

CONTRACT EXEMPTION NO. 2011-01

Issued On September 1, 2011 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Wetzel County Commission** seeks approval of an agreement with the prosecuting attorney relating to the expenses of the Office of the Prosecuting Attorney.

FACTS RELIED UPON BY THE COMMISSION

On June 2, 2011, the Ethics Commission issued Advisory Opinion 2011-08 relating to part-time county prosecuting attorneys and their use of public resources in furtherance of their private law practice. In that opinion, the Commission held that:

[P]art-time prosecuting attorneys may not use public resources, including specifically, staff, equipment, and phone lines, without reimbursement to the County Commission and/or direct payment to the vendor for their *pro rata* private use.

A.O. 2011-08.

Wetzel County is one of a few counties in the State which utilizes an elected part-time prosecuting attorney. As with other part-time prosecutors, the prosecuting attorney in Wetzel County also maintains a private law practice. For more than five years, he has operated the prosecuting attorney's office out of a building in which his private law practice is located.¹

The Prosecutor provides the office space for the prosecuting attorney's office at no cost to the County. Additionally, he provides office equipment, internet services, receptionist services and other administrative services for the prosecutor's office at no cost to the County. The County does, however, provide a copier, paper for the copier, and office supplies needed for the prosecuting attorney's office (e.g. filing folders). The County also pays one-third (1/3) of the utilities.

According to the Prosecutor, he uses the copier for his private law practice on a limited basis (e.g. 101 copies in June 2011 and 84 copies in July 2011). However, he purchases his own copier paper for his private practice use, and instructs his staff to alternate the copier paper.

¹ In A.O. 2011-08, the Commission discouraged part-time prosecuting attorneys from operating a private law practice out of their courthouse office space.

Historically, since the Prosecutor does not charge the County for the office space, equipment, internet services, and the receptionist services, the County Commission has not required reimbursement to the County for the limited use of the copier and office supplies. The Requester states that this arrangement has provided a significant financial benefit to the County.

In light of Advisory Opinion 2011-08, the Requester and the Prosecutor entered into an Agreement memorializing their arrangement. The Agreement allows the Prosecutor to continue the limited use of the copier, along with certain office supplies and paper, in furtherance of his private law practice. In return, the Prosecutor agrees not to seek reimbursement for the office space, equipment and receptionist he provides to the County in furtherance of the work of the office of the prosecuting attorney. A copy of the Agreement is attached hereto and shall be a part of this Contract Exemption.

Since the financial arrangement creates a prohibited interest in a public contract, the County Commission seeks a contract exemption allowing/approving the arrangement and written Agreement.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) reads:

Use of public office for private gain. – (1) A public official or public employee may not knowingly or 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. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in *de minimis* private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

W. Va. Code § 6B-2-5(d)(1) provides in part that ... no elected or appointed public official ... or business with which he or she is associated may be party to or have an interest in ... a contract which such official or employee may have direct authority to enter into, or over which he or she may have control.

W. Va. Code § 6B-2-5(d)(3) provides that where the provision of subdivision (1) of this subsection would result ... in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, ... or other governmental agency, the affected government body ... may make written application to the ethics commission for an exemption from subdivision (1) ... of this subsection.

W. Va. Code § 61-10-15(a) states in part: "It shall be unlawful for any member of a county commission, . . . 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, . . . he or she may have any voice, influence or control..."

Finally, W. Va. Code § 61-10-15(h) provides:

Where the provisions of subsection (a) of this section would result in the loss of 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 a written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-B of the Code, for an exemption from subsection (a) of this section.

ADVISORY OPINION

The Ethics Act and West Virginia Code § 61-10-15

The Ethics Act prohibits public servants, including elected prosecuting attorneys, from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control, unless his or her governing body seeks, and receives, an exemption to contract with the public official. W. Va. Code § 6B-2-5(d)(1). For purposes of this provision, a limited interest is defined as an interest which does not exceed one thousand dollars in the profits or benefits of the contracts in a calendar year. W.Va. Code § 6B-2-5(d)(2)(A).

In addition to the Ethics Act, prosecuting attorneys must abide by the stricter prohibitions contained in W.Va. Code § 61-10-15. W. Va. Code § 61-10-15, a separate criminal statute, imposes criminal penalties against County officials who are pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over which those officials exercise "voice, influence, or control."

As the statutory attorney to the County Commission, a county prosecuting attorney is responsible for advising the Requester on contracts and legal matters, including this Agreement.² The Commission has previously ruled that this legal relationship constitutes voice, influence, and control under W.Va. Code § 61-10-15. See A. O. 2009-05. Hence, it is proper and necessary for the County Commission to seek a contract exemption.

