ADVISORY OPINION NO. 2012-17

Issued On May 3, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Presiding Officer** of a house of the West Virginia Legislature asks whether he may be retained to provide legal services to an Association which is actively engaged in lobbying on behalf of its members, and employs a lobbyist, when the legal services he will provide are unrelated to the Association's lobbying activities.

FACTS RELIED UPON BY THE COMMISSION

The Requester is the Presiding Officer of a house of the West Virginia Legislature. He is also a licensed attorney. He seeks to enter into a private contract with an Association whose membership consists of public employees in a profession. The members pay membership dues through payroll deductions.

In addition to providing professional development and networking opportunities to its members, the Association also engages in lobbying. It retains a registered lobbyist to promote its legislative agenda, including laws affecting the profession, and laws which affect the salaries or benefits of the Association's members.

The Requester would be hired as an independent contractor. Upon information and belief, he would maintain his office and headquarters in his Legislative District and would continue his private practice, albeit on a more limited basis. He will receive no fringe benefits such as health insurance, paid vacation, or any other employee benefits. Instead, he will be an independent contractor, not an employee.

He would be paid a flat-rate fee to provide the following legal services:

(1) Advise which member defense cases are appropriate for funding consistent with the Association's legal service program;

(2) Contact outside counsel to be retained by the Client and, where necessary, review their work and billing;

(3) In certain cases to be determined by the Client and the Requester, advise and determine legal strategy with such retained outside counsel;

(4) Prepare and sign briefs in member defense cases;

(5) Provide training in legal research and strategy;

(6) Modeling and reviewing hearing and written arguments prepared by the Association's staff; and

(7) Advising and representing the Association and its Director and their local Governing Bodies regarding:

a. Corporate legal matters, reporting requirements, tax, zoning, staff negotiations and contract maintenance,
b. Personnel matters such as policies, employment, discipline, grievances and arbitration, and
c. The laws governing political action committees and election law.

The contract also contains a clause which in relevant part reads:

> Provided that Consultant shall not lobby for said Client and hereby reserves the right to remove himself from any matter and not participate in any matter that conflicts with his duties as a Member of the West Virginia Legislature.

The Requester asks the Commission to recognize:

> [T]hat as a citizen legislator, [the Requester] obviously has the right and need to hold additional employment, as do nearly all of other 133 legislative members. Finally, we would ask that you give consideration that throughout the legislature, various members' occupations constantly overlap into issues being handled before the body. It is an issue consistent with being a citizen legislature. For these reasons, the legislative body has Joint Rule 49 to govern any conflict of interest related to voting.

West Virginia Senate Rule 43 is entitled "Excused from voting". It reads:

> Every member within the Senate Chamber, when a question is put, shall vote unless he or she is immediately and particularly interested therein, meaning an interest that affects the member directly and not as one of a class, or the Senate excuses him or her. All motions to excuse a member from voting must be made by the member requesting to be excused before the Senate divides, or before the call of the yeas and nays is commenced, and it shall be decided without debate, except that the member making the motion to be excused from voting may briefly state the reason why it ought to be adopted.

West Virginia House of Delegates Rule 49, "When Members Not to Vote", reads:

> When a question is put, any member having a direct personal or pecuniary interest therein should announce this fact and request to be excused from voting. The disqualifying interest must be such as affects the member directly and not as one of a class.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-1-2, "Legislative findings, purpose, declaration and intent" reads:

> (c) The Legislature finds that the state government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official or public employee from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official or public employee, such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

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

> (b) Use of public office for private gain. -- (1) 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-2-5(e), *Confidential information,* 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.

W. Va. Code§ 6B-2-5 reads:

> (i) Members of the Legislature required to vote. -- Members of the Legislature who have asked to be excused from voting or who have made inquiry as to whether they should be excused from voting on a particular matter and who are required by the Presiding Officer of the House of Delegates or Senate of West Virginia to vote under the rules of the particular house shall not be guilty of any violation of ethics under the provisions of this section for a vote so cast.

W. Va. Code§ 6B-3-1 reads in relevant part:

> (8)(A) "Lobbyist" means any individual employed by a lobbying firm or who is otherwise employed or contracts for economic consideration, other than reimbursement for reasonable travel expenses, to communicate directly or

> through his or her agents with any elective state official, agency official or legislative official for the purpose of promoting, advocating, opposing or otherwise attempting to influence... legislation....

ADVISORY OPINION

Although the West Virginia Constitution prohibits a Member of the Legislature from being employed by the State of West Virginia, no provision in the Ethics Act prohibits a Member of the Legislature, a part-time elected official, from accepting any particular employment position. While this Commission recognizes that it does not have unfettered authority to dictate the affairs of the Legislature, the Commission is empowered to interpret the Ethics Act and would be remiss in performing its statutory duty if it did not address inescapable conflicts. The Ethics Commission believes the guidance in this opinion is within its statutory authority.

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.

More recently, in Advisory Opinion 2008-03, a non-precedential opinion, the Commission ruled that a candidate for the West Virginia Legislature, if elected, may **not** continue to operate a business which provided lobbying services finding that such dual service presented an inescapable conflict. *See also* Advisory Opinion 2006-06. (Member of Legislature should not use her position to influence the appropriation of public funds to a non-profit by which she is employed.)

The Ethics Commission is mindful of the Legislative finding that certain conflicts of interest are inherent in part-time service by elected officials in state government. Recognizing that the usual and customary duties of Members of the Legislature include sponsoring legislation, particularly legislation which is sought by constituents, the Commission has issued opinions authorizing certain outside employment for various Members of the Legislature. *See generally* Advisory Opinions 93-02, 96-55, 99-23, 2001-20, 2003-14, and 2006-06. In these opinions, the Commission cautioned the Members to follow the relevant legislative voting rules, and, in certain instances, recommended public disclosure of the conflict of interest. This opinion does not adversely impact or overrule any of the foregoing opinions.

The Commission is equally mindful, however, that the chief obligation of a Member of the Legislature is to represent the interests of the people in her or his district.

Indeed, the Presiding Officer of a house of the West Virginia Legislature has an even higher

duty to all citizens of the State, and to the efficient operation of the house. The duties of the Presiding Officer are legion and include, without limitation, presiding over the house during its proceedings, appointing standing committees, designating committee chairpersons, referring bills to committees, and certifying (with the Clerk) the official record or journal of the house. Additionally, the Presiding Officers, as chairs of their respective Rules Committee, wield more power than chairs of most other legislative committees. By virtue of his position as Presiding Officer, the Requester has far more power than all but one other Member of the Legislature. As a consequence of his additional duties and responsibilities, he earns more compensation than the other Members of the Legislature. *See* W. Va. Code§ 4-2A-4.

Thus, the situation presented here is different from the previously cited opinions because the Requester is not just a part-time Member of the Legislature, but a Presiding Officer thereof. As a result, he is not similarly situated to other Members of the Legislature, and must, therefore, be held to a higher standard to preserve the integrity of the legislative process. Neither strict compliance with the voting rules, nor advance disclosure of conflicts of interest minimize the conflict that arises from the Requester's situation, given the position that he holds.

The Requester seeks to serve as Legal Counsel to an Association which actively engages in lobbying on behalf of its members and has a registered lobbyist. Although the Requester has no ownership interest in the Association nor do his job duties under the proposed contract include advising the Association on legislative matters or its lobbying strategy, concerns remain. For example, the proposed contract requires the Requester to advise and represent the Association and its Director and their local Governing Bodies regarding the laws governing political action committees and election law. The Commission finds that this position is similar to a General Counsel position. *See* Advisory Opinion 2008-08 (City Attorney, whose responsibilities cover every conceivable legal matter in which the City is interested, functions more as general counsel to the governing body.)

As a legislator, the Requester has access to confidential information not otherwise available to non-legislators, such as the positions taken or proposed in a closed party caucus. Permitting a Presiding Officer to accept the equivalent of a General Counsel position with the Association may have a chilling effect on free and full discussion in legislative sessions.

Additionally, the public may perceive that the Association has 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.

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) Admittedly, at times this provision is a challenge to interpret, particularly when attempting to balance the right of a part-time public official to hold gainful employment while ensuring that neither the official nor private employer gains an

unfair advantage. In most cases, part-time legislators are able to separate their public interests from their private interests.

While, the private gain prohibition provides an exception for "the performance of usual and customary duties associated with the office ... or [performance of] constituent services", the Ethics Act expressly limits the exception to those duties performed **without compensation.** Here, the Commission finds that in applying this provision to the facts presented, it is impracticable, if not impossible, to craft limitations that clearly and fairly demarcate his public job duties, the interests of the Association, and the interests of his constituents. Hence, an "inescapable conflict".

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.

The Commission commends the Requester for seeking this opinion on such a complicated issue. The Commission is cognizant of its duty to balance the competing needs to maintain the integrity of the legislative process and the employment rights of part-time public servants. Further, the Commission does not want to discourage or deter qualified and committed individuals from seeking public office by imposing unduly burdensome requirements.

Thus, this opinion is limited to the Presiding Officers of the houses of the West Virginia Legislature.

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.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman