

ADVISORY OPINION NO. #91-61

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON SEPTEMBER 13, 1991

GOVERNMENTAL BODY SEEKING OPINION

A County Prosecuting Attorney

OPINION SOUGHT

- a. Whether it is a violation of the Ethics Act for a County Prosecuting Attorney to list his office telephone number when advertising the sale of personal property?
- b. Whether it is a violation of the Ethics Act for a County Prosecuting Attorney to operate a private law practice from his public office which would include the use of the telephones, office equipment, secretarial staff and utilities?

FACTS RELIED UPON BY THE COMMISSION

As a part-time Prosecuting Attorney, the requestor is permitted to maintain a private law practice. The common practice in this Judicial Circuit, as in many other circuits with part-time prosecutors, has been that the Prosecuting Attorney is permitted to operate his private practice from the public office.

The requestor operates his practice from his public office, using telephones, office equipment, secretarial staff and utilities. All long distance telephone calls are paid by the requestor through the Sheriff's Office.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 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 Section 6B-2-5(b)(2) states in pertinent part that...the Legislature, in enacting this subsection (b), relating to the use of public office or public office or public employment for private gain, recognizes that there may be certain public officials or public employees who bring to their respective offices or employment their intelligence, education, experience, skills and abilities, or other personal gifts or traits. In many cases, these persons bring a personal prestige to their office or employment which inures to the benefit of the state

and its citizens. Such persons may, in fact, be sought by the state to serve in their office or employment because, through their unusual gifts or traits, they bring stature and recognition to their office or employment and to the state itself. While the office or employment held or to be held by such persons may have its own inherent prestige, it would be unfair to such individuals and against the best interests of the citizens of this state to deny such persons the right to hold public office or be publicly employed on the grounds that they would, in addition to the emoluments of their office or employment, be in a position to benefit financially from the personal prestige which otherwise inheres to them. Accordingly, the commission is directed, by legislative rule, to establish categories of such public officials and public employees, identifying them generally by the office or employment held, and offering persons who fit within such categories the opportunity to apply for an exemption from the application of the provisions of this subsection. Such exemptions may be granted by the commission, on a case-by-case basis, when it is shown that: (A) The public office held or the public employment engaged in is not such that it would ordinarily be available or offered to a substantial number of the citizens of this state; (B) the office held or the employment engaged in is such that it normally or specifically requires a person who possesses personal prestige; and (C) the person's employment contract or letter of appointment provides or anticipates that the person will gain financially from activities which are not a part of his or her office or employment.

ADVISORY OPINION

a. Pursuant to subsection 6B-2-5(b)(1) of the Ethics Act a public official may not use his office for private gain. However, the part-time Prosecuting Attorney's use of the office telephone number in the advertisement is inconsequential and creates an economic impact of a de minimis nature which does not result in additional expense to the County. The Commission does not consider the listing of an office telephone number when advertising the sale of personal property to be the type of private gain contemplated by this subsection.

The advertisement will run in the local County newspaper and should not generate toll calls and receiving phone calls should not increase expenses for the County. However, if the requestor must return a phone call that is long distance, he should reimburse the County for that expense.

b. In West Virginia there is a long established, open and widespread practice of permitting part-time county prosecuting attorneys to conduct their private law practices in their public offices. Although the specific arrangements differ from county to county, reimbursement is not generally required from the prosecuting attorneys for their private use of the public office.

It is generally conceded that this practice is tailored to accommodate the needs of smaller counties to offer some inducement to lawyers to accept the lower salaries paid for part-time prosecutors. This use of public office space during time when it would not otherwise be needed for official business is seen as a way to reduce the cost of county government. It seems also designed to allow a more efficient use of the prosecutor's time.

Does the receipt of this benefit constitute either a prohibited use of public office for private gain or the acceptance of a prohibited gift?

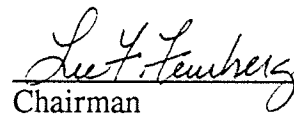
Legislative findings of the Ethics Act, WV Code §6B-1-2(a), provide "Public officials and public employees who exercise the powers of their office or employment for personal gain *beyond the lawful emoluments of their position* ... undermine public confidence in the integrity of a democratic government." [Emphasis added.] This clearly establishes the purpose and limitations of the Act's prohibitions against receiving things of value.

Thus, the Commission finds that the Act's prohibitions against (1) the use of public office for private gain and (2) the acceptance of gifts are not intended to apply to those items which are a part of the lawful emoluments of the office.

The Commission rules that the unreimbursed private use of public office space by part-time prosecuting attorneys, which is intended and legitimately extended as part of the emoluments of the office, does not constitute either private gain or a gift for the purposes of the Ethics Act.

The Commission's ruling would apply as well to office furniture, equipment and office personnel, which are necessary to and provided for official use of the prosecutor, when not otherwise needed for official business. It would, of course, be inappropriate to obtain and supply at official expense any furniture, equipment or office personnel required only to accommodate the requirements of the prosecutor's private practice.

This opinion is strictly limited to part-time prosecuting attorneys and should not be relied upon by any other class of public officials or public employees.


Chairman