

# Advisory Opinion 2020-04

Issued on March 5, 2020, by

The West Virginia Ethics Commission

## Opinion Sought

The **Governor**<sup>1</sup> asks (1) whether he may use state aircraft to fly from Lewisburg to destinations outside of Charleston on official state business, and (2) whether he may participate in campaign activities following his state work and before his return flight provided that the primary purpose of the travel is for official state business and there is no additional use of the aircraft for campaign-related travel.

## Facts Relied Upon by the Commission

The Governor states that on numerous occasions he has used state aircraft for official state business trips that began or ended in Lewisburg where he has a home. These trips have not been to Charleston but rather to events and meetings in other parts of the state and occasionally to other states. The Governor asserts that as for traveling to work in Charleston, he drives his personal automobile at his own expense and seeks no reimbursement from the State.

The Governor also states that on rare occasions his trips in state aircraft for state business are followed up with a campaign-related activity in the same area before his return flight.<sup>2</sup> For example, on June 4, 2019, the Governor traveled to Parkersburg on a state aircraft for the unveiling of a new state tourism marketing campaign. While in Parkersburg, he also attended a town hall meeting with local voters that was organized by his campaign for re-election as Governor. The Governor states that no additional use of the aircraft was necessitated by his campaign activities.

The Governor asserts that his use of state aircraft is appropriate because it is within the performance of his usual and customary duties as governor. He has provided documentation that shows his use of the aircraft is significantly less than that of some of his predecessors. One former governor used state aircraft an average of 3.77 times per month and another former governor used the aircraft an average of 8.65 times per month. The current Governor's state aircraft use has averaged 1.59 times per month thus far in his term of office.

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<sup>1</sup> The Ethics Act provides that the identity of a person requesting an Advisory Opinion may not be revealed. W. Va. Code § 6B-2-3(a). The Ethics Commission is disclosing that this Opinion request is from the Governor, and the Governor has consented to this disclosure because the practice of using state aircraft for and providing security to governors in this state is, historically, unique to the office of Governor.

<sup>2</sup> This type of trip is often referred to as a "mixed purpose" trip for purposes of federal tax and campaign finance reporting laws.

The Governor is not asking whether he is entitled to use state aircraft for purely personal travel but asserts that a governor in fact is entitled to state transportation and security detail for all travel, including some personal travel. The Governor asserts that he is entitled to state transportation to ensure his safety and security; to travel for official duties, and to travel rapidly during emergencies. He alleges that this assertion is supported by the fact that the West Virginia State Police has established an executive protection division which is charged with the protection of the Governor, his immediate family and other persons as designated. The State Police's annual reports historically have contained the following language: "When directed, executive protection officers provide protection and transportation to visiting dignitaries and schedule the utilization of any state aircraft, vehicle, or other transportation used by the Governor or other individuals under their protection."

### **Provision Relied Upon by the Commission**

W. Va. Code § 6B-2-5(b)(1) provides, in pertinent part:

A public official or public employee may not knowingly and 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. [*Emphasis added*]

### **Advisory Opinion**

In Advisory Opinion 2018-03, the Ethics Commission stated that the Ethics Act permits the expenditure of public funds when there is a legitimate government purpose for the expenditure.<sup>3</sup> The Commission finds that the same principle applies in determining whether the use of state property or other public resources violates the Ethics Act.

In Advisory Opinion 2018-03, the Commission further stated:

An unauthorized expenditure ... may constitute the unlawful use of office for private gain if the overriding benefit is to the public official or employee as opposed to the agency or public. W. Va. Code § 6B-2-5(b)(1); Advisory Opinion 2013-56 (finding that public funds may not be used to pay for a sheriff's flight lessons and airplane rental to acquire a pilot's license because the stated reasons for these expenditures resulted in more personal benefit to the sheriff than to the public).

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<sup>3</sup> The Opinion cites Advisory Opinions 2015-12 and 2012-27.

In making these determinations, the Commission considers whether the proposed expenditure is authorized elsewhere. “[T]he Commission relies upon the common law, West Virginia Code, Legislative Rules, Attorney General Opinions and opinion letters issued by the Auditor’s Office to determine whether there is express or implied authority for the expenditure. Advisory Opinion 2012-50 ....”

