

ADVISORY OPINION NO. 2007-04

Issued on June 7, 2007 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

Whether an **Assistant Attorney General** assigned to a State Agency may represent claimants, respondents or both before the State Agency within a 1 year period following his departure from the agency?

Whether an **Assistant Attorney General** may assume the representation of a claimant in a pending matter before the State Agency through his private law practice when he is currently representing the claimant as part of his assigned duties at the State Agency?

Whether an **Assistant Attorney General** may send a letter to the individuals he has represented through his public agency for the purposes of notifying them of his change of employment and informing them that they should feel free to contact him if they ever need the services of an attorney?

FACTS RELIED UPON BY THE COMMISSION

A State Agency has the statutory mission of eliminating all discrimination in employment and places of public accommodation. The agency is governed by an Appointed Commission. The members of the governing body are appointed by the Governor with the advice and consent of the Senate. The State Agency also has an executive director who serves at the will and pleasure of the Governor. An executive director and staff oversee the day-to-day operations of the State Agency.

The State Agency is authorized to investigate complaints when it is alleged that there has been unlawful discrimination. The WV Attorney General is statutorily required to render legal services to this State Agency. Pursuant to this statutory mandate, the Attorney General's Office has assigned various Assistant Attorneys General to the State Agency.

The Requester is an Assistant Attorney General who has been assigned to the Agency. His duties primarily involve representing complainants in administrative proceedings before the Agency. Through this position he has interaction with the investigators hired by the Agency. From time to time he may also advise agency staff on legal matters. Providing legal advice to Agency Officials is not his primary job function. This job function falls mainly with his supervisor. This separation of job functions is not pursuant to any statutory provision, but is mainly due to the internal administrative structure and delineation of job responsibilities within the group of Assistant Attorneys General assigned to the Agency.

If citizens believe they are the victims of discrimination, they may file a Complaint with the State Agency. The State Agency's staff investigates the Complaint. At the conclusion of the investigation there is either a finding of probable cause or the case is dismissed. At times the Assistant Attorney Generals assigned to the Agency may consult with and advise the investigators during the investigative stage.

If there is a finding of probable cause, then the case proceeds to a public hearing. The Requester, as an Assistant Attorney General assigned to the State Agency, is responsible for presenting the case in support of the Complainant. Complainants also have the option of retaining a private attorney to represent them.

The State Agency appoints an Administrative Law Judge to preside at the public hearing. Once the hearing has concluded, and the evidence of record has been considered, the ALJ submits proposed findings of fact and conclusions of law. The State Agency, through its Commissioners, either accepts or rejects the findings of the ALJ.

Once a case is being litigated before the Commission, the Assistant Attorney General may not discuss the case with the Commissioners. The Commissioners and the ALJ are charged with the responsibility of fairly and impartially evaluating the evidence of record. Neither the Commissioners nor the ALJ are supposed to show any favoritism to the Assistant Attorney General.

Either party may appeal an adverse finding to Circuit Court. As such, at times the Assistant Attorney General may represent a Complainant on an appeal when the State Agency has made a finding against him or her.

The Requester is leaving his public position to join a private law firm. At times the firm represents alleged victims of discrimination before the State Agency. At present, the Requester is representing a claimant whose case is set to proceed to public hearing within several months. The Requester has expressed an interest in taking on this claimant as a private client once he joins the law firm. He would then continue his representation of the claimant at the public hearing before the State Agency. His supervisor has no objection to this course of action because the departure of the Requester will leave a heavy work load for the remaining Assistant Attorneys General. While presumably the Requester will be replaced, both the Requester and his supervisor recognize that it will take a significant amount of work for a new attorney to take over the case midstream.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b)(1) reads:

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(f) reads:

(f) *Prohibited representation.* -- No present or former elected or appointed public official or public employee shall, during or after his or her public employment or service, represent a client or act in a representative capacity with or without compensation on behalf of any person in a contested case, rate-making proceeding, license or permit application, regulation filing or other particular matter involving a specific party or parties which arose during his or her period of public service or employment and in which he or she personally and substantially participated in a decision-making, advisory or staff support capacity, unless the appropriate government agency, after consultation, consents to such representation. A staff attorney, accountant or other professional employee who has represented a government agency in a particular matter shall not thereafter represent another client in the same or substantially related matter in which that client's interests are materially adverse to the interests of the government agency, without the consent of the government agency: *Provided*, That this prohibition on representation shall not apply when the client was not directly involved in the particular matter in which the professional employee represented the government agency, but was

involved only as a member of a class. The provisions of this subsection shall not apply to legislators who were in office and legislative staff who were employed at the time it originally became effective on the first day of July, one thousand nine hundred eighty-nine, and those who have since become legislators or legislative staff and those who shall serve hereafter as legislators or legislative staff.

