

ADVISORY OPINION NO. 94-25

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON SEPTEMBER 1, 1994

GOVERNMENTAL BODY SEEKING OPINION

A County Prosecuting Attorney

OPINION SOUGHT

Is it a violation of the Ethics Act for a full time prosecuting attorney to serve as the trustee of a trust agreement?

FACTS RELIED UPON BY THE COMMISSION

The requester is a full time county prosecuting attorney. A former client is quite wealthy and desires to establish a testamentary trust for the benefit of his children and grandchildren who reside outside of the requester's county. This individual has contacted a law firm located outside the county to draw up the trust and was advised that he should select a trustee to manage and oversee the operation and distribution of the trust. He then approached the requester to serve as the trustee and informed him that there would be provisions in the trust for compensation of the trustee.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-2-5(b)(1) states in pertinent part that...a public official...may not knowingly and intentionally use his... office or the prestige of his...office for his...own private gain or that of another person.

West Virginia Code §6B-2-5(h)(1) states in pertinent part that no full-time public official...who exercises policymaking, nonministerial or regulatory authority may seek employment with, or allow himself...to be employed by any person who is or may be regulated by the governmental body which he...serves while he...is employed or serves in the governmental agency. The term "employment" within the meaning of this section includes professional services and other services rendered by the public official...whether rendered as an employee or as an independent contractor.

ADVISORY OPINION

In considering this request the Ethics Commission has analyzed the facts presented in light of the statutory violations contained in the Ethics Act. The Commission has determined that there is no provision of the Ethics Act which per se prohibits the prosecuting attorney from acting as the trustee of a trust and receiving compensation for serving in such capacity.

Employment

Pursuant to WV Code §6B-2-5(h)(1) a full-time public official who exercises policymaking, nonministerial or regulatory authority may not seek or accept employment with any person who is or may be regulated by the official's governmental agency. The Commission has determined that although the county prosecuting attorney does exercise policymaking and nonministerial authority, the office of the Prosecuting Attorney does not "regulate" private citizens as that term is used in this section of the Ethics Act.

Therefore, it would not be a violation of WV Code §6B-2-5(h)(1) for the full-time prosecuting attorney to serve as trustee of a trust agreement after the death of the settlor.

Private Gain

West Virginia Code §6B-2-5(b)(1) provides that a public official may not use his office or the resulting prestige for his own private gain. Consequently, the requester may not use his status or influence as the county prosecuting attorney to obtain, increase or promote his personal interests. Further, the requester may not use public time, equipment, materials and resources for such private activities.

However, the Commission notes that this opinion is limited to an analysis of the Ethics Act. The Commission is without authority to offer an opinion as to whether the prosecutor's service as trustee would constitute a violation of WV Code §7-7-4, which provides that any full-time prosecuting attorney of a Class I or Class II county "shall devote full time to his public duties to the exclusion of any other employment." The requester is a Prosecuting Attorney for a Class I county.


Chairman