The Commission therefore must determine under what circumstances the Governor’s use of state aircraft is expressly or implicitly authorized, or limited by, state laws, rules or agency opinions. The Commission will also consider whether the state aircraft is being used in the “[t]he performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation ....” W. Va. Code § 6B-2-5(b)(1). If this is the case, the private gain provision of the Ethics Act would not be violated.

### **Express Authority**

The Legislature has not expressly specified when a governor is authorized to use state aircraft. The Legislature has authorized the Secretary of the Department of Administration to establish an Aviation Division to manage aircraft owned by the state, in W. Va. Code §§ 5A-3-48 through 5A-4-53, and the Legislature has stated that state “aircraft shall not be used for personal purposes ....” W. Va. Code § 5A-3-52(a)(1).

The Aviation Division’s internal Operations Manual states, in relevant part, the following:

### **3-3 RESERVATIONS & USE OF STATE AIRCRAFT**

The reservations and use of State Aircraft shall be in accordance with the State of West Virginia Travel Regulations. A general synopsis of this document follows:

A. State owned aircraft should be used in the following circumstances:

1. Travel where the use of state owned aircraft, for either an individual or group, is equal to or less than the cost of commercial air carriers for the same itinerary; or
2. Travel with multiple destinations and destinations not serviced by air carriers;
3. If time is of the essence and/or there is an indirect cost savings due to more efficient use of work time, a reduction in nonproductive drive time, hotel or rental car expense for state personnel.
4. When the security of the passenger(s), as determined by the Superintendent of the State Police, Governor’s Security Personnel or the

Director of Aviation, is a primary concern in the preparation and execution of the itinerary; or

5. As directed by the Governor, Secretary of a Department or his/her designated representative.

The provision above could provide express authority to use state aircraft when time is of the essence, when the security of passengers is a primary concern in the preparation and execution of the Governor's itinerary, and under the other specified circumstances. The Commission is unable to determine whether the internal Operations Manual provides express legal authority for use of the state aircraft to fly from Lewisburg to destinations outside of Charleston or to use the state aircraft for a "mixed purpose" trip even if there is no additional cost to the state.

Absent express legal authority or clear guidance from the Legislature on this issue, it is necessary to determine under what conditions there is implied authority for the Governor to use state aircraft or whether such use is consistent with the usual and customary duties of a governor under W. Va. Code § 6B-2-5(b)(1).

### **Implied Authority/Usual and Customary Duties**

#### *Governor's flights to and from Lewisburg for official trips*

Few states have established laws or issued opinions providing guidance on whether a governor's use of state aircraft is permissible.

For example, in Kentucky<sup>4</sup> the following statute concerning the use of state aircraft provides, in part:

State aircraft shall not be used for personal business, except when the Governor or Lieutenant Governor, for reasons of security, protocol, ceremonial functions, or overall demands of time, require travel considerations not accorded to other officials. In recognition of these realities, flights that may be solely for personal business, or partly for official business or partly for personal business, may be scheduled for the Governor or the Lieutenant Governor and their immediate families.

KY Rev. Stat. § 174.506(2)

Alabama's Ethics Commission, in Advisory Opinion 1980-466, held that the Governor would not violate its Ethics Act's private gain provision by using state airplanes for personal trips and vacations. The Opinion stated that the use was justified by "the necessity of protecting the Governor and his family members by arranging for all their travel in State-owned aircraft/automobiles." The Opinion concluded as follows:

Until the Alabama Legislature shows that tax monies appropriated by them for travel of the Governor and his family should not include travel in

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<sup>4</sup> KY Rev. Stat. § 174.506 [Use of state aircraft.] in its entirety states:

(1) Except as provided in subsection (2) of this section, state aircraft, including air charters, shall be used only for official business.

(2) State aircraft shall not be used for personal business, except when the Governor or Lieutenant Governor, for reasons of security, protocol, ceremonial functions, or overall demands of time, require travel considerations not accorded to other officials. In recognition of these realities, flights that may be solely for personal business, or partly for official business or partly for personal business, may be scheduled for the Governor or the Lieutenant Governor and their immediate families.

