

# **Advisory Opinion 2023-06**

**Issued on July 6, 2023, by**

**The West Virginia Ethics Commission**

## **Opinion Sought**

A **State Agency Director** asks whether he may continue being employed as an attorney by a private law firm in an of counsel position.

## **Facts Relied Upon by the Commission**

The Requester is an attorney who is employed by a private law firm in a part-time, of counsel position. He has recently been hired by the state of West Virginia as the full-time Director of a state agency, and may be hired shortly to be the Executive Director of a related state agency. His Director position is with an agency that is responsible for creating energy policies, and he reports to a state department secretary. The Executive Director position would be with an agency that is responsible for promoting and overseeing the development of energy facilities and projects, and he would report to an appointed board in that position.

The Requester asserts that the state agency charged with promoting and developing energy facilities and projects has authority to construct, lease, finance, and purchase energy projects. The state agency is also authorized to issue bonds to finance energy projects. This state agency issues permits and conducts adversarial proceedings. The Requester states that it is possible that the law firm that employs him may be asked to represent a client before that state agency, but he would not have any substantive involvement in any matter in which his law firm is representing a client or is otherwise involved.

The Requester asserts that the primary duties of the related state agency by which he is currently employed are creating energy policies, crafting an energy plan for the state, overseeing the state's energy efficiency programs, promoting collaboration among the state's universities on energy research, and collaborating with the state Department of Administration to develop energy saving strategies. This state agency does not conduct any adversarial proceedings and does not issue any permits. State law requires this agency to hold a public hearing at least every five years as part of creating or updating the state's energy plan. The Requester does not anticipate that any clients of the law firm by which he is employed would appear before that agency on any matter.

The Requester states that if it is permissible for him to continue being a part-time, of counsel employee of the law firm while employed by the state of West Virginia in a full-time position, he will conduct his private business activities on his own time and that he will not use state resources or disclose or use confidential state information. He states that he will not continue to actively litigate cases for the law firm while employed by the state and anticipates that he will mostly be serving in an advisory capacity with

the law firm. The Requester states that his law firm employer does not currently have any matters, either directly or through the representation of its clients, before either agency.

### **Code Provisions Relied Upon by the Commission**

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

(1) No full-time official or full-time public employee may seek employment with, be employed by, or seek to purchase, sell or lease real or personal property to or from any person who:

(A) Had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding 12 months; or

(B) Has a matter before the agency on which he or she is working or a subordinate is known by him or her to be working, or

(C) Is a vendor to the agency where the official serves or public employee is employed and the official or public employee, or a subordinate of the official or public employee, exercises authority or control over a public contract with such vendor, including, but not limited to: (i) Drafting bid specifications or requests for proposals; (ii) Recommending selection of the vendor; (iii) Conducting inspections or investigations; (iv) Approving the method or manner of payment to the vendor; (v) Providing legal or technical guidance on the formation, implementation or execution of the contract; or (vi) Taking other nonministerial action which may affect the financial interests of the vendor.

. . . .

(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.

W. Va. Code § 6B-2-5(e) 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.

### **Advisory Opinion**

The Requester is employed by the state of West Virginia on a full-time basis as the Director of a state agency, and he may also be hired to be the Executive Director of an agency with a related mission. One agency develops energy projects, while the other agency develops energy policies. The Ethics Commission must determine whether the Requester may be employed in a part-time, of counsel position with a law firm while being employed by the state of West Virginia in either or both positions.

The Requester knows that if he has outside employment while being employed by the state, he must conduct his private business activities on his own time and that he may not represent clients before his agencies, disclose confidential information, or use public resources.<sup>1</sup> The Ethics Commission must only consider, therefore, if the provision in the Ethics Act banning outside employment with certain persons, under W. Va. Code § 6B-2-5(h), bars his continued employment with the private law firm.

The Ethics Act restricts full-time public employees and public officials from having other employment in certain circumstances. Specifically, W. Va. Code § 6B-2-5(h)(1), provides that full-time public officials and employees may not seek employment with or be employed by those persons who have had a matter on which the public official or public employee, or a subordinate, is known to have taken regulatory action within the preceding 12 months. W. Va. Code § 6B-2-5(h)(1)(A). These persons also include those who currently have a matter before the agency on which the public official or public employee is working, or a subordinate is known by the employee to be working. W. Va. Code § 6B-2-5(h)(1)(B).<sup>2</sup> The Requester is subject to the restrictions in “h” because he is a full-time public employee or public official.

In [Advisory Opinion 2018-06](#), the Ethics Commission held that a deputy fire marshal may lease and operate a private club that is subject to the City’s fire code as long as neither he nor a subordinate of his inspect or investigate matters concerning the club.

In [Advisory Opinion 2019-16](#), the Ethics Commission held that a full-time state employee who regulates holders of unclaimed property, such as insurance companies, may moonlight for a private consulting firm whose clients include the same insurance companies he regulates, but on unrelated matters, provided that he does not perform his private services for these insurance companies.

