

ADVISORY OPINION NO. 2008-08

Issued on October 2, 2008 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A City Attorney, providing services as general counsel, asks whether his spouse's potential business relationship with a limited liability corporation that may contract with the City would result in a prohibited conflict of interest.

FACTS RELIED UPON BY THE COMMISSION

The Requester is employed by the City and is the only attorney on staff. He also maintains a private practice. Generally, when a conflict of interest arises that prevents him from representing the City, the City hires an attorney to do the necessary work on an *ad hoc* basis.

His wife is employed by a non-profit corporation. She and some of her associates are considering forming a limited liability company for purposes of engaging in commercial real estate development. The Requester will have no direct interest in the company, nor will he provide legal services to the company.

This company may, however, in the future have direct dealings with the City in the areas of planning and zoning, land development, real estate acquisition, obtaining real estate options, and real estate development agreements/contracts.

Generally, in accordance with its competitive bidding process, the City will publicly solicit requests for qualifications and proposals for the development of real estate the City owns. The successful developer will develop the real estate in accordance with plans and specifications approved by the City, without any City funds. The City will, however, waive the purchase price of the real estate. The Requester acknowledges that the purchase price of any such real estate would exceed \$1,000 per calendar year.

The Requester has indicated that if a direct conflict between his employment as City Attorney and his spouse's company should arrive, "I can avoid any potential issue by following the existing Rules of Professional Conduct for attorneys." The Requester has stated that in the event that his wife's company is the successful bidder, he will most likely disclose his interest and not participate in the process.

According to the Requester, he has no involvement in the process of developing the City's real estate **before** any such development contract is awarded. The Requester has provided the following description of his responsibilities to the City:

Presently providing general legal services to the City of __, including preparation of written legal opinions on various topics as requested; advising and counseling city manager; prosecution and collection of delinquent fire fee and B&O tax accounts through civil process; defense of

workers' compensation cases; providing legal representation in employee disputes before the W.V. Human Rights Commission and the personnel appeals board; drafting of ordinances and resolutions; providing legal representation before the Police and Fire Civil Service Commission; providing legal representation in circuit court matters including matters appealed from municipal agencies and boards; providing legal representation in annexation matters before the__ County Commission; drafting agreements and contracts; reviewing agreements and contracts; participating in council meetings as requested; enforcement of municipal ordinances and prosecution of violations thereof in municipal court; providing legal representation in matters before the Public Service Commission of West Virginia, including utility rate cases, certificates of convenience and necessity applications, applications for approval of sale of utility assets, utility condemnation proceedings.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 68-2-5(d), *Interests in public contracts*, reads, in pertinent part:

(1) ...[N]o ... public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control....

(2) In the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having a prohibited financial interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is awarded a public contract. A limited interest for the purposes of this subsection is:

(A) An interest which does not exceed one thousand dollars in the profits or benefits of the public contract or contracts in a calendar year;

(8) An interest as a creditor of a public employee or official who exercises control over the contract, or a member of his or her immediate family, if the amount is less than five thousand dollars.

(3) If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest....

ADVISORY OPINION

Although some municipalities hire an attorney on an *ad hoc* basis to handle lawsuits or other legal matters, here the City Attorney functions more as general counsel to the governing body. His responsibilities cover every conceivable legal matter in which the City is interested. The broad range of his authority makes his position comparable to a City Manager. Thus, the Commission finds that, in this case, the nature of the Requester's responsibilities as the City's Attorney vests in him the direct authority or control over the City's public contracts contemplated by W. Va. Code § 6B-2-5(d).¹

This situation differs from that set forth in Advisory Opinion 2006-04. There, a county resource coordinator asked if his spouse's business relationship with a property developer would prohibit him from providing administrative support to the county planning commission. In that opinion, the Commission wrote: "The requester does not have decision-making authority on the developer's proposal. He is employed in a support capacity where he provides input to the individuals and agencies which exercise that authority." As a result, no prohibited conflict existed, although the Commission cautioned the employee to notify his employer that his spouse may appear before his agency, in order to avoid to maintain confidence in the integrity and impartiality of government.

The Requester has proposed that, if a conflict arises between his employment and the interest of his spouse's corporation, he would follow the Rules of Professional Conduct for attorneys. The relevant Rule reads:

Rule 1.7. Conflict of interest: General rules.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantage and risks involved.

¹The Commission notes that subsection 68-2-5(d)(4) provides that where the provisions of subsection 68-2-5(d)(1) would result in undue hardship, excessive costs or other substantial interference with the operation of the municipality, the affected governmental agency may submit a written application to the Commission for an exemption.

The Requester contends that the City may waive the conflict of interest and allow him to continue to serve as its counsel while his wife's corporation enters into development contracts with the City. It is acknowledged that the Rules of Professional Conduct apply to all attorneys, but they do not control the interpretation of the Ethics Act when it applies to an attorney who is also acting as a public servant. The Commission finds that the Requester's authority and control reaches all departments and all legal decisions of the City, thus making it impossible for the requester to insulate himself from any conflict resulting from proposed contractual relationship between his spouse's corporation and the City.

The Commission has previously recognized that some conflicts of interest are so inherently entrenched that they cannot be waived. In Advisory Opinion 2000-31, a Prosecuting Attorney sought to perform work for a Regional Council retained by the County Commission to administer a grant. In denying the Prosecutor's request, the Commission wrote: "...[I]t is clear that the Commission continues to exercise oversight of the Council's work and has a degree of control over the award of the legal services contract the project requires. Similarly, the Prosecutor's statutory position as County Commission attorney gives him 'voice' and 'influence' over that contract." Thus, the Commission finds that the Requester would violate the Ethics Act if he were to continue his employment as the City's Attorney while his wife's proposed corporation was a party to a public contract with the City.

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, rules or agency policies. 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/Drema Radford for
R. Kemp Melton, Chair
WV Ethics Commission