states in part that the legislature in enacting this subsection (b) relating to the use of public office or public employment for private gain, recognizes that there may be certain public officials or public employees who bring to their respective offices or employment their own unique, personal prestige which is based upon their intelligence, education, experience, skills and abilities, or other personal gifts or traits. In many cases, these persons bring a personal prestige to their office or employment which inures to the benefit of the state and its citizens. Such persons may, in fact, be sought by the state to serve in their office or employment because, through their unusual gifts or traits, they bring stature and recognition to their office or employment and to the state itself. While the office or employment held or to be held by such persons may have its own inherent prestige, it would be unfair to such individuals and against the interests of the citizens of this state to deny such persons the right to hold public office or be publicly employed on the grounds that they would, in addition to the emoluments of their office or employment be in a position to benefit financially from the personal prestige which otherwise inheres to them.

West Virginia Code Section 6B-2-5(d)(1) states in part...that no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract with the governmental body over which he or she has direct authority or with which he or she is employed. Provided, that nothing herein shall be construed to present or make unlawful the employment of any person with any governmental body; Provided, however, that nothing herein shall be construed to prohibit a member of the Legislature from entering into a contract with any governmental body.

West Virginia Code Section 6B-2-5(f) states that no present or former elected or appointed public official or public employee shall during or after his or her public employment or service represent a client or act in a representative capacity with or without compensation on behalf of any person in a contested case, rate-making proceeding, license or permit application, regulation filing or other specific matter which arose during his or her period of employment and in which he or she personally participated in a decision-making, advisory or staff support capacity.

West Virginia Code Section 6B-2-5(g)(1) states that no elected or appointed public official and no full-time staff attorney or accountant shall, during his or her public service or public employment or for a period of six months after the termination of his or her public service or public employment with a governmental entity authorized to hear contested cases or promulgate regulations appear in a representative capacity, before the governmental entity in which he or she serves or is or was employed in the following matters:

- (A) A contested case involving an administrative sanction, action or refusal to act;
- (B) To support or oppose a proposed regulation;
- (C) To support or contest the issuance or denial of a license or permit;
- (D) A rate-making proceeding, and
- (E) To influence the expenditure of public funds.

West Virginia Code Section 6B-2-5(g)(2) states that "represent" includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person; Provided, that nothing contained in this subsection shall prohibit, during any period, a former public official or employee from being retained by or employed to represent, assist, or act in a representative capacity on behalf of the public agency by which he or she was employed or in which he or she served. Nothing in this subsection shall be construed to prevent a former public official or employee from representing another state, county, municipal or other governmental entity before the governmental entity in which he or she served or was employed within six months after the termination of his or her employment or service in the entity.

West Virginia Code Section 6B-2-5(h)(1) states no full-time public official or full-time public employee who exercises policymaking, nonministerial or regulatory authority may seek employment with, or allow himself or herself to be employed by any person who is or may be regulated by the governmental body which he or she serves while he or she is employed or serves in the governmental agency. The term "employment" within the meaning of this section includes professional services and other services rendered by the public official or public employee whether rendered as an employee or as an independent contractor.

ADVISORY OPINION

With respect to the first request, please see the Commission's advisory opinion 89-15.

With respect to requests two, three, and four, the Commission does not believe there to be any violation of the Act.

With respect to request number five, the key question is whether the prosecuting attorney has a limited interest in the financial institution, as described in subsection 5(d)(2) (a limited interest for the purposes of this section is an interest not exceeding 10% of a partnership or the outstanding shares of a corporation or \$30,000.00, whichever is less). If a prosecuting attorney has more than the statutorily defined limited interest, he or she would be in violation subsection 5(d)(1). In the latter event, the affected governmental body or agency may apply for an exemption pursuant to subsection 5(d)(3) based upon statutorily defined grounds.

With respect to requests six through twelve, inclusive, the Commission does not believe there to be any violation of the Act.

The foregoing advisory opinions are based upon general factual representations made by the requesting association. The Commission believes it important to caution all prosecuting attorneys and assistant prosecuting attorneys to be mindful of all statutory provisions applicable to public officials and employees, and in particular, those cited in this advisory opinion. The statute clearly prohibits the use of public office for the prestige of that office for the private gain of any person, prohibits public officials and employees, their businesses, and members of their immediate families from being parties to or having an interest in the benefits of a contract with the governmental body over which the public employee has direct authority or with which he or she is employed; prohibits present and past public officials and employees from certain representation and employment; and prohibits the knowing disclosure of any confidential information acquired by the public official in the course of his duties. This advisory opinion is limited to the specific circumstances presented to the Commission in the written request of the association and should not be construed on any broader basis.


Chairman