ADVISORY OPINION NO. 2012-39

Issued On October 4, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Commissioner** who owns a business with the County Prosecuting Attorney asks whether it is permissible to vote and participate in matters relating to the Prosecuting Attorney's office.

FACTS RELIED UPON BY THE COMMISSION

The Requester is an elected County Commissioner. In 2011, he purchased an ownership interest in an existing business venture. The business refurbishes and rents out apartments and other residential dwellings.

He has two business partners; each has a one-third ownership interest. One of the business partners is the elected County Prosecuting Attorney. The other business partner is not a County official or employee.

The County Commission recently considered a budget item relating to the County Prosecuting Attorney's office. It did not involve the Prosecutor or any matter related to the Prosecutor's salary or employment. During the course of the budget discussion, a question was raised about the Commissioner's business relationship with the Prosecutor, and whether it precluded the Commissioner from participating in budget matters relating to the Prosecutor's office.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> 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-2-5U) reads in relevant part:

(1) Public officials ... may not vote on a matter:

> (A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a

financial interest. Business with which they are associated means a business of which the person or an immediate family member 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.

* * *

(II) A public official may vote:

(A) If the public official, his or her spouse, immediate family members or relatives or business with which they are associated are affected as a member of, and to no greater extent than any other member of a profession, occupation, class of persons or class of businesses. A class shall consist of not fewer than five similarly situated persons or businesses ....

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In establishing the Ethics Act, the Legislature sought to create a code of ethics to guide public officials and employees in their public employment. The expressed goal was to assist public servants in avoiding conflicts between their public service and any outside personal interests. W.Va. Code§ 6B-1-2(d).

For this reason, the Ethics Act prohibits public officials from voting or participating in matters in which they have a financial interest. W.Va. Code§ 6B-2-5U). *See also* W.Va. Code§ 6B-2-5(d)(prohibiting public servants from having a financial interest in a public contract) and W.Va. Code§ 61-10-15 (a criminal statute prohibiting County Commissioners and other county officials from having a direct or indirect financial interest in a public contract). The Ethics Act also prohibits public servants from using their public position for their own private gain or the private gain of another. W.Va. Code § 6B-2-5(b).

The Requester owns a business with the County Prosecuting Attorney, and asks whether it is permissible for him to vote and participate in matters relating to the Prosecuting Attorney's office. As a business partner, the Requester has at least an indirect financial interest in the County Prosecuting Attorney's compensation. Accordingly, the Commission hereby finds that the Requester may not vote on or participate in matters in which the County Prosecuting Attorney has a financial interest, e.g. approving the Prosecutor's expense reimbursement. [1]

[1] Since the Prosecutor is an elected official whose salary is set by statute, the Commission does not envision many situations in which this would be applicable. Some potential situations include a removal petition against the Prosecutor; or if some other disciplinary matter is pursued against the Prosecutor prompting the County Commission to consider obtaining the services of a special prosecutor or requesting the Sheriff to investigate.

Instead, the Requester must recuse himself from such matters. For recusal to be effective, the Requester must excuse himself from participating in the discussion and decision-making process by leaving the room during the period, fully disclosing his interests, and recusing himself from voting on the issue. W. Va. Code§ 6B-2-50)(3). The meeting minutes or other relevant record should also reflect the Requester's recusal.

This, however, only partially answers the Requester's question. As a County Commissioner, the Requester is responsible for setting and approving the budget for the Office of the Prosecuting Attorney, and handling certain personnel matters of the employees of the Prosecutor's office. The Requester asks if he must recuse himself from these matters as well.

Having considered the statute and its underlying rationale, the Commission hereby finds that the Requester does not have to recuse himself from such matters relating to the Prosecutor's office. In reaching this conclusion, the Commission notes that it is the usual and customary duty of the County Commission to handle the budget and personnel matters of all County departments, including the Prosecutor's office. " According to the Requester, neither the Requester nor the County Prosecuting Attorney has a prohibited financial interest with an employee in the Prosecutor's office. Additionally, since the Prosecutor is an elected official whose salary is set by statute, the County Commission does not have discretion in the setting of the Prosecutor's compensation. Therefore, in the absence of a prohibited financial interest, the Requester is not required to recuse himself from the personnel and/or operational budget matters relating to the Prosecutor's office.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.* and W.Va. Code§ 61-10-15, 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 public agencies unless and until it is amended or revoked, or the law is changed.

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