

ADVISORY OPINION NO. 2008-03
Issued On June 5, 2008 By The
WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A candidate for the State Legislature asks if she may continue to operate a business that includes providing lobbying services while serving as a Legislator.

FACTS RELIED UPON BY THE COMMISSION

The requester is a candidate for election to the State Legislature. The requester also serves as President of a commercial business, a government relations company which represents a number of statewide and national businesses and organizations. The company provides various services to these clients, including strategic planning, business development, public relations and lobbying.

These services are provided by staff and independent contractors. The requester is currently registered with the WV Ethics Commission as a lobbyist.

The requester recognizes that she may no longer work as a lobbyist, after she is elected to serve in the Legislature. However, she would like to continue operating her business through staff in substantially the same manner while serving in the Legislature.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b)(1), *Use of public office for private gain* 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.

W. Va. Code § 6B-2-5(e), *Confidential information*, provides:

No present or former public official or employee may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.

W. Va. Code § 6B-3-1 includes the following definitions:

(6) "Lobbying" or "lobbying activity" means the act of communicating with a government officer or employee to promote, advocate or oppose or otherwise attempt to influence:

(i) The passage or defeat or the executive approval or veto of any legislation which may be considered by the Legislature of this state; or

(ii) The adoption or rejection of any rule, regulation, legislative rule, standard, rate, fee or other delegated legislative or quasilegislative action to be taken or withheld by any executive department.

(7) "Lobbying firm" means any business entity, including an individual contract lobbyist, which meets either of the following criteria:

(A) The business entity receives or becomes entitled to receive any compensation, other than reimbursement for reasonable travel expenses, for the purpose of lobbying on behalf of any other person, and any partner, owner, officer or employee of the business entity.

(B) The business entity receives or becomes entitled to receive any compensation, other than reimbursement for reasonable travel expenses, to communicate directly with any elected state official, agency official or legislative official for the purpose of lobbying on behalf of any other person.

(8)(A) "Lobbyist" means any individual employed by a lobbying firm or who is otherwise employed or contracts for economic consideration, other than reimbursement for reasonable travel expenses, to communicate directly or through his or her agents with any elective state official, agency official or legislative official for the purpose of promoting, advocating, opposing or otherwise attempting to influence:

(i) The passage or defeat or the executive approval or veto of any legislation which may be considered by the Legislature of this state; or

(ii) The adoption or rejection of any rule, legislative rule, standard, rate, fee or other delegated legislative or quasilegislative action to be taken or withheld by any executive department.

(B) The term "lobbyist" does not include the following persons, who are exempt from the registration and reporting requirements set forth in this article, unless they engage in activities which would otherwise subject them to the registration and reporting requirements:

* * *

(vii) Members of the Legislature are exempt.

ADVISORY OPINION

Generally, the Ethics Act does not prohibit a member of the Legislature from accepting any specific employment or operating any particular kind of business. However, in Advisory Opinion 96-55, the Commission recognized the potential for an inescapable conflict to arise between the public responsibilities of a part-time public servant and the demands of a second position. This represents one of those situations.

In most cases, a part-time public servant is able to separate her public interests from her private interests. For example, in Advisory Opinion 2006-06, the Commission advised a

Legislator not to use her position to influence budget appropriations to her non-profit employer. However, lobbying activities are not ordinarily limited to a single budget item or a solitary bill. Lobbyists may represent multiple entities and interests on a wide variety of legislative issues, as represented by the registration statements currently on file with the Commission.

Under W. Va. Code § 61-10-17, lobbyists are prohibited from lobbying on the floor of the Legislature. If the requester lobbied a fellow Legislator on the floor of a Legislative chamber regarding a particular bill and a lobbyist working in the requester's firm was being paid to lobby toward the same outcome for the same bill, a proponent or lobbyist advocating for the opposite outcome for that particular piece of legislation would undoubtedly have an indelible perception that the requester was using her public position for private gain.

The Ethics Act prohibits public servants from improperly using confidential information to further their own personal interests or the interests of another person. As a Legislator, the requester would have access to confidential information not otherwise available to lobbyists, such as the positions taken or proposed in a closed party caucus. Permitting a Legislator to operate a lobbying business might have a chilling effect on the free and full discussion in these sessions which is part of our State's legislative process.

By definition, lobbyists are individuals who may be compensated to influence Legislation by lobbying Legislators. Should a Legislator operate a lobbying business and receive compensation from that business for the express purpose of influencing Legislation which comes under their authority as a public servant, such activity might be construed to amount to bribery prohibited by the Bribery and Corrupt Practices Act.

The exemption from lobbyist registration requirements does not affect the outcome in this matter. Legislators are exempt from the Ethics Act's requirement to register as lobbyists, only so long as they are not otherwise subject to the Act's registration and reporting requirements. The requester would not be exempt from these registration and reporting requirements where she continues to operate a "lobbying firm" as defined in § 6B-3-1(7) of the Ethics Act.

Accordingly, the Commission finds that the requester, if elected to serve in the State Legislature, may continue to operate a business which provides legitimate strategic planning, business development and public relations services. However, the requester may not have an ownership interest in a business which provides lobbying services to clients, nor may she register as a lobbyist, during the time she is serving as a member of the Legislature.

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. Further, this opinion is limited in application to the particular facts and circumstances presented, and may not be relied upon as precedent.


R. Kemp Morton, Chairman