

Contract Exemption 2024-02

Issued on June 6, 2024, by

The West Virginia Ethics Commission

Opinion Sought

The **Kanawha County Sheriff's Office** requests a contract exemption to continue contracting with the law firm Bailey & Wyant PLLC if the Kanawha County Commission selects Marc Slotnick, an equity member in the law firm Bailey & Slotnick PLLC, an entity that is a member of the law firm Bailey & Wyant PLLC, to fill a vacant seat on the County Commission.

Facts Relied Upon By the Commission

A Kanawha County Commissioner resigned, and the Kanawha County Commission is seeking to appoint a person to fill the vacant position. The successful applicant will serve until the term expires on December 31, 2024. One applicant is Marc Slotnick, an equity member in the law firm Bailey & Slotnick PLLC ("Bailey & Slotnick"), an entity that is a member of the law firm Bailey & Wyant PLLC ("Bailey & Wyant").¹

The Kanawha County Sheriff's Office Tax Division (Sheriff's Office) requests a contract exemption to continue using Bailey & Wyant for legal services related to conservatorships and estates if Marc Slotnick is selected to serve as a County Commissioner for six months, the time remaining on the unexpired term.

The Sheriff's Office states that Bailey & Wyant has represented the Sheriff's Office for over 16 years in over 200 matters involving the management of conservatorships and the administration of decedents' estates pursuant to the Sheriff's Office statutory authority and duties relating to fiduciary matters. The Sheriff's Office states that Bailey & Wyant is currently providing legal representation in approximately 30 pending fiduciary matters. The Sheriff's Office further states that it uses Bailey & Wyant for approximately 100% of its fiduciary matters due to the law firm's expertise in this area.

The conservatorship matters involve the management of a protected person's financial affairs under W. Va. Code §§ 44A-3-1 through 44A-3-18. Examples of legal services provided by the law firm to the Sheriff's Office in conservatorship proceedings include giving legal advice regarding the management of a protected person's financial affairs, securing and selling real and personal property at public auctions, and communicating with a guardian or guardian ad litem to handle specific issues in the case. For estate matters, legal services include providing legal advice regarding the administration of the decedent's estate, pursuing legal action on behalf of an estate or representative,

¹The Requester submitted the contract exemption request on May 24, 2024. The Kanawha County Commission appointed Marc Slotnick as the new County Commissioner on May 30, 2024, following the inclusion of this matter on the Ethics Commission's agenda.

locating and securing assets, and handling legal and contested issues amongst the interested parties.

The Sheriff's Office states that it will suffer an undue hardship if it cannot use Bailey & Wyant for the approximate six-month period that Marc Slotnick would serve as a County Commissioner, if he is selected, because of Bailey & Wyant's expertise and experience in handling fiduciary matters. The Requester states that if the Ethics Commission grants the contract exemption, other partners or associates at Bailey & Wyant, not Marc Slotnick, would be performing the legal services for the Sheriff's Office. The Sheriff's Office contracts with and pays Bailey & Wyant, not its member Bailey & Slotnick, for legal services.

The Sheriff's Office is requesting the exemption until January 1, 2025, or the date on which the new County Commissioner, elected in the November 5, 2024, general election, is sworn in, whichever is sooner. Mr. Slotnick is not a candidate for this office in the 2024 general election. It is the Sheriff's Office, not the County Commission, that hires attorneys to represent the Sheriff's Office in fiduciary matters and authorizes the payment of the invoices for legal fees and expenses incurred. The Sheriff's Office submits some invoices to the County Commission for approval to pay them. The Requester states for any invoices requiring County Commission approval for payment, that Mr. Slotnick will refrain from voting or taking any other action regarding such invoices.

Provisions Relied Upon By the Commission

[W. Va. Code § 6B-2-5\(d\)\(1\)](#) states, in relevant part:

[N]o 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 which the official or employee may have direct authority to enter into, or over which he or she may have control

[W. Va. Code § 61-10-15](#) states, in relevant part:

(a) It is unlawful for any member of a county commission, district school officer, secretary of a Board of Education, supervisor or superintendent, principal or teacher of public schools or any member of any other county or district board or any county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control

(h) Where the provisions of subsection (a) of this section would result in the loss of a quorum in a public body or agency, in excessive cost, undue

hardship or other substantial interference with the operation of a governmental body or agency, the affected governmental body or agency may make written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-b of this code for an exemption from subsection (a) of this section.

Opinion

Prohibited contracts

County officers, such as county commissioners, must abide by the prohibitions in W. Va. Code § 61-10-15(a), a statute that imposes criminal penalties against a county official who has a pecuniary interest, either directly or indirectly, in the proceeds of a contract over which the official exercises voice, influence, or control.

Mr. Slotnick has a financial interest in contracts between Bailey & Wyant and the Sheriff's Office because Mr. Slotnick is an equity partner in Bailey & Slotnick PLLC, and that legal entity is a member of Bailey & Wyant. As a county commissioner, Mark Slotnick would also have the requisite voice, influence, and control over the contracts of the County Commission and County offices, including the Sheriff's Office, under W. Va. Code § 61-10-15. See [Contract Exemption 2017-08](#) (finding that a county commissioner has influence and control over a sheriff department's contracts.)²

Accordingly, W. Va. Code § 61-10-15 would prohibit Bailey & Wyant from representing the Sheriff's Office in conservatorship and estate matters for the period that Marc Slotnick would serve as a County Commissioner unless the Ethics Commission grants a contract exemption.

