

ADVISORY OPINION NO. 96-18

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON MAY 2, 1996

PUBLIC SERVANT SEEKING OPINION

State Bar Representative

OPINION SOUGHT

Is it a violation of the Ethics Act for government attorneys to handle pro bono cases for low income citizens?

FACTS RELIED UPON BY THE COMMISSION

All attorneys who practice law in West Virginia must be members of the State Bar which, pursuant to WV Code 51-1-4a(d), is part of the Judicial branch of State government serving as an administrative agency for the Supreme Court of Appeals of West Virginia. Attorneys must also comply with the Rules of Professional Conduct promulgated by the Supreme Court.

One of those Rules requires that lawyers provide pro bono services. It states that:

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or at a reduced fee to persons of limited means or to public service or charitable groups or organization, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means. Rule 6.1 Pro bono publico service.

The official comment to this Rule states that:

Every lawyer, regardless of professional prominence or professional work load, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services...Every lawyer should support all proper efforts to meet this need for legal services.

The State Bar, in cooperation with private legal services programs in West Virginia, initiated a Pro Bono Referral Project. This program requests that lawyers volunteer their time and efforts to assist low income citizens with their civil legal problems. Presently, over seven hundred (700) West Virginia lawyers have agreed to handle at least one (1) civil legal case per year on behalf of low income citizens on a pro bono basis.

A State Bar representative inquires whether the Ethics Act would prohibit government lawyers from giving their time and effort on a free basis to pro bono cases for low income persons.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(b)(1) states in pertinent 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. 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.

West Virginia Code 6B-2-5(f) provides in pertinent part that: [n]o present or former elected or appointed public official or public employee shall, during or after his or her public employment or service, represent a client or act in a representative capacity with or without compensation on behalf of any person in a contested case, rate-making proceeding, license or permit application, regulation filing or other particular matter involving a specific party or parties which arose during his or her period of public service or employment and in which he or she personally and substantially participated in a decision-making, advisory or staff support capacity, unless the appropriate government agency, after consultation, consents to such representation. A staff attorney, accountant, or other professional employee who has represented a government agency in a particular matter shall not thereafter represent another client in the same or substantially related matter in which that client's interests are materially adverse to the interests of the governmental agency, without the consent of the governmental agency: Provided that this prohibition on representation shall not apply when the client was not directly involved in the particular matter in which such professional employee represented the government agency, but was involved only as a member of a class...

West Virginia Code 6B-2-5(g)(1) provides in pertinent part that... No full-time staff attorney or accountant shall, during his or her public service or public employment or for a period of six months after the termination of his or her public service or public employment with a governmental entity authorized to hear contested cases or promulgate regulations, appear in a representative capacity before the governmental entity in which he or she serves or served or is or was employed in the following matters:

- (A) A contested case involving an administrative sanction, action or refusal to act;
- (B) To support or oppose a proposed regulation;
- (C) To support or contest the issuance or denial of a license or permit;

- (D) A rate-making proceeding; and
- (E) To influence the expenditure of public funds.

ADVISORY OPINION

The requester inquires whether government attorneys may spend time and effort providing pro bono representation to low income individuals. As described by the requester, attorneys would provide legal services and representation to low income individuals in this State on a pro bono basis. The attorneys would provide such services without remuneration or compensation.

Pursuant to the Ethics Act, at WV Code 6B-2-5(b)(1), a public servant may not "use his or her office...for his or her own private gain or that of another person." However, this section contains a proviso which affords that 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." (Emphasis Added)

The pro bono referral project does not compensate participating attorneys and is intended to advance the goal of providing access to legal services to those who would otherwise be unable to afford representation. Therefore, such activities would not be considered a use of public office for the private gain of another as set forth above.

This determination is supported by the legislative rules implementing the provision of the Ethics Act on private gain. See 158 CSR Series 6. For example, 158 CSR 6-8 states only that public employees "may not receive private compensation for performing private work during public work hours." As proposed by the requester, the pro bono activity would not result in private compensation to the government attorneys.

Also, all lawyers must comply with the Rules of Professional Conduct, which are promulgated and adopted by the Supreme Court of Appeals. Rule 6.1 mandates that "a lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations." Consequently compliance with Rule 6.1 involves the advancement of public policy. The Commission notes that although this Rule establishes and recommends the provision of pro bono legal services, the Rule itself it is not intended to be enforced through a disciplinary process.

Therefore, the Commission finds that any private gain that may accrue to the disadvantaged person represented by a government attorney acting under a State Bar sponsored pro bono project would not be the type of private gain prohibited by WV Code 6B-2-5(b)(1).

There are, of course, some limitations to the type of pro bono cases which the government attorneys may litigate. For example, West Virginia Code 6B-2-5(f) would prohibit a public employee from representing a client, even without compensation, in a particular matter in which

the public servant personally and substantially participated in a decision-making, advisory or staff support capacity on behalf of his employing State agency. Also, a staff attorney who has represented a government agency in a particular matter can not thereafter represent another client in the same or substantially related matter if that client's interests are materially adverse to the interests of the governmental agency.

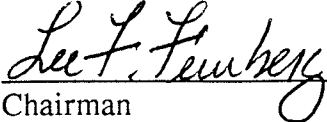
Further, West Virginia Code 6B-2-5(g)(1) provides that during the duration of the public service or for a period of six months after the termination of public service, a full-time staff attorney may not appear in a representative capacity before the governmental entity which he served. This provision is applicable only to those governmental agencies which are authorized to hear contested cases or promulgate regulations.

Although any pro bono activities engaged in by government attorneys would support the provision of legal services to the disadvantaged and would serve to advance public policy goals, these activities may never interfere with government attorneys' timely completion of all government job responsibilities. The Commission finds that insuring that pro bono activity by government lawyers does not impede prompt attention to government work is not an ethical question but rather a matter for management supervision within the agency.

Further, attorneys may be required to make up the time spent on a pro bono case if the case required attention during regular work hours. Most attorneys are professional rather than hourly employees. As such, the flexibility in their work schedule may allow the attorney to compensate the public agency for any time spent on a pro bono case during the normal work day, provided the employing agency consents to this arrangement.

The Commission notes that agencies are free to impose stricter standards on employees than those contained in the Ethics Act. Government attorneys desiring to meet their professional responsibility to provide pro bono services must first check with the appropriate agency official to ensure that the proposed activity will not be contrary to any agency policy and that the activity is undertaken in a manner that complies with agency guidelines.

De minimis use of public resources for pro bono cases would not be considered a substantial, material violation of the Ethics Act. See 158 CSR 6-4 and 6-5.2. However, approval of any specific uses of these resources must be left to the policies of the specific agency involved. Each agency is free to determine, in light of its resources, priorities, and activities, what would constitute an improper use of its public resources.


Chairman