

ADVISORY OPINION NO. 2007-07

Issued On August 2, 2007 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Mayor** asks if she may appoint her son to serve as the City Attorney.

FACTS RELIED UPON BY THE COMMISSION

A newly-elected Mayor is considering appointing her emancipated son as City Attorney. The City Attorney would represent the municipality in connection with any legal matter or matters, including providing legal advice to the Mayor, City Council and other municipal officials. In accordance with State Code, the City Council must approve the Mayor's appointment of a City Attorney.

The Mayor's son is not dependent on his mother. They are not financially dependent on one another in any way. There are approximately 30 lawyers in the county where this municipality is located.

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(d)(1) *Interests in public contracts*, provides in part that . . . no elected or appointed official or 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 . . . a contract which such official or employee may have direct authority to enter into, or over which he or she may have control: Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body.

ADVISORY OPINION

The Ethics Commission has previously determined that W. Va. Code § 6B-2-5(d) generally permits elected officials and members of their immediate family to be employed by the municipality on whose governing body they serve. The Act defines "immediate family" to include "a spouse with whom the individual is living as husband and wife and any dependent child or children, dependent grandchild or grandchildren and dependent parent or parents." W. Va. Code § 6B-1-3(e). Because the Mayor's son is emancipated, he is no longer considered "immediate family."

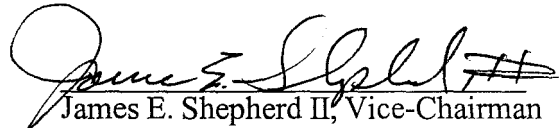
The prohibition in the Act against use of public office for private gain in the Act ordinarily requires that a public official refrain from voting on or otherwise participating in the decision to hire himself or herself or an immediate family member based upon the fact that the public official has a personal financial interest in that employment decision. Although, the Mayor here does not have a personal

financial interest in her son's appointment as City Attorney, there still remains the question of whether his appointment may constitute use of public office for the personal gain of another, which is also prohibited by the Act.

The Commission recognizes that the appointment of a person to fill the position of City Attorney requires more than identifying an applicant who simply meets the minimum qualifications for holding the position. Appointment of an attorney to represent the municipality and provide legal advice to the governing body involves selecting a qualified individual in whom the elected officials have the special trust and confidence required to perform these duties.

The Commission also recognizes that the position of City Attorney falls under the direct supervision of the Mayor. As noted by the requester, her familial relationship with her son will permit her to discuss some issues informally, avoiding legal fees. This purported benefit simply illustrates how this relationship appears to provide the Mayor with a personal attorney serving in the capacity of City Attorney. In the Commission's view, the proposed arrangement would create an unavoidable conflict of interest resulting in an impermissible use of office. Therefore, the requester should seek other qualified persons to serve as City Attorney.

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.


James E. Shepherd II, Vice-Chairman