**Based upon the plain language in the Ethics Act and its prior Advisory Opinions, the Ethics Commission finds that the state official, who is the director of a state agency, may continue his part-time, of counsel employment with a private law firm that does not currently represent clients or have other matters before his state agency employer on which he or any of his subordinates is working. He may also be employed as the Executive Director of a related state agency under these same conditions.**

The Requester states that his law firm employer may be asked to represent clients before the state agency for which he may become the Executive Director. The Commission must analyze, therefore, whether the Requester may remain employed by the law firm if it represents a client in a matter before his state agency employer.

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<sup>1</sup> W. Va. Code § 6B-2-5(b), (e), (f), and (g).

<sup>2</sup> For purposes of this provision, “the term ‘employment’ includes professional services and other services rendered by... the public employee, whether rendered as employee or as an independent contractor . . . .” W. Va. Code § 6B-2-5(h)(2).

The Ethics Act expressly prohibits a full-time public official or public employee from being employed by a person that has a *matter* before the agency on which he or she or a subordinate employee is working. W. Va. Code § 6B-2-5(h)(1)(B) [emphasis added]. The Ethics Commission has analyzed what constitutes a “matter” in prior Opinions. For example, in [Advisory Opinion 2019-28](#), the Commission held that persons who are being investigated by a sheriff’s office have a matter before that office. See *also* [Advisory Opinion 2020-01](#) (discussing what constitutes a matter before an agency charged with reducing soil erosion and water pollution).

If a law firm is representing a client before an agency, then the client clearly has a “matter” before the agency. The Commission has not previously answered the question however of whether a law firm’s representation of a client before a public agency equates to the law firm itself having a “matter” before the state agency.<sup>3</sup> A prior Advisory Opinion, 1995-33, provides some guidance on this legal question.

In [Advisory Opinion 1995-33](#), a state employee asked whether he may seek employment with an engineering consulting firm (“engineering firm”). The Ethics Commission analyzed “h” in the Opinion. The Commission noted that the engineering firm had clients subject to the public agency’s control, but that the engineering firm did not conduct work in geographical areas that were within the “requester’s area of public responsibility.” Based upon the facts presented, the Ethics Commission held that the state employee may seek employment with the engineering firm. The Commission reasoned that “the pivotal factor is that neither the requester nor any of his subordinates have taken regulatory action with regard to the engineering consulting firm in the past twelve months and that the firm does not have a matter currently pending” before the agency.

The term “matter” is not defined in the Ethics Act but the dictionary definition is, in relevant part: “a: a subject under consideration, b: a subject of disagreement or litigation.”<sup>4</sup> **In analyzing the plain language in the Ethics Act, prior Advisory Opinions, and the definition of “matter,” the Ethics Commission holds that a law firm’s representation of a client before a public agency equates to the law firm having a matter before the public agency. Hence, the restrictions in W. Va. Code § 6B-2-5(h)(1) prohibits a public agency employee or official from being employed by a law firm representing clients before his or her public agency if the public employee or official or one of his or her subordinates is working on that matter.**<sup>5</sup>

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<sup>3</sup> The Ethics Act defines “persons” as “an individual, corporation, business entity, labor union, association, firm, partnership, limited partnership, committee, club, or other organization or group of persons, irrespective of the denomination given such organization or group.” W. Va. Code § 6B-1-3(h). The law firm is a person for purposes of the Ethics Act because it is a business entity.

<sup>4</sup> Merriam-Webster.com Dictionary, s.v. “matter,” accessed June 27, 2023, [Matter Definition & Meaning - Merriam-Webster](#).

<sup>5</sup> If a public agency attorney or any public employee or public officials wishes to seek employment with a law firm that has a matter before his or her public agency on which he or she or a subordinate is working, then he or she may seek an employment exemption. W. Va. Code § 6B-2-5(h). These exemptions are granted when a public employee or public official wishes to explore employment opportunities while he or she is still employed by the public agency. The Ethics Commission rarely, if ever, has granted an

Based upon the foregoing, if the law firm represents a client before his state agency employer on any matter on which the Requester or a subordinate agency employee is working then he must discontinue his employment with the law firm to comply with the Ethics Act. The term “matter” for purposes of this restriction does not include ministerial actions such as providing general information about the agency. See [Advisory Opinion 2020-01](#) (discussing what constitutes ministerial functions for purposes of the restrictions in W. Va. Code § 6B-2-5(h)).

The following restrictions also apply to the Requester’s employment by a private law firm:

- The Requester, either through the private law firm or directly, may not represent clients that have matters before his agencies on which either he or one of his subordinates at the agencies is working or on which he or his subordinates has taken regulatory action within the past twelve months.<sup>6</sup>
- The Requester may not use or disclose confidential information he acquired in his state positions.
- The Requester may not perform his private work during times he is working, e.g., on the clock, for the state, and he may not use state resources for his private employment or clients.
- The Requester may not receive private compensation for providing information or services that he is required to provide in carrying out his public job responsibilities.

*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 the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, 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/ Robert J. Wolfe  
Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission

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exemption to allow a public official or public employee to simultaneously be employed by a public agency and a law firm or other person that has a matter before the public agency on which the public official or public employee or a subordinate is working.

<sup>6</sup> The twelve-month lookback period does not include the period predating the Requester’s employment by the state of West Virginia.