ADVISORY OPINION NO. 2013-14

Issued On June 6, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Municipal Judge** who also maintains a private law practice asks whether he may announce his appoint to his government position on his business website; and whether he may, in his private capacity, continue to be paid to represent the Municipal Sanitary Board.

FACTS RELIED UPON BY THE COMMISSION

The Requester has recently been appointed to serve as Municipal Judge, a part-time employment position. As Municipal Judge he also serves as Department Head. He also operates a private law practice in the municipality and his law practice has a presence on the Internet in the form of a website. After his appointment as Municipal Judge, the Requester has found that some people in the community question whether he is closing his private practice, which he is not.

Accordingly, the Requester proposes to update his website under the "News and Events" section with an announcement that reads as follows: "[The Requester] appointed Municipal Judge.... The position is part-time, and [the Requester] will continue in his private practice."

Prior to his appointment, the Requester served as counsel for the Municipal Sanitary Board, a separate public entity from the municipality. City Council approves the Board's budget. The Requester asks whether he is permitted to receive a paycheck from the municipality and receive payment/fees from the Municipal Sanitary Board.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b)(1) provides, in relevant part, that: 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(d)(1) provides, in relevant part, that no elected or appointed public official or public employee or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control.

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

> (1) Public officials... may not vote on a matter:
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> (A) In which they ... or a business with which they ... [are] associated have a financial interest. Business with which they are associated means a business of which the person ... is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.
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> (3) For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue.

ADVISORY OPINION

The Ethics Act generally prohibits public officials from using the resources or prestige of their office for private gain. In Advisory Opinion 2000-04 the Commission authorized a County School Board to provide a link on its web page to a Board Member's personal website where he had information regarding his re-election campaign. Although this opinion relied on the School Board's decision to make links on its web page available to any candidate running for the Board, the Commission noted that a link to another web page is "merely an option which a visitor to the site may choose to accept or ignore."

Then, in Advisory Opinion 2007-05, the Commission ruled that a County Commissioner was permitted to provide information on the website for his private law practice relating to his role as an elected Commissioner. The Commission did not propose to create a link from the County Commission's website to his law practice website. Instead, he effectively donated part of his private website to support his work as an elected County Commissioner by providing an opportunity for citizens to contact him about his County Commission duties. Under those circumstances, the Commission found that any use of office for personal gain was *de minimis.*

The same result obtains here. The Requester is not proposing a link from a municipal website to his private website. Instead, he is merely referencing his appointment to a public position. Thus, he is permitted to list the proposed announcement on his private law practice website.

Next, the Commission must determine whether the Requester's position as Municipal Judge prohibits him from continuing to represent a separate, but related, municipal board. Simply put, does a Municipal Judge have direct authority or control over the Municipal Sanitary Board's contracts? As a part-time municipal employee, the Requester lacks direct authority or control over the municipality's contracts with the exception of contracts relating to his department; he is even farther removed from the Municipal Sanitary Board's contracts. As a result, he may continue to represent the Municipal Sanitary Board and receive compensation therefor.

Limitations apply. To the extent that any violation of the Municipal Sanitary Board's regulations may result in a complaint heard by the Municipal Judge, the Requester shall recuse himself from all such cases; similarly, he is required to recuse himself from presiding over any matters involving a relative, business associate, or client of his private practice.[1] *See* Advisory Opinion 2012-07 wherein the Commission provided general guidance to mayors/municipal judges on recusal in relation to customers of their private businesses, and stated:

> For those mayors who also serve as municipal judge, they need to take special care if a customer appears before them in their judicial capacity. Again, the fact that a citizen purchased goods or services in the past from a mayor is generally insufficient to require the mayor to recuse herself/himself from the proceeding. The mayor shall, however, disclose the fact of the transaction, and if either party requests that the mayor recuse herself/himself from the proceeding following such disclosure, the mayor shall do so. Further, mayors are prohibited from presiding over a judicial matter involving a customer when the transaction occurred within the preceding six months.

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

[1] The Requester is encouraged to obtain advice from the West Virginia State Bar regarding any potential legal ethics concerns arising from his dual service.