ADVISORY OPINION NO. 2013-11

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WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Legislator** asks whether he may sponsor a bill relating to an issue upon which he advised a client prior to his election to the Legislature when the bill uniquely affects his client.

FACTS RELIED UPON BY THE COMMISSION

The Requester is an elected Member of the Legislature. He is also an attorney.

He resides in a small county. He practices law with his father. He states that there are few attorneys or law firms in the county.

Normally, his law practice does not involve advising clients on gambling laws. Nevertheless, prior to being elected to the Legislature, one of his clients retained him to research relevant laws to determine whether the client could build a casino in the county. The Requester advised his client that under existing laws, a casino could not be built in the county. Hence, a change in the law would be required before either his client or any business could build a casino.

Upon advising his client that the law would need to be changed, he introduced his client to several Members of the Legislature from his district. He did not lobby on behalf of his client. Instead, he gave them the names of several lobbyists which the client could use if the client wanted to retain someone to lobby on its behalf.

After he performed this legal work for the client, he was elected to the Legislature. He still performs legal work for the client; however, the work does not involve matters relating to the gambling industry. Instead, the legal services he performs for the client involve transactional work such as real estate closings. His law firm has also represented the client in arbitration proceedings. The Requester states that their law practice has many clients and that the client with the interest in building the casino represents five percent (5%) or less of their law firm's book of business.

The Requester thinks it is in the best interest of his county to have a casino as he states that there is a limited economic base in the county and expanding legalized gambling is one means of expanding that base. He states that his constituents are well aware of his

views on this matter. As such, based upon his personal views as to what is in the best

interest of his county, he wants to promote the passage of legislation which would allow his client or others to build a casino.

This bill, as past bills introduced in the Legislature which sought to authorize casinos in certain areas of the State, is narrowly crafted to limit the counties and potential sites which could benefit from it. The bill is crafted in this manner as historically bills which broadly legalize gambling on a statewide basis meet with wider spread opposition.

The Requester, as a newly elected Member of the Legislature, seeks guidance on whether he may sponsor the bill or actively promote it. He states that he does not financially stand to profit from the passage of the bill as he is not being compensated by the client to lobby for the bill or to work on the legislation. On the other hand, he recognizes that the bill uniquely affects his client as the client owns property in the county which, if the bill passes, could be used to build a casino. While other businesses could purchase similar property; still, it is arguable that realistically, five or fewer businesses stand to profit from the bill. The Requester wants this particular fact known as his interest is in transparency and complying with the Ethics Act. He states that if he is allowed to be involved with this legislation, obviously he will not represent this client in any future casino related matters.

As a newly elected Member, while he serves on several committees, he holds no Legislative leadership positions.

CODE PROVISIONS RELIED UPON BY COMMISSION

W. Va. Code§ 6B-1-2, "Legislative findings, purpose, declaration and intent" reads:

> (c) The Legislature finds that the state government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official or public employee from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official or public employee, such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

W. Va. Code § 6B-2-5 reads, in relevant part:

> (b) Use of public office for private gain. -- (1) 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 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), Confidential information, provides:

> 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 reads: _

> (i) Members of the Legislature required to vote. -- Members of the Legislature who have asked to be excused from voting or who have made inquiry as to whether they should be excused from voting on a particular matter and who are required by the Presiding Officer of the House of Delegates or Senate of West Virginia to vote under the rules of the particular house shall not be guilty of any violation of ethics under the provisions of this section for a vote so cast.

W. Va. Code§ 6B-3-1 reads in relevant part:

> (8)(A) "Lobbyist" means any individual employed by a lobbying firm or who is otherwise employed or contracts for economic consideration, other than reimbursement for reasonable travel expenses, to communicate directly or through his or her agents with any elective state official, agency official or legislative official for the purpose of promoting, advocating, opposing or otherwise attempting to influence... legislation....

West Virginia Senate Rule 43 is entitled "Excused from voting". It reads:

> Every member within the Senate Chamber, when a question is put, shall vote unless he or she is immediately and particularly interested therein, meaning an interest that affects the member directly and not as one of a class, or the Senate excuses him or her. All motions to excuse a member from voting must be made by the member requesting to be excused before the Senate divides, or before the call of the yeas and nays is commenced, and it shall be decided without debate, except that the member making the motion to be excused from voting may briefly state the reason why it ought to be adopted.

West Virginia House of Delegates Rule 49, "When Members Not to Vote", reads:

> When a question is put, any member having a direct personal or pecuniary interest therein should announce this fact and request to be excused from voting.

The disqualifying interest must be such as affects the member directly and not as one of a class.

