

Advisory Opinion 2019-16

Issued on August 1, 2019, by

The West Virginia Ethics Commission

Opinion Sought

An **Employee of a State Agency** that regulates holders of unclaimed property, such as insurance companies, asks whether he may be employed part-time by a private consulting firm whose clients may include regulated insurance companies.

Facts Relied Upon by the Commission

The Requester is employed in a full-time position with a state agency. The primary function of the Requester's position is to identify and assist holders of unclaimed property who are out of compliance with the West Virginia Unclaimed Property Act.¹

The Unclaimed Property Act applies to all "holders" of unclaimed property. Insurance companies are common holders of unclaimed property such as life insurance proceeds that have not been claimed by a beneficiary. Under the Act, a holder of unclaimed property must use due diligence in notifying the apparent owners of the existence of the unclaimed property, and that if the property remains unclaimed, it may be remitted to the State. W. Va. Code R. §§ 112-1-1 through 112-5-15. Holders of unclaimed property must also report unclaimed property to the State. Holders that violate the Act are subject to the imposition of interest and penalties.

The private consulting firm for which the Requester may work primarily performs "market conduct examinations" ² on behalf of state insurance departments and other public regulatory agencies. The State of West Virginia is not a client of the private consulting firm. (The firm was a State vendor in 2016 and 2017, but with a different state agency.) The consulting firm also offers its services to private insurance companies on many regulatory insurance issues, but rarely do they involve unclaimed property laws.

The Requester asks whether he may perform market conduct examinations for the consulting firm on a part-time basis outside of his public work hours. The Respondent's private work would be limited to working for regulatory agencies in states outside of West Virginia and would exclude any examination of compliance with the West Virginia Unclaimed Property Act.

¹ This Act is in Chapter 36 of the West Virginia Code.

² The firm's market conduct examinations analyze private insurance companies' practices for compliance with state insurance laws, specifically in the area of consumer protection., e.g., ensuring rates to customers are fair and claims are timely paid.

The Requester states that he would not accept any assignment with the private firm in which an insurance company is the client. However, the Requester may work on projects paid for by a public regulatory agency in one state which would include audits of insurance companies that are licensed both in that state and in West Virginia. The Requester's audits would not include compliance with the West Virginia Unclaimed Property Act.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(b)(1) 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.

....

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

(1) No full-time official or full-time public employee may seek employment with, be employed by, or seek to purchase, sell or lease real or personal property to or from any person who:

(A) Had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding twelve months; or

(B) Has a matter before the agency on which he or she is working or a subordinate is known by him or her to be working.

...

(2) Within the meaning of this section, the term "employment" includes professional services and other services rendered by the public official or public employee, whether rendered as employee or as an independent contractor; "seek employment" includes responding to unsolicited offers of employment as well as any direct or indirect contact with a potential employer relating to the availability or conditions of employment in furtherance of obtaining employment ...

(5) 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.

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W. Va. Code § 6B-2-5(h)(1)(B) prohibits public employees from being employed by a “person” who has a matter on which the employee, or his or her subordinate, is working or is known to have taken regulatory action on within the preceding 12 months.

The Requester’s agency does not regulate the private consulting firm. The firm has some clients who are insurance companies licensed in West Virginia. Those clients are regulated by the Requester or his subordinates solely on issues involving unclaimed property in West Virginia.

In Advisory Opinion 1995-33, an employee asked whether it was permissible for him to seek work with a private engineering consulting firm whose clients would likely be subject to the regulatory control of the employee’s state agency. The Commission held that,

. . . the engineering consulting firm is the “person” offering the employment to the requester. This is a separate legal entity. In this instance, the pivotal factor is that neither the requester nor any of his subordinates have taken regulatory action with regard to the engineering firm in the past twelve months and that firm does not have a matter currently pending before them.

Therefore, it would not be a violation of W. Va. Code § 6B-2-5 (h) for the requester to discuss, and eventually accept, employment with the consulting firm.

In Advisory Opinion 1991-27, a state employee who had regulatory authority over contractors who disposed of asbestos asked if he could own and operate an asbestos testing laboratory. His private laboratory would test for the presence of asbestos in building materials on behalf of building owners. His public employer did not regulate building owners. The Requester stated that his private company would not do business with any regulated contractor. The Commission held that the employee would not violate the Act if he does not conduct business with persons who are regulated by his governmental agency.

Likewise, in Advisory Opinion 1997-26, the Requester was permitted to serve as a paid consultant for corporations that provided services to companies his public agency regulated, provided that he had no contact with the regulated companies. The public agency did not have regulatory control over the corporations themselves.³

³ In Advisory Opinions 1990-127 and 1990-192, state foresters were prohibited from working for a private consulting firm who provided services to regulated landowners. These Advisory Opinions were issued under a former version of W. Va. Code § 6B-2-5(h) and have no application to the instant Opinion.

The Requester's anticipated private employment would not violate W. Va. Code § 6B-2-5(h)(5) since his job duties for the private firm would not include providing information or services that he is required to provide in his public position.

The Ethics Commission holds that the Ethics Act permits the Requester's employment with the private consulting firm whose clients may include insurance companies regulated by him or his subordinates provided that he does not provide private services to insurance companies that he or his subordinates regulate or have regulated within the past 12 months.

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, at 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 other public agencies 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