(a) The cost of flights scheduled solely for personal business of the Governor or Lieutenant Governor shall be charged to that officer in accordance with the rate schedule set forth in the administrative regulations authorized by KRS 174.504.

(b) If a particular flight is in part official business and part personal business, the Governor or the Lieutenant Governor shall make a reasonable allocation of the flight time between official and personal business and be responsible for paying with nonstate funds to the Capital City Airport Division the charge for the part of the flight that is allocable to personal business. The rate charged shall be calculated using costs that would be considered in a rate developed by a commercial air charter company. In these cases, the allocation made and the basis for the allocation shall be indicated on the aircraft request form.

(3) Constitutional officers, other elected state officials, members of the General Assembly, officers and employees of the cabinets, departments, and agencies of state government, officers and employees of other governmental units, and other persons traveling under the auspices of a state agency or in connection with state business deemed desirable by an agency head, including dependents of state officials, and news media representatives and other persons having an interest in the official purpose of the trip may be authorized to use state aircraft. Charges for travel in state aircraft shall be paid by the requesting state agency in accordance with the rate schedule established in administrative regulations authorized by KRS 174.504.

State-owned vehicles and aircraft for private and/or personal trips, the Alabama Ethics Commission holds that the Governor is not in violation of the law.

West Virginia's Governor has not asked whether he may use state aircraft for purely personal trips and vacations. The Commission notes, however, that the Legislature has stated generally that state "aircraft shall not be used for personal purposes ...." W. Va. Code § 5A-3-52(a)(1). This provision does not specifically address the Governor's use of aircraft.

In *Oklahoma Ethics Comm'n v. Keating*, 958 P.2d 1250, 1998 OK 36 (Okla. 1998), the court held that the Governor's use of a state car and aircraft to attend fundraising events for individuals campaigning for public office was permissible under its state ethics law. The court noted that 47 O.S.1991 § 2-101 (b) states that "the Commissioner of Public Safety shall provide personal security and protection, transportation, and communications capabilities for the Governor, the Governor's immediate family, and the Lieutenant Governor." The court noted that the statute did not prohibit using the aircraft for personal reasons and stated that "although the destination is unrelated to his official duties, we must necessarily ... conclude that the public purpose fulfilled by providing such transportation is one of those "activities that are a part of the ordinary conduct of the governmental entity."

Finally, New York's Joint Commission on Public Ethics, in Advisory Opinion 2013-02, considered whether flights from the Governor's home in Westchester to places of state business other than Albany were permissible under New York's ethics laws. The New York Commission recognized that the state police department is responsible for the Governor's safety and that the Governor's duties include traveling the entire state. Accordingly, the Joint Commission held that flights from Westchester did not violate ethics laws so long as such travel met the following standards:

- (i) the primary purpose of the trip is for bona fide state business;
- (ii) the trip is not being used as a pretext to engage in non-state business, and
- (iii) use of state aircraft is consistent with an internal written policy, approved by counsel to the Governor, which provides clear guidelines for such use.

Under these standards the New York Commission found that occasional travel from the Governor's home in Westchester to the seat of government in Albany was justified when it is based on security or scheduling needs and consistent with an internal written policy that had been approved by counsel to the Governor.

The West Virginia Ethics Commission finds that the principles set forth in the laws and opinions of these states are consistent with West Virginia's public policy and the normal and customary duties of a governor in West Virginia.

**The Ethics Commission holds that the Governor has implied authority to use state aircraft for trips to and from Lewisburg to destinations outside of Charleston on official state business and that such travel is consistent with the usual and customary duties of a governor, pursuant to W. Va. Code § 6B-2-5(b)(1), under the following conditions:**

- (i) the primary purpose of the flight between Charleston and Lewisburg is justified by an official public policy reason, e.g., security or scheduling needs, and not merely for the convenience of the Governor;**
- (ii) the flight between Charleston and Lewisburg is not being used as a pretext to engage in non-state business, and**
- (iii) the Governor must document the specific justification for using state aircraft for each flight between Charleston and Lewisburg.**