ADVISORY OPINION

The question presented is unique. Many Members of the Legislature work for law firms or businesses which have clients who stand to benefit from legislation which a Member of the Legislature may sponsor or promote. For example, a law firm may have oil and gas clients while an insurance agent may work closely with certain insurance companies. Oftentimes legislation affects the interests of the oil and gas or insurance industries. In turn, the position a Member of the Legislature takes on these issues also affects his or her business clients. Nevertheless, normally the Legislator's involvement in such matters is permissible as his or her client(s) benefit as a class of five or more businesses which conduct business in the State, e.g. five or more oil and gas companies will be affected by changes to the laws regulating drilling.

What is unique about the present situation is that the legislation, from a practical standpoint, uniquely affects the Requester's client, i.e. affects it as a class of five or fewer businesses. While other businesses could buy land in the county, as this business already owns property in the county, in actuality it most readily stands to benefit from a change in the law. The Requester wants this fact understood for purposes of transparency.

Based upon the relevant facts and law, the Commission must determine whether the Legislator may sponsor a bill on an issue which he feels strongly is in the best interest of his county, or whether his business relationship with his client precludes him from doing so.

The West Virginia Supreme Court has held: "The power of the Legislature ... to prescribe essential qualifications to be possessed by candidates in order to be eligible to be nominated or elected is plenary within constitutional limitations." Adkins v. Smith, 408 S.E.2d 60 (W.Va. 1991). *See* A.O. 2007-14. No provision in the Ethics Act prohibits a Legislator, a part-time elected official, from accepting any particular employment position or having particular clients. A.O. 2006-06.

Nevertheless, common sense and the law dictate that limitations apply. For example, in A.O. 2012-17 the Commission ruled that the **Presiding Officer** (emphasis supplied) of a house of the West Virginia Legislature may not be retained to provide legal services to an Association which is actively engaged in lobbying on behalf of its members, and employs a registered lobbyist, even if the legal services he will provide are unrelated to the Association's lobbying activities. In A.O. 2008-03, the Commission ruled that a candidate for the West Virginia Legislature, if elected, may not continue to operate a business which provided lobbying services as it presented an inescapable conflict.

In A.O. 2003-14 a State Legislator was employed by a company which wanted table gaming. The County commission of the county represented by the Legislator was petitioning the Legislature to pass a law giving county residents the right to decide by local referendum whether table games would be permitted. The Commission found that as the Legislator was employed by a business which would be a principle beneficiary of the legislation, the Legislator should not sponsor the Legislation.

Here, in reliance upon the law and past opinions cited therein, the Commission finds that the Requester may **not** sponsor the legislation in question as it uniquely affects his client. While there is no suggestion that his client his compensating him to work on promoting the passage of this legislation, or that the client is a major client of his law firm; still, the client stands to uniquely benefit from the passage of the legislation. If the legislation affects a class of five or more similarly situated companies a different result would follow. The Commission reached a similar conclusion in A.O. 2012-07 when it advised a Mayor that he may not vote on matters **uniquely** (emphasis supplied) affecting current customers.

There are no facts in the present case to suggest that the Requester has any motive other than promoting legislation which he believes is in the best interest of his county. Still, the Commission declines to find that he may sponsor the legislation as such a finding may create a loophole for bad actors who may be paid large sums of money from clients for "other work" when, in actuality, the client is seeking to influence the Legislator's actions and decisions on legislation which **uniquely** (emphasis supplied) affects the client.

Although the Requester may not sponsor the legislation, nothing in the Ethics Act prohibits him from exercising his right to advocate, formally or informally, on behalf of its passage.

Whether he may ultimately vote on the passage of the Bill is a question to be answered by the presiding officer of the house in which he serves. W. Va. Code§ 6B-2-5 reads:

> (i) Members of the Legislature required to vote. -- Members of the Legislature who have asked to be excused from voting or who have made inquiry as to whether they should be excused from voting on a particular matter and who are required by the Presiding Officer of the House of Delegates or Senate of West Virginia to vote under the rules of the particular house shall not be guilty of any violation of ethics under the provisions of this section for a vote so cast.

Pursuant to this procedure, a Member of the Legislature publicly discloses to the presiding officer his interest in a particular bill. It provides transparency in the Legislative process. So long as the Requester complies with the foregoing voting rule, as well as the direction of the presiding officer, he does not violate the Ethics Act.

Regardless of the ruling of the presiding officer, it is a means of publicly disclosing the business relationships of Members of the Legislature. In turn, regardless of whether the presiding officer directs a Member to vote, this rule assists constituents in being informed of the outside business interests of their elected representatives. In turn, the constituents may determine at the ballot box if their elected representative was acting in their best interests, or whether their representative acted in the best interests of a client to their detriment.

In closing, the question presented is a close call. The Commission commends the Requester, as a newly elected Member of the Legislature, for seeking guidance on this issue.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 68-1-1, *et seq.,* and does not purport to interpret other laws or rules. Pursuant to 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.

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