² Due to his financial interest in the contract, the Requester recused himself from the County Commission's consideration of the Agreement. He further advised the County Commission to seek outside legal counsel relating to this Agreement, but the County Commission declined to seek an outside review.

Undue Hardship, Excessive Cost, and Substantial Interference

The Commission may grant an exemption from the prohibitions in W. Va. Code § 61-10-15 if the prohibition results in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency. Similarly, under W.Va. Code § 6B-2-5(d) of the Ethics Act, the Commission may grant an exemption if the prohibition would result in excessive cost, undue hardship, or other substantial interference with the operation of the affected government body. Since the factors to be considered under both provisions are similar, the analysis will be combined and shall be deemed applicable to both statutory prohibitions.

In this matter, the Requester and Prosecutor desire to memorialize a reimbursement Agreement for the use of office space, equipment and personnel. In many ways, this Agreement establishes the converse of the situation presented in Advisory Opinion 2011-08, where the prosecuting attorney works out of the courthouse office space. In this matter, the Prosecutor is operating the county prosecuting attorney's office in the same off-site location as his private law practice. The Prosecutor provides the office space, equipment, and receptionist without reimbursement from the County Commission. Thus, with the exception of the copier and some related supplies, the Prosecutor is not using any public resources on behalf of his private law practice.

The Commission hereby finds that the proposed Agreement is permissible. While the Prosecutor normally would be required to reimburse the County for the private use of the copier and supplies, the amount is offset by the value of services, office space, and equipment he provides to the County Commission. This offset is also expressly set forth in the Agreement. Therefore, in accordance with the terms of the proposed Agreement, there is no need for the Prosecutor to reimburse the County Commission for his use of the copier and related supplies.

The Commission further finds that the County's use, at no charge, of the Prosecuting Attorney's private office space, equipment and services provides a significant financial benefit to the County. Hence, the Commission finds that prohibiting the County Commission from entering into this Agreement would result in excessive cost and undue hardship to the County.

Finally, the Commission is mindful that the demands of a part-time prosecuting attorney are different than those of a full-time prosecuting attorney who is prohibited from engaging in private practice. W.Va. Code §§ 7-7-4 and -4A. Therefore, in counties with part-time prosecuting attorneys, the Ethics Commission finds that an exemption may be warranted to allow both the prosecuting attorney and the County Commission to efficiently and financially operate the Office of the Prosecuting Attorney.

Accordingly, the Commission hereby grants a contract exemption and approves the proposed Agreement, with the following conditions:

1. This exemption shall only extend to the current part-time prosecuting attorney. If the status converts to full-time and/or if the prosecuting attorney changes, then this exemption is null and void.
2. Any and all amendments to the Agreement must be approved by Executive Director of the Ethics Commission, unless such amendment substantially alters the terms of the Agreement, in which case, another contract exemption must be obtained.
3. County funds or services may not be used to make repairs or capital improvements to the office space until and unless the County Commission first seeks advice from the Ethics Commission.
4. The Prosecutor must recuse himself from any and all matters relating to this Agreement.

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



Jonathan E. Turak, Acting Chairperson

COPY

AGREEMENT REGARDING REIMBURSEMENT OF EXPENSES

2011 AUG 9 PM 12:20
WV STATE ARCHIVES

This Agreement, made this 2nd day of July, 2011, by and between **TIMOTHY E. HAUGHT, Attorney at Law**, and the **WETZEL COUNTY COMMISSION**.

WHEREAS, Timothy E. Haught is the Prosecuting Attorney for Wetzel County and said position is presently a part-time position.

WHEREAS, Timothy E. Haught is also engaged in the private practice of law and his offices for both the Prosecuting Attorney and his private practice are located in a building provided by him in his practice as a private attorney at no cost to the Wetzel County Commission.

WHEREAS, the parties acknowledge that the statements in the letter from Timothy E. Haught to the Wetzel County Commission, attached hereto as Exhibit A, are true and correct to the best of the parties' knowledge, information and belief.

WHEREAS, the West Virginia Ethics Commission has issued a recent ruling regarding part-time prosecutors.

WHEREAS, the parties desire to enter into a formal agreement memorializing their former understanding and past practice and providing for the reimbursement of expenses for Timothy E. Haught by the in-kind use of certain office equipment and supplies.

WHEREAS, Timothy E. Haught provides office space, equipment, internet services, receptionist services and other services as set forth in Exhibit A to the Wetzel County Commission at no cost. Those items of equipment, office space and services are of substantial value to the Wetzel County Commission, and Timothy E. Haught has never sought reimbursement for the same.

