Advisory Opinion 2016-07

Issued on May 5, 2016, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Board Member** asks whether the Ethics Act prohibits him from rendering expert opinion testimony in a civil case against a defendant company which previously appeared as an appellant before the State Board.

FACTS RELIED UPON BY THE COMMISSION

The Requester has been a part-time appointed member of the State Board since 2002, is a professor at a state university and maintains an active consulting practice. The Requester's consulting practice includes acting as an expert witness to render testimony in his field of expertise, and often involves testifying on behalf of plaintiffs in civil cases. This expertise is a qualification of his professorship and appointment to the State Board.

The State Board is comprised of five members appointed by the Governor with the advice and consent of the Senate. It serves as a quasi-judicial board of review and is responsible for hearing appeals regarding a state agency's issuance or denial of permits, permit conditions and enforcement decisions.

The defendant in the civil action has appeared before the State Board as an appellant eight times during the past five years. These eight appearances were unrelated to the dispute in the civil action and the expert opinion testimony. Requester states that all information that comes before the State Board, including that relating to the defendant, is public record. He receives no confidential information regarding the defendant as a result of his position on the Board. Requester additionally states that he has no special knowledge, or access to records that would provide him with special knowledge, as a result of his position on the Board that could be used against the defendant in the civil action.

PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code§ 6B-2-5(b)(1) provides, in relevant 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.

W.Va. Code§ 6B-2-5(e) provides, in relevant part:

> 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-2-5(h)(6) provides, in relevant part:

> A full-time public official or full-time public employee may not receive private compensation for providing information or services that he or she is required to provide in carrying out his or her public job responsibilities.

ADVISORY OPINION

The West Virginia Governmental Ethics Act generally does not prohibit a public official from testifying as an expert witness at trial even when the testimony is based on experience and knowledge gained through the public employment position.

The Ethics Commission previously considered a similar issue in Advisory Opinion 91-02. The issue there was whether public employees of a forensic laboratory would violate the Ethics Act by testifying in civil cases and charging a professional or expert witness fee for testimony given during their off-duty hours. The public employees there were subpoenaed to testify. The Ethics Commission did not consider "the use of general knowledge and experience gained through an employment position to be a use of public office for private [gain] as meant by subsection 6B-2-5(b)(1) of the Ethics Act." Advisory Opinion 91-02.

The testimony anticipated in Advisory Opinion 91-02 concerned the evidentiary results of tests conducted in a state laboratory by state personnel during state work time. *Id.* The Commission held that it would violate the Ethics Act for the public employees to testify *and* charge a professional or expert witness fee when the testimony would be based on the results of tests conducted at the state's expense and when the testing was considered part of the public employees' job responsibilities. *Id.;* W.Va. Code§ 6B-2-5(h)(6) ("A *full-time* public official or *full-time* public employee may not receive private compensation for providing information or services that he or she is required to provide in carrying out his or her public job responsibilities." *(emphasis added)).*

In the instant case, the Requester's position on the State Board is not full-time and his testimony would not be based upon test results or other information gained from his public position. Since he would not use the resources of his public office, there is no improper "private gain" under the Ethics Act. Accordingly, the Requester would not violate the Ethics Act by testifying as an expert witness in a civil action against a defendant that has previously appeared before the State Board.[1]

[1] Although the question was not posed, the Commission notes that serving as a full-time professor at a state university is no bar to giving expert testimony where the provisions of W.Va. Code § 6B-2-5(n) are met. *See* Advisory Opinion 91-60.

The Ethics Commission cautions the Requester that while the Ethics Act does not prohibit him from testifying as an expert or require him to recuse himself from Board actions concerning the defendant, he may not improperly use his position on the Board for his personal benefit, a plaintiff's benefit or to the detriment of a defendant who may appear before the Board as this would result in improper private gain.

Furthermore, while the Requester states that he has received no confidential information regarding the defendant as a result of his position on the State Board, the Ethics Commission nonetheless cautions the Requester that the Ethics Act prohibits a present or former public official or public employee from knowingly and improperly disclosing any confidential information acquired in the course of his official duties and prohibits him from using such information to further his personal interests or the interests of another person. W.Va. Code §6B-2-5(e).[2]

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as *it may alter the analysis and render this Opinion invalid.*

This Advisory Opinion is limited to questions arising under W.Va. Code§ 61-10-15 and under the Ethics Act, at W.Va. Code§ 68-1-1 through W Va. Code§ 68-2-10, and does not purport to interpret other laws or rules. In accordance with W.Va. Code § 68-2-3, 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/ Robert J. Wolfe, Chairperson
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[2] The Commission has also analyzed W.Va. Code§ 6B-2-5(f) and finds it does not prohibit the Requester from serving as an expert witness in the civil case as the civil case does not involve a matter in which he "personally and substantially participated in a decision-making, advisory or staff support capacity ..." For purposes of this Opinion, it is not necessary for the Commission to determine whether the limitations on representation in this subsection apply only to attorneys, accountants or other licensed professionals.