

Advisory Opinion 2019-17

Issued on August 1, 2019, by

The West Virginia Ethics Commission

Opinion Sought

A **part-time appointed State Board member** asks whether he may, in his private capacity and for private pay, teach continuing education courses to licensees when the State Board is responsible for approving continuing education courses for credit.

Facts Relied Upon by the Commission

The Requester is a part-time appointed member of a State Board which regulates members of a profession. The State Board's duties include establishing and enforcing continuing education requirements for licensees.

The Board members are appointed by the Governor, and the Board is comprised of representatives of the regulated profession and related businesses and members who do not have a direct financial interest in the profession.

The West Virginia Code provides that the Board may employ staff as necessary to perform the functions of the Board. The Board has an executive director and staff who are responsible for the day-to-day administration of the agency.

The Board has an Education Committee which oversees the Board's continuing education requirements. The Requester does not serve on the Education Committee.

The Education Committee has delegated the responsibility of approving continuing education courses and instructors to Board staff. The only time the Education Committee must approve a course is when a licensee attends a course for which the provider has not requested or received approval for credits in West Virginia. The full Board does not consider or vote on approving continuing education courses.

The Requester has been on the Board for several years and is a member of the profession which the Board regulates. He states that he has been providing education opportunities to members of his profession for 25 years and that he is a nationally certified instructor. The Requester states that he must go through the same approval with Board staff as any other course provider.

The Board staff approves approximately 150 courses per year and 11 active instructors. A person who wants to have a course certified for continuing education credits completes a form providing an overview of the class, the qualifications of the instructor and the course materials. The staff approves the course instructors as part of its approval

process. The Board staff alone determines if a course should be approved and posts approved courses and instructors on the Board's website.

Licensees must attend a West Virginia law class that includes an exam component every four years, and the Requester teaches this class. Instructors must prepare material and an exam for the course and submit these items to Board staff for approval. The instructor must give the exam to the attendees as part of the course and issue course completion certificates to attendees who pass the exam.

The requirement for the law class has been in effect since 2015, prior to the Requester becoming a Board member. Only the Requester and one other provider have applied to the Board for certification of a law course, and both were approved by staff. The staff also states that as part of the approval process for West Virginia state law classes, the Board's executive director and attorney review the course materials and exams.

The Requester has reviewed Advisory Opinion 2006-14, which holds that an appointed part-time board member may not teach a course which must be approved on the Board on which he or she serves. He asks whether the Opinion restricts him from teaching continuing education courses since only the Education Committee and Board staff, and not the full Board, approve classes. He asks the Ethics Commission to reconsider its holding in Advisory Opinion 2006-14.

The Requester charges a fee for the courses. He states that teaching courses is not a statutorily mandated Board member duty.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(b) states, in relevant 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.

W. Va. Code § 6B-2-5(h)(6) states, in relevant part:

A full-time public official or full-time public employee may not receive private compensation for providing information or services that he or she is required to provide in carrying out his or her public job responsibilities.

Advisory Opinion

In Advisory Opinion 2006-14, the Ethics Commission held that “when a State Board is required to certify its members to act as a course instructor for a third-party provider, it amounts to the use of public office for private gain and should not be permitted.” The Opinion further concluded that recusal of the affected Board member did not effectively eliminate the appearance of impropriety. The Opinion also provided that an adversely affected board member could request an exemption from the prohibition from the Ethics Commission, and an exemption could be granted by the Ethics Commission if it found the interests of the public would be served by allowing the Board member to teach a course.

The Requester asks the Commission whether the restrictions in Advisory Opinion 2006-14 apply if the Education Committee and Board staff, and not the full Board, approve the courses.

In Advisory Opinion 1995-13, the Ethics Commission held that a school psychologist may provide “private services to students they serve in the course of their public school employment, provided such services are not considered part of their contractual responsibilities to the school board.” The Commission ruled that businesses which employed the psychologist could be included on a comprehensive referral list but that the list should not disclose which school psychologist is employed by which firm.

In Advisory Opinion 1997-04, the Ethics Commission ruled that a state trooper may own a towing company but that his fellow officers and coworkers may not give preferential treatment to his business. The Commission also ruled that his fellow officers and coworkers may not give advantage to his company when providing a comprehensive list of towing companies or by indicating or highlighting on the list that he was a state trooper.

In Advisory Opinion 2014-22, the Ethics Commission ruled that a state death investigator may be selected by his agency as a vendor to provide medical examination services if the agency selected him by strict adherence to an established rotation list and when the state investigator does not participate in the creation of the rotation list.

In the present case, the State Board has delegated the responsibility of approving courses for continuing education credits to its Education Committee and staff. The Requester is not involved in approving continuing education courses or course providers, and he does not serve on the Education Committee. Further, the Requester is not required to teach courses as part of his statutory board duties.

The Ethics Commission finds that the instant situation is distinguishable from the facts in Advisory Opinion 2006-14 because the State Board has delegated the responsibilities for approving courses to its Education Committee and staff, and the Requester does not serve on the Education Committee.¹ The procedure in place for continuing education

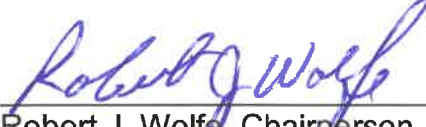
¹ As set forth in Advisory Opinion 2017-22, the Ethics Commission does not have authority to determine who is eligible to serve on a committee. But in this case, as the Requester does not serve on the Education Committee, it removes the necessity of analyzing whether recusal from Education Committee votes on

course and instructor approval effectively removes the Requester from the approval process. The Ethics Commission finds that, based upon the facts presented, it does not constitute the knowing and intentional use of office for private gain for the Requester to teach continuing education courses.

The Ethics Commission therefore holds that the Requester may teach continuing education courses to licensees, in his private capacity and for private pay, so long as it is the Education Committee and staff, and not the full Board, which approves the courses and instructors and so long as he does not serve on the Education Committee. The State Board may not give the Requester preferential treatment, and the Requester may not use his public job title when teaching the courses. The Requester may list his job title in biographical information included on his website or written materials, but he may not use his job title to advertise his courses.²

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 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.


Robert J. Wolfe, Chairperson
West Virginia Ethics Commission

matters affecting continuing education course approval would effectively eliminate any potential conflict of interest.

² See Advisory Opinion 2017-13 (holding that it is permissible for public officials to list their public job titles on their websites and in written materials, but that public officials may not use their public job titles to directly promote their private businesses in television, radio and other forms of advertising.)