Pre-existing contracts

The Ethics Commission, however, has applied an exception to the public contract restrictions in the Ethics Act and W. Va. Code § 61-10-15 for pre-existing contracts. See [Advisory Opinion 2001-11](#) (holding a board of education may continue buying dairy services under an existing contract with the superintendent's spouse's employer because it was a pre-existing contract); [Advisory Opinion 2000-16](#) (holding a board of education may continue its existing service contract with a board member to maintain a TV satellite system that he installed before becoming a member, so long as there is no modification of the contract's terms and conditions); and [Advisory Opinion 1996-49](#) (holding a board of education may purchase textbooks from a publisher that employs the superintendent's wife during the balance of the term of the contract due to the pre-existing contract). Bailey & Wyant is currently providing legal services to the

² The Ethics Act is not implicated in the case because of its lower standard of "direct authority" or "control." In [Advisory Opinion 1995-24](#), the Ethics Commission held that a county commissioner does not have a prohibited interest in a sheriff's department's contracts under the lower standard in the Ethics Act public contract provision, W. Va. Code § 6B-2-5(d). [Advisory Opinion 2011-02](#) discusses the distinction. See also [Contract Exemption 2017-08](#) (acknowledging the distinction in footnote one.)

Sheriff's Office in approximately 30 pending conservatorship, fiduciary, and estate matters involving specific persons or matters, such as a protected person or a specific estate dispute.

The Commission holds that, if Marc Slotnick becomes a member of the Kanawha County Commission, the Kanawha County Sheriff's Office may continue to contract with Bailey & Wyant for legal services in the pending conservatorship and estate matters for which the law firm is currently providing representation pursuant to the pre-existing contracts exception.

Contract exemption for new matters

As for new conservatorship and estate matters that arise, they do not fall under the pre-existing contract exception. Thus, Bailey & Wyant may only provide representation to the Sheriff's Office in new matters that arise if the Ethics Commission grants an exemption from the prohibitions in W. Va. Code § 61-10-15. This requires a finding that the prohibition would result in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency. In [Advisory Opinion 1989-129](#), the Ethics Commission granted an exemption to a board of education to continue its 15-year contract for legal services with a board employee's spouse.³ The Commission stated:

Through his representation of the County Board of Education the attorney has developed an expertise with regard to matters associated with the school system in general and the County Board of Education in particular. If the exemption is not granted the Board would have to go outside the County and obtain legal counsel from another area, which would increase the cost of legal representation to the Board. There are currently an excess of forty separate pending cases concerning the County Board of EducationThe Commission finds that excessive cost, undue hardship and substantial interference would result from the enforcement of (d)

The Commission finds the reasoning in Advisory Opinion 1989-129 to be sound and grounds for granting a contract exemption in the instant case. The Sheriff's Office states that Bailey & Wyant has expertise in estate administration and guardianship matters and the Sheriff's Office has been contracting with the law firm for approximately 16 years to handle these matters. Moreover, the Sheriff's Office, due to the expertise of Bailey & Wyant, contracts with the law firm for approximately 100% of its fiduciary cases requiring legal advice or representation of protected persons. If the Kanawha County Commission appoints Mr. Slotnick to fill the vacant seat, he would only be serving for approximately six months in that position.

Based upon the factors presented and applicable law, the Ethics Commission finds that it would create an undue hardship on the operation of the Sheriff's

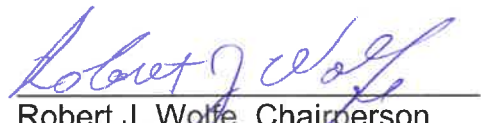
³ This exemption was granted under the Ethics Act and not W. Va. Code § 61-10-15(h). This distinction, however, is immaterial.

Office, relating to its conservatorship and estate fiduciary duties, for the Sheriff's Office to discontinue using the services of Bailey & Wyant during the limited period that Marc Slotnick may serve as a County Commissioner. Therefore, the Commission grants the contract exemption with the below limitations.

First, the contract exemption will expire on December 31, 2024, or when the successful candidate following the November 5, 2024, election is sworn in as a Kanawha County Commissioner, whichever is sooner.

Second, Mr. Slotnick must recuse himself from decisions, discussions, and votes, if any, relating to the Sheriff's Office's contracts with or payments to Bailey & Wyant. See W. Va. Code § 6B-2-5(j)(3). For recusal to be proper, he must first fully disclose on the record his disqualifying interest and leave the room during the discussion, deliberation, and vote on the matter. In addition, the minutes or record of the meeting must reflect the basis for the recusal and that Mr. Slotnick left the room during all consideration, discussion, and vote on the contract and payment for services.

The Commission notes that exemptions must be granted on a case-by-case basis. Therefore, this Contract Exemption is limited to the facts and circumstances of this particular case and may not be relied upon as precedent by other persons or entities.


Robert J. Wolfe, Chairperson
West Virginia Ethics Commission