Overuled by
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ADVISORY OPINION NO. 2013-60

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THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Member of a State Licensing Board** asks if she may accept a paid position with a private entity that conducts business with professionals that the Board licenses and regulates and still remain on the Board.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a member of a State Licensing Board ("Board") established under W. Va. Code Section 30. The Board consists of nine members, appointed by the Governor with the advice and consent of the Senate. The Board regulates certain professionals, including the Board member who is the subject of this opinion. The regulation includes issuance, renewal, denial and revocation of licensure, conducting disciplinary hearings, and pursuing legal action against professionals whom the Board regulates.

The Board's enabling legislation provides that any person connected to a commercial entity that derives financial gain from the profession that the Board regulates is not eligible for appointment thereto.

The Requester has recently accepted a position as the West Virginia Director for a private firm that conducts business with professionals that the Board licenses and regulates. The firm subcontracts with professionals licensed by the Board in order to provide services to participants in government programs.[1] The relevant state agency, in its correspondence to Board-regulated professionals, described the firm as "an administrative services organization that is leading the provider contracting effort." The Requester's responsibilities with the private entity include reviewing claims and authorizations on the private entity's system, representing the entity to local professionals, acting as a liaison between professionals and the private entity, and accompanying the marketing director to meetings as necessary.

The Requester states that professional participation in the program she helps administer is entirely voluntary, and that her claim review process is blind. Additionally, the Requester explains that she only accompanies the marketing director as support

[1] The Commission has consistently applied the Ethics Act's prohibitions to relationships with subcontractors as well as contractors. *See* Advisory Opinions 94-22, 95-44, 2012-40 and 2013-12.

staff and not in a decision making capacity. She further states that her compensation is not affected by the number of professionals who sign up for the company's programs. Finally, the Requester explains that the liaison position merely "provide[s] a local person for a [professional] to contact in the event they want more information on the program."

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) states 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. 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(e) states:

> 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.

ADVISORY OPINION

The Requester's question is whether the Ethics Act prohibits a member of a State Licensing Board from working for a private entity that contracts with professionals licensed by the Board. This is not an issue of first impression for the Commission.

As early as 1996, the Commission recognized the potential for an inescapable conflict to arise between the ethical obligations of a part-time public servant and the requirements of a private position. In Advisory Opinion 96-55, the Commission wrote:

> Cases arise in which an inescapable conflict exists between the public responsibilities of a part-time public servant and the demands of a second position, public or private. In such a situation, where the public servant cannot be expected to perform both positions without creating either substantial problems or the appearance of impropriety, both positions may not be held.

More recently, in Advisory Opinion 2012-17, the Presiding Officer of a House of the West Virginia Legislature asked if the Ethics Act permitted him to provide legal advice as an independent contractor to a private organization that lobbies the Legislature, if that advice was unrelated to the organization's lobbying activities.

There, he would have been paid a fee to provide advice on member defense cases, contact outside counsel and review billing issues, provide training in legal research and strategy, and otherwise advise and represent the organization and its officers in various legal matters. Additionally, the legislator's contract contained a safeguard that barred him from lobbying on the organization's behalf or participating in any issue that would create a conflict with his legislative position. Nevertheless, the Commission still barred him from holding both positions.

That opinion is non-precedential due to the specificity of the legislator's position, but the analysis remains applicable. Notably, even with the additional safeguards written into the legislator's contract, the Commission explained that "[n]either strict compliance with the voting rules, nor advance disclosure of conflicts of interest minimize the conflict that arises from the Requester's situation." The Commission further concluded:

> While the private gain prohibition provides an exception for "the performance of usual and customary duties associated with the office ... ", the Ethics Act expressly limits the exception to those duties performed without compensation. Here, the Commission finds that in applying this provision to the facts presented, it is impracticable, if not impossible, to craft limitations that clearly and fairly demarcate his public job duties, the interests of the Association, and the interests of his constituents ...

This provision was more recently cited in Advisory Opinion 2013-29, another non-precedential opinion. There, the Commission barred a County Flood Plain Manager from performing private surveys while employed as the Flood Plain Manager. The Commission concluded that the "situation results in divided loyalty between his private business and public duties," and that, as above, it was almost impossible to fairly demarcate lines between those duties.

Finally, in Advisory Opinion 2007-07, the Commission barred a Mayor from appointing her son as City Attorney. There, the Commission found that their relationship was still too close to avoid the appearance of impropriety and potential private gain, partially because the other members of the governing body need to have a "special trust and confidence" in the person who fills that particular position.

Here, the situation is similar, insofar as it relates to "divided loyalties" and the requisite "trust and confidence" the position requires. The Requester serves on a board that licenses a certain field of professionals. The private entity contracts with those same professionals in various governmental and non-governmental capacities. While this situation alone is not dispositive of an irreparable conflict of interest, it requires additional examination.

First, the Requester is responsible for enforcing compliance with state and professional regulations in her public position. Conversely, in her private position, she would represent a private entity to local professionals in an informational capacity. The Ethics Act prohibits public officials from endorsing products or services. See, *e.g.,* Advisory Opinions 2000-19, 2000-21, 2002-18, 2005-10, 2007-02, 2009-12, and 2012-31.

In Advisory Opinion 2012-31, the Commission prohibited a Circuit Clerk from recommending a product, service or business of an "interested person," since it would lend the prestige of the office to advance the vendor's private interest. Here, the Requester indicates that the private entity's compensation is not tied to the quantity of the professionals who sign up. Nevertheless, a member of the State Licensing Board for a group of professionals, acting in her private capacity as a liaison for a private company that those professionals hire, necessarily creates a tacit personal endorsement of that private company and lends the prestige of that office to advance the private company's interest.

This is not to say that being employed by a vendor immediately disqualifies a public servant from serving on a Board that deals with that vendor. Here, specifically, the public servant is appearing as a public representative of the vendor, both as a liaison to the professionals she regulates, and in her appearances with the marketing director. The reason for her appearances with the marketing director is immaterial; it is enough that the appearances are made. This situation is similar to Advisory Opinion 2012-17, where the presiding officer of a house of the West Virginia Legislature would have been, in part, advising and representing the organization legally, providing advice and reviewing billing issues; even with safeguards in place, the appearance of impropriety is enough.

Further, while the Requester's private review power is "blind," her public review power is not. She investigates and passes judgment on other professionals as part of her public position. As part of those investigations, she receives confidential information on other professionals. She also is the statewide director of and liaison for a private company, and, as part of her private job duties, she represents that company and its programs to the same professionals she regulates in her public capacity. Members of a state-regulated profession need to have a "special trust and confidence" in the people who control their professional licensure and govern their behavior, as in Advisory Opinion 2007-07. A Board Member who-fairly or not-is perceived to have a conflict of interest between her public and private roles does not engender the "trust and confidence" that the public position requires. Further, regulated professionals might easily be influenced to engage in business with the private entity as an attempt to curry favor or gain some other perceived benefit with the Public Board. Here, as before, the appearance of a conflict is enough.

As a result, as in Advisory Opinion 2012-17, here, too, the Requester's public and private roles are "too inextricably intertwined and present an impossible impediment to impartiality". Simply put, the Requester is unable to perform both positions without

creating an unavoidable conflict of interest resulting in an impermissible use of office for private gain, in violation of W. Va. Code § 6B-2-5(b) of the Ethics Act. Therefore, the Commission hereby finds that the Requester may **not** accept a paid position with a private entity that conducts business with professionals that the Board licenses and regulates and still remain on the Board.

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.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman