ADVISORY OPINION NO. 2013-21

Issued On July 11, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Prosecuting Attorney** asks if it is permissible under the Ethics Act for a County Commission to employ a private attorney (either as an employee or on a contract basis) for civil matters, if that attorney maintains a private criminal defense practice in the same county.

FACTS RELIED UPON BY THE COMMISSION

Although the Prosecuting Attorney is the statutory counsel to county entities, W. Va. Code§ 7-4-3 allows County Commissions to employ private legal counsel. In such circumstances, the County Attorney would generally advise the County Commission on civil legal matters, refer lawsuits to its insurance carrier, attend County Commission meetings, review contracts, and generally advise the County Commission on various legal matters.

The County Commission is responsible for setting the budget for the Prosecuting Attorney's Office. The County Attorney would not be involved in setting the budget of the Prosecuting Attorney's Office, or for any other county elected offices.

The County Commission seeks to determine whether employing or retaining a lawyer-- one who maintains a private criminal defense practice in the same county-- to serve as County Attorney would create a conflict of interest prohibited by the Ethics Act.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b)(1) reads:

> 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) 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.

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The Ethics Act does not bar a County Commission from employing or contracting with a private attorney to provide civil legal services. Nevertheless, as early as 1996, the Ethics Commission recognized the potential for an inescapable conflict to arise between the public responsibilities of a part-time public servant and the demands of a second 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.

In Advisory Opinion 2012-17, the Requester, a Presiding Officer of the State Legislature, sought to serve as Legal Counsel to an Association which actively engages in lobbying on behalf of its members and has a registered lobbyist. The Commission likened the position to the position of General Counsel to the Association. Further, the Commission found that the Requester had access to confidential information not otherwise available to non-legislators.

Additionally, the Commission lodged a concern that the public may perceive that the Association hired the Requester because of his unique ability to influence legislation. Further, other Associations that do not employee a high ranking member of the Legislature may believe that they are at a disadvantage in the legislative process. As the Ethics Commission stated in Advisory Opinion 2006-06, one of the main purposes of the Ethics Act is to uphold the integrity and impartiality of the government decision-making process.

As a result, the Commission found the Requestor to have an inescapable conflict and held he could not accept the position. The same situation exists here.

The County Commission is responsible for setting the budget for the Prosecuting Attorney's Office and the County Sheriff's Office. The Requester states that the County Attorney would not be involved in setting the budget of the Prosecuting Attorney's Office, or for any other county elected offices. This, however, does not cure the conflict.

For example, the County Commission can play a pivotal role regarding the Prosecuting Attorney's Office such as a removal petition against the Prosecutor, or allegations of misconduct that would prompt the County Commission to seek the appointment of a special prosecutor. The County Commission is also the regulator of other funding received by the prosecutor such as the issuing of funds for training and office furnishings.

Additionally, in the private law practice, the County Attorney may not use or reveal confidential information, if any, obtained during the course of public duties. In this situation, the County Attorney could be privy to confidential information regarding the County Prosecutor's Office and the County Sheriff's Office. It may be impossible for a County Attorney with a criminal defense practice to separate information s/he has learned in his/her public position from his/her private criminal practice.

For example, a County Attorney with an active civil practice may also learn of certain situations arising within the County Sheriff's Department. These situations could range from personnel issues to issues regarding civil lawsuits against the Sheriff. The County Attorney could be perceived to have and use information gained in that capacity in the course of his representation of criminal clients. For instance, the County Attorney could find him/herself questioning a witness whom County Attorney knows has pending personnel or civil litigation issues which are not public. In that situation, it would be impossible for the County Attorney to effectively represent either party. Further, the Ethics Act prohibits a public servant's use of confidential information to further his or her personal interests or the interests of another person. W. Va. Code§ 6B-2-5(e)

Even if the County Attorney does not participate in the setting of the budget for the Prosecuting Attorney, the same issues may exist. The County Attorney could become aware of certain situations within the Prosecutor's Office which could be inextricably intertwined with his/her criminal practice. For example, like in the potential situation with the Sheriff, the County Attorney could learn of non-public lawsuits or personnel issues which would render it impossible for him/her to fairly represent either party.

The Ethics Act prohibits public officials from knowingly and intentionally using their public offices or the **prestige** of their offices for their own private gain or that of another person. W. Va. Code§ 6B-2-5(b). (emphasis supplied). It is possible that the County Attorney could be selected by a criminal defendant for representation because of County Attorney's presumed knowledge of both the Prosecutor and Sheriff Offices. That presumption would be based also in the assumption that County Attorney has information other criminal defense attorneys don't have regarding those offices.

Indeed, the Requester's public role is too inextricably intertwined and presents an impossible impediment to impartiality. As a result, this is one of the cases anticipated in Advisory Opinion 96-55 and justifies an imposition of an outright ban due to the inescapable conflict. The Commission hereby finds that the Requester cannot be expected to perform both positions without creating an unavoidable conflict of interest or the appearance of impropriety, or both and therefore he may not hold both positions.

Although the Requester may have obtained permission from the West Virginia State Bar -which regulates the conduct of attorneys-for a County Attorney to engage in private criminal defense practice in the same county, the Ethics Act has a different standard.

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 other similarly situated public servants unless and until it is amended or revoked, or the law is changed.

/s/Jonathan E. Turak,
Jonathan E. Turak, Acting Chairperson