

ADVISORY OPINION NO. 2009-03

Issued On April 2, 2009 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Commission** asks whether it may reimburse County Officials or Employees at an established monthly rate for government related calls made on their personal cellular phones.

FACTS RELIED UPON BY THE COMMISSION

A County provides cellular phones to some elected officials and employees. The cellular phones are to be used for County business.

Some elected officials and employees have personal cellular phones. They would prefer not to carry two phones. Instead, they would prefer to use their private cellular phones and be reimbursed some portion of their monthly cellular phone bills for costs attributed to government related calls.

The County proposes reimbursing these officials at a rate which would not exceed the current contract rate it pays for the county issued cellular phones, but at a rate less than the actual costs incurred by the public officials for their personal cellular phone plans.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) reads 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....

ADVISORY OPINION

A government agency may issue cellular phones to public officials or employees when it finds that they are necessary to effectively conduct government business. In this case, the County Commission asks whether, in lieu of providing cellular phones to some of its officials or employees, it may reimburse them on a monthly basis at a rate intended to compensate them for government calls made on their personal cellular phones.

The Ethics Commission finds that the Requester may establish a policy wherein it reimburses public officials or employees for governmental calls made on their personal cellular phones. The Requester may either establish a per call reimbursement rate or a flat rate amount which does not exceed the monthly contract rate it currently pays for the County issued cellular phone call service plans or the actual costs incurred by any official. This proposed course of action does not violate the Ethics Act as the County is seeking to reimburse its employees for calls related to government business.

In establishing a reimbursement rate policy, the County should review applicable Internal Revenue Service Guidelines (IRS). Based upon information and belief, the IRS guidelines and applicable regulations generally address when the use of cell phones is a legitimate government/business expense. The established policy should be carefully considered and drafted to ensure that the County only reimburses the public officials or employees for government related calls, not personal or private business calls. If the policy is not narrowly drawn, the reimbursement policy may result in taxable consequences to the public officials and employees and would likewise run afoul of the Ethics Act which prohibits the use of public official for private gain.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et. seq.*, 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/ R. Kemp Morton, Chairman
R. Kemp Morton, Chairman