WHEREAS, Timothy E. Haught, in the operation of his civil practice, may from time to time, use some paper, office supplies and a copier provided by the Wetzel County Commission.

WHEREAS, such use is de minimus, particularly in light of the value of the equipment, office space, and services provided to the Wetzel County Commission under the existing arrangement. The Wetzel County Commission and Timothy E. Haught agree that Timothy E. Haught may use the copier, paper and other office supplies as partial reimbursement for the expenses of the office space, equipment, internet, receptionist and other services as set forth in the attached Exhibit A.

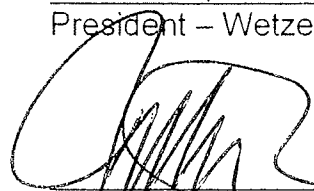
Timothy E. Haught agrees not to seek full reimbursement for the expenses he has incurred for the same for the benefit of Wetzel County.

This Agreement shall remain in effect until the end of Timothy E. Haught's present term of office which is December 31, 2011 and may be renewed by mutual agreement of the parties.

Dated this 2nd day of August, 2011.



President – Wetzel County Commission



Timothy E. Haught

TIMOTHY E. HAUGHT

ATTORNEY AT LAW

925 THIRD STREET

P.O. BOX 268

NEW MARTINSVILLE, WEST VIRGINIA 26155

ADMITTED IN OHIO
AND WEST VIRGINIA

June 13, 2011

(304) 455-0172
FAX (304) 455-0174

Wetzel County Commission
Post Office Box 156
New Martinsville, WV 26155

Dear Commissioners:

This letter is to advise you that due to a recent West Virginia Ethics Commission advisory opinion, it is advisable for us to reduce our existing agreement regarding the use of my office space for the office of the Prosecuting Attorney and equipment and supplies to writing.

As you know, I agreed to vacate the space in the Courthouse in order to provide office space for the Family Court. The County actually receives approximately \$400.00 per month in rent as a result of my agreement to move. Moreover, I provide the County with four offices, three storage rooms, a conference room, a bathroom, and a kitchen which adjoins my civil office at no charge. I estimate the fair market value of the rent for that space to be in excess of \$700.00 per month.

I also provide a receptionist at no cost to the County. I pay for the fax line and provide a fax machine at no cost to the County. I also provide internet services to the County at no cost, and pay two thirds of the electric, gas, water, garbage, and sewage. The County reimburses me for one-third of these expenses. I provide the County with parking, lawn care and snow removal at no cost.

County property and Prosecutor's property are clearly marked with the exception of ink pens, paper clips, paper, note pads and other supplies. The County does provide my office with toilet paper, paper towels, and liquid hand soap which may at times have been used by civil clients and my personal office staff. The County also provides a water cooler which may at times have been used by my civil clients and office staff.

The County provides a copier and paper which may at times have been used for civil clients, however, such use has been minimal. I believe that this follows the agreement that we had regarding my move from the Courthouse.

The new Ethics opinion was basically for Prosecutor's who were using office space provided by the County but also addresses the use of equipment and supplies.

I am prepared to address the advisory opinion in one of two ways:

1) I will pay for the copies or provide paper for all civil copies and use my own paper towels, toilet paper, bottled water, and other office supplies for my civil practice; or,

2) We would enter into a written contract in which I agree to provide the equipment set forth herein and the rental space, and the County agrees to let me use the copier, water cooler, toilet paper, paper towels, and other office supplies.

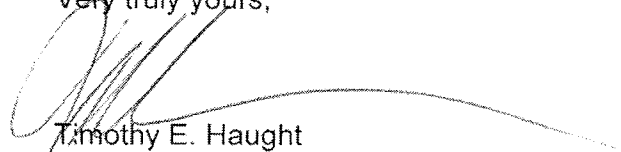
Clearly, the County has been receiving the "benefit of the bargain" under our existing arrangement which I am satisfied with as well. Under these circumstances, it seems ridiculous for anyone to assert that I am "profiting" from the use of public funds. If anything I have suffered a loss under our existing agreement and the County has profited. However, we will need to reach a written agreement as to the same and submit to the Ethics Commission for approval.

In the meantime, I will keep track of all civil copies and other items used to the best of my ability and reimburse the County for the same, if deemed necessary.

I have no interest in charging the County for the space, services, or equipment that I personally provide the County. However, I want to make certain that our arrangement complies with the new opinion. More importantly, however, I do not want to give even the appearance of any impropriety. As you know, I have always endeavored to provide the County the highest quality of legal services at the lowest possible cost.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,



Timothy E. Haught

TEH:brd