W. Va. Code § 6B-2-5(g), limitation on practice before a board, agency, commission or department, provides, in pertinent part, as follows:

(1) No elected or appointed public official and no full-time staff attorney or accountant shall, during his or her public service or public employment or for a period of one year after the termination of his or her public service or public employment with a governmental entity authorized to hear contested cases or promulgate or propose rules, appear in a representative capacity before the governmental entity in which he or she serves or served or is or was employed in the following matters:

- (A) A contested case involving an administrative sanction, action or refusal to act;
- (B) To support or oppose a proposed rule;
- (C) To support or contest the issuance or denial of a license or permit;
- (D) A rate-making proceeding; and
- (E) To influence the expenditure of public funds.

* * *

(2) As used in this subsection, "represent" includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person

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(5) An elected or appointed public official, full-time staff attorney or accountant who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the six months (*sic*) prohibition against appearing in a representative capacity, when the person's education and experience is such that the prohibition would, for all practical purposes, deprive the person of the ability to earn a livelihood in this state outside of the governmental agency. The Ethics Commission shall by legislative rule establish general guidelines or standards for granting an exemption or reducing the time period, but shall decide each application on a case-by-case basis.

ADVISORY OPINION

1. Whether an Assistant Attorney General with a State Agency may represent claimants, respondents or both before the State Agency within a 1 year period following his departure from the Agency?

Section 2-5(g) of the Ethics Act provides that a former public official, staff attorney or staff accountant may not appear in a representative capacity before his former agency in certain types of cases. This "revolving door" provision is intended to prohibit a public servant from exploiting the personal prestige he may have established as a former official in an agency. This type of rule is primarily focused on avoiding the appearance of impropriety as opposed to any actual conflict of interest. Public servants who hold these particular positions are allowed to return and appear before their former agency in a representative capacity after a specified "cooling off" period has elapsed. In the 2005 Special Legislative Session, the Legislature amended this provision, extending this "cooling off" period from six months to one year, effective July 1, 2005.

To determine whether the Assistant Attorney General is prohibited from appearing before the State Agency for a 1 year period, we must first determine whether he is a "staff attorney" for purposes of the Ethics Act. The term "staff attorney" is not defined in the Ethics Act nor is a definition for this particular term found in other parts of the West Virginia Code.

The term staff is defined by the dictionary as "A group of assistants who aid an executive or other person in authority." THE AMERICAN HERITAGE DICTIONARY, 2ND ED. at 1186. In the case presented, the Assistant Attorney General is assigned to the Agency to aid the Agency in carrying out its mission of eliminating discrimination. Most of his responsibilities, by way of internal office structure, involve serving the Agency by representing alleged victims of discrimination as opposed to directly providing legal counsel to the Executive Director of the Agency or its Commissioners. However, there is no statutory separation of duties between attorneys assigned to the Agency to litigate cases, as opposed to rendering legal advice to the decision-makers. Regardless, there appears to be no distinction in the Ethics Act between an attorney who is on staff for the purposes of rendering legal advice to agency administrators as opposed to an attorney who is on staff for the primary purpose of litigating cases for or on behalf of the agency or the claimant on whose behalf cases are brought. As such, for purposes of the Ethics Act, the Commission finds that the Requester is a staff attorney for purposes of the Ethics Act.

Next, the Commission must determine whether the revolving door provisions apply to the Requester when he is employed by the Attorney General's Office, not the State Agency. The Ethics Act reads in relevant part: "No ... appointed public official and no full-time staff attorney or accountant shall, ... for a period of one year after the termination of his or her public service or public employment with a governmental entity authorized to hear contested cases... appear in a representative capacity before the governmental entity in which he or she serves or served or is or was employed..." Because the revolving door provision uses the broad term "serves," in addition to the term "employed", the Ethics Commission finds that the term "serves" contemplates that a public employee may be assigned to serve a public agency when another agency is his or her primary employer. The Ethics Commission finds that the Requester serves the State Commission to which he is assigned. His services include the representation of claimants, and providing legal advice to Agency Staff when needed. As such, he is barred for a 1 year period from appearing before the Agency in his capacity as a private attorney.

The Ethics Commission recognizes that at first blush, some may argue that no apparent conflict exists for the Assistant Attorney General to immediately appear before his agency because he is merely continuing to represent the interests of claimants, the same responsibility with which he is charged as an Assistant Attorney General. However, the revolving door limitations are not only focused on eliminating actual conflicts, but perceived conflicts. Normally employers are the adverse parties in proceedings before the State Agency. Both sides in a contested case must be afforded a fair and equal process through which the merits of the case may be decided. An employer may perceive that an attorney in private practice, who just left the State Agency, may have undue influence over the State Agency Staff. This is particularly true at the initial investigation stage where the State Agency must make a recommendation concerning the crucial question of whether probable cause exists to proceed further. The Ethics Commission is not suggesting that this would happen, only that there could be such an appearance.

Further, while the Requester intends to represent claimants in the private sector, the Ethics Commission must consider its ruling as it impacts Assistant Attorneys General who may instead elect to join defense firms and represent employers. Once again, the Ethics Commission believes the appearance of impropriety would exist for an attorney who is employed by a public agency to

represent the interest of claimants, to immediately proceed to leave his employment and appear back before the agency for the purpose of representing respondents, in this case employers. A defense firm who hired an Assistant Attorney General for this purpose may be viewed as attempting to peddle influence. The revolving door limitation is a cooling off period which was specifically imposed by the Legislature to help eliminate this appearance.