*Mixed purpose trips*

The Governor also asks whether he may participate in campaign activities following his official work and before his return flight provided that the primary purpose of the travel is for official state business and there is no additional use of the aircraft for campaign-related activities. In Advisory Opinion 2007-03, the New York Ethics Commission held that using the state plane for a mixed purpose would only be permissible under the following five conditions:

- (i) there must be a *bona fide* State purpose for the trip;
- (ii) the State purpose must be the primary reason for the trip;
- (iii) the public official must make an accurate apportionment of the time spent between the State and non-State business and promptly reimburse the State for the portion of the flight that is not related to State business;
- (iv) such reimbursement must be based on current airplane charter costs; and,
- (v) the official must provide the Executive Chamber with the details of the activities upon which the allocation ... is based, except to the extent public disclosure would jeopardize the security of the public official.

The West Virginia Ethics Commission finds that most of the conditions adopted by the New York Ethics Commission are consistent with West Virginia's laws, the normal and customary duties of a governor, and West Virginia public policy. However, the West Virginia Ethics Commission declines to adopt the apportionment and reimbursement method used in New York. The Commission instead adopts a method of reimbursement for a mixed purpose trip based on the U.S. House of Representatives Ethics Manual, 110<sup>th</sup> Congress, 2d Session (2008)<sup>5</sup>. This method requires the Governor and other

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<sup>5</sup> [https://ethics.house.gov/sites/ethics.house.gov/files/documents/2008\\_House\\_Ethics\\_Manual.pdf](https://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf) (page 116) provided that following in relation to mixed purpose trips:

public officials to reimburse the state for additional costs incurred for personal or campaign activities: *it does not, however, require a pro rata cost reimbursement when there are no additional costs to the state.* The Commission believes this method to be consistent with the practice used in West Virginia when employees travel on state business. For example, if a state employee uses his or her personal vehicle and stays an extra day on a state business trip to sightsee, the employee may still be reimbursed by the state for driving home a day later because it did not result in extra cost to the state. The employee is responsible for extra meals, events and lodging that result from his or her prolonged stay, however.

**The Ethics Commission holds that the Governor has implied authority which is consistent with the usual and customary duties of a governor, under W. Va. Code § 6B-2-5(b)(1), to participate in personal and campaign activities following his state work and before his return flight in state aircraft under the following conditions:**

- (i) the primary purpose of the trip is for official state business;**
- (ii) the trip is not being used as a pretext to engage in non-state business, and**
- (iii) any additional meals, lodging, or other travel expenses that the Governor incurs in serving a secondary purpose, e.g., a campaign or personal function, must be paid by the source associated with that secondary purpose.**

*This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission*

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For the most part, the preceding discussion in this section treats all trips as having a single purpose, i.e., an officially-connected purpose, a personal purpose, a political purpose, or an official purpose.

However, insofar as the Standards Committee is concerned, it is possible for a trip to have more than one such purpose. As to any such mixed purpose trip, the Member, officer, or employee must determine the primary purpose of the trip. The source associated with that primary purpose – for example, a political committee for campaign or political activity, the federal government for official business, or the traveler's own funds for personal business – must pay for the airfare (or other long-distance transportation expense), and all other travel expenses incurred in accomplishing that purpose. Any additional meal, lodging, or other travel expenses that the Member or staff person incurs in serving a secondary purpose must be paid by the source associated with that secondary purpose. The determination of the primary purpose of a trip must be made in a reasonable manner, and one relevant factor in making that determination is the number of days to be devoted to each purpose. That is, often the primary purpose of a trip is the one to which the greater or greatest number of days is devoted. However, any mixed purpose trip that would be paid in part with campaign funds or House funds must also comply with, respectively, Federal Election Commission rules or rules of the Committee on House Administration. The Standards Committee understands, for example, that FEC rules severely limit the ability of Members to, for example, attend a campaign fundraiser while in the course of officially-connected travel paid for by a private source. Thus[,] Members and staff should consult the Standards Committee, the Committee on House Administration, and the FEC, as appropriate, when planning a mixed purpose trip.

*for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, and does not purport to interpret other laws or rules.*

*In accordance with W. Va. Code § 6B-2-3, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked or the law is changed.*

/s/ Robert J. Wolfe  
Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission