

## **Advisory Opinion 2022-14**

**Issued on June 2, 2022, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

The **General Counsel** for a State Board asks whether she may assist the Board in selecting a lawyer or law firm to provide outside legal counsel services when the Requester's spouse is a member in a law firm that may apply to provide outside legal services.

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

The Requester is an employee of the State Board. The State Board is governed by a Board of Trustees.

The Requester's title is General Counsel, and the Requester is the only in-house attorney at the State Board. The Requester intends to retire at the end of the fiscal year. The State Board does not anticipate hiring an employee to replace the Requester. Instead, the State Board plans on contracting with a law firm (or lawyer) to provide outside legal counsel services.

In order to seek these services, the State Board has sent out a Request for Information ("RFI" or "bid") to approximately 17 law firms. The RFI has been placed on the State Board's website and sent to the West Virginia Bar Association for distribution.

The Board of Trustees Legal & Legislative Committee ("Committee"), which consists of Board of Trustees members, will direct the RFI process with assistance from the State Board's Executive Director, Chief Financial Officer, and the Requester ("Executive Staff"). The Executive Staff will support and provide input to the Committee throughout all stages of the RFI process. The Committee will identify a firm or firms to retain from the responses received from the RFI, and the Committee, under delegated authority from the Board of Trustees, will make the final decisions as to the firm or firms to be hired.

The Committee will review and score all responses. If the Committee receives a substantial number of responses to the RFI, the Committee may direct its Executive Staff to initially screen the responses based upon criteria determined by the Committee. In this scenario, the Committee would still receive all responses. Distribution of the RFI, physical receipt of responses, maintenance of records, and other administrative work to be done on the RFI will be performed by the State Board's administrative assistants, not its Executive Staff.

The Requester's spouse is a member in and owner of a law firm which was selected to receive the RFI. The firm has over 100 attorneys and offices in several states. The Requester's spouse holds no other title or position in the firm other than Member. His ownership interest is less than five percent. The Requester's spouse will also be retiring and intends to withdraw as an owner at the end of 2022. After retirement, he will work for the firm as a self-employed, independent contractor and will begin to receive a payout from the law firm based upon his equity capital account accruals that he paid into over time. Her spouse's payout will begin in 2023 and continue for two years. The firm also has discretion to extend the length of the payout.

The Requester states that if her spouse's firm is awarded the contract, her spouse can arrange with the firm that over the last months of his employment, none of his ownership earnings would be received from fees paid by the State Board to his firm. Finally, the Requester states that her spouse would not perform any services for the State Board if his firm is awarded the contract because his practice area(s) does not coincide with the legal services sought by the State Board through the RFI.

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

W. Va. Code § 6B-2-5(b) states, 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 . . . .

W. Va. Code § 6B-2-5(d)(1) states, in relevant part:

[N]o elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control .... Provided, however, That nothing herein shall prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

W. Va. Code R. § 158-8-4 states, in relevant part:

Public officials or public employees or members of their immediate family are considered to be "associated" with a business if they or their immediate family member are a director, officer or holder of stock which

constitutes five percent or more of the total outstanding stocks of any class.

W. Va. Code § 6B-2-5(d)(3) states, in relevant part:

If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. Public officials shall also comply with the voting rules prescribed in subsection (j) of this section.

### **Advisory Opinion**

#### *Prohibited interest in public contract*

Pursuant to the Ethics Act, at W. Va. Code § 6B-2-5(d)(1), a public official or public employee may not have more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. This prohibition against private interests in public contracts extends to public servants' spouses and businesses in which either spouse has an ownership interest of more than five percent, or with which is otherwise "associated." In other words, it violates the Ethics Act for public servants or their spouses to have an ownership interest of more than five percent in a business which is a party to a public contract over which the public servant may have the authority to award or control, even if the public servant does not participate in awarding the contract.

The Requester has the requisite degree of authority or control over the State Board's contracts through her role as General Counsel.<sup>1</sup> The Commission must now determine whether a financial interest exists that would prohibit the State Agency from awarding the contract to the Requester's spouse's law firm. If the contract is permissible, then the Commission must determine whether the Requester may be involved in selecting a law firm to provide outside legal counsel services to the State Board if her spouse's law firm submits a bid.

Neither the Requester nor her spouse are parties to the contract or has a direct financial interest in the award of the contract. Any payments made by the State Board under the contract would go directly to the law firm (or person)<sup>2</sup> awarded the contract. Therefore, because the spouse's law firm could be awarded the contract, an analysis of whether he is "associated" with the business/law firm for purposes of the public contract restrictions

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<sup>1</sup> [Advisory Opinion 2008-08](#) (full-time city attorney has inherent authority over municipal contracting equivalent to a general counsel or prosecuting attorney).

<sup>2</sup> It is the spouse's law firm and not him who may submit a proposal to provide outside legal counsel services.

is necessary as the financial interests of a spouse are imputed to a public servant under the public contract restrictions.

In order to be “associated” with a business, the Requester or her spouse would need to be a “director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.” W. Va. Code R. § 158-8-4. The Requester’s spouse is a member of the law firm: he is not a director or officer of the law firm. The Requester’s spouse’s ownership interest is less than five percent in the law firm. Therefore, neither the Requester nor her spouse is “associated” with the firm for purposes of prohibiting the State Board from awarding the contract to that law firm. This finding is consistent with prior holdings by the Ethics Commission. Advisory Opinion 1990-77 (municipality may contract with a bank where the mayor owned less than ten percent of the outstanding stock shares of the bank and did not have a financial interest in the profits or benefits of the municipality’s contract with the bank); [Advisory Opinion 1997-27](#) (school board may contract with the Director of Technology’s spouse’s company to provide computer installation services because the spouse’s ownership interest in the company was less than ten percent); [Advisory Opinion 2001-07](#) (county commission project coordinator may oversee a county project which involves an engineering firm that employs her spouse where the spouse owns less than ten percent of the engineering firm).<sup>3</sup>

**Therefore, the State Board may contract with a law firm in which its General Counsel’s spouse’s ownership interest is less than five percent.**

*Participation in making the contract*

W. Va. Code § 6B-2-5(d)(3) states:

If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government

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<sup>3</sup> Prior to 2008, W. Va. Code 6B-2-5(d)(2) stated that a limited financial interest included an interest that did