At the conclusion of 1 year from the date he terminates his employment with the State Commission, the Requester may commence appearing before the State Agency as a private pay attorney for claimants, respondents or both. If the Requester, as a private attorney, seeks to represent a client before the State Agency on a matter in which he personally and substantially participated, then the State Agency must consent to his representation in that matter. W. Va. Code § 6B-2-5(f).

2. Whether an Assistant Attorney General may assume the representation of a claimant in a pending matter before the State Agency through his private law practice when he is currently representing the claimant as part of his assigned duties at the State Agency?

The Assistant Attorney General is currently representing a claimant whose case is nearing the public hearing stage. Both the Requester and his supervisor believe that it would be preferable for the Requester to continue representing the claimant as opposed to having a new attorney taking over the case midstream.

As set forth in the previous section, the Requester may not represent private pay clients before the Agency for one year. However, the Ethics Act specifically states that the revolving door provision does not prohibit "a former public official or employee from being retained by or employed to represent, assist or act in a representative capacity on behalf of the public agency by which he or she was employed or in which he or she served." W. Va. Code § 6B-2-5(f). Pursuant to this code provision, the Attorney General's Office or the State Agency, may elect to contract with the Requester to continue representing the claimant. As a contract attorney for the State Agency or Office of the Attorney General, the Requester may immediately appear back before the agency. Further, there is no language in the Ethics Act which suggests that his limited service as a contract attorney starts triggering a new date from which the one year revolving door provision runs.

3. Whether an Assistant Attorney General may send a letter to the individuals he has represented through his public agency for the purposes of notifying them of his change of employment?

The Requester asks if he may send the following letter to Claimants he has represented.

Dear XXXX:

I wanted to let you know that I'm changing jobs. In the upcoming weeks, I'll be ending my tenure with the XXXX Division of the West Virginia Attorney General's Office and on May 16th, I'll begin working with a private law firm, [Firm Name].

While I'll no longer be working for the XXXX Division, I'll continue to represent victims of discrimination in my new capacity as a private lawyer. I'll also be working with my new firm on social security disability, black lung, police misconduct, personal injury, workers compensation, and civil liberties cases.

Please feel free to contact me if you ever need the assistance of an attorney. My new phone number is XXXX and my new email address is XXXX.

Sincerely,
[Attorney's name]

The Requester states that the names and addresses of complainants with cases pending before the State Commission are public information. As such, he does not have access to the names of claimants whom he represented due to his public position. Instead, the information is readily available to any member of the public who requests the information through the Freedom of Information Act.

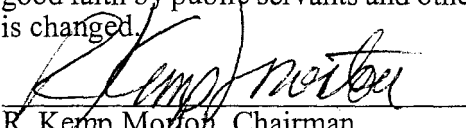
The Ethics Act prohibits public servants from using their office for private gain. W. Va. Code §6B-2-5(b). The purpose of this provision is to restrict public servants from using their public office for personal financial benefit.

The Requester, just like any other citizen, may obtain a list of names and addresses which are public documents for purposes of the Freedom of Information Act. This action does not constitute the use of office for private gain because the information is equally available to other members of the public. The Requester may also notify claimants he is leaving his position with the State Agency, provided he complies with the limitations hereafter discussed.

If the Requester was moving from one private law firm to another, then the proposed letter may be considered appropriate and customary.¹ However, the persons he was previously assigned to represent are not private clients, they are individuals on whose behalf the State Agency had a statutory duty to administratively prosecute alleged acts of discrimination. To market his services to alleged victims of discrimination with whom he developed his relationship through his public employment could amount to the use of public office for private gain.

On the other hand, the Commission finds that as a matter of courtesy to past and present claimants whom he represented, it would be appropriate for the Requester to send a letter to them notifying them of his departure from the Agency. Further, it would not be practicable to limit any reference to the fact that as a private sector attorney he may be available to represent them. Weighing and balancing these considerations, the Commission finds that the proposed letter is acceptable provided that: (1) the Requester does not use the State Agency letterhead; (2) the letter be prepared and mailed on the requester's own time, using his own resources; and, (3) paragraph two is stricken. This paragraph reads: *While I'll no longer be working for the XXIX Division, I'll continue to represent victims of discrimination in my new capacity as a private lawyer. I'll also be working with my new firm on social security disability, black lung, police misconduct, personal injury, workers compensation, and civil liberties cases.*

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 public servants and other persons unless and until it is amended or revoked, or the law is changed.


R. Kemp Morton, Chairman

¹ The WV State Bar regulates attorneys. As the Requester is aware, normally it is advisable to obtain the opinion of the State Bar as to whether a proposed letter, to be sent under the circumstances described, is consistent with the Standards of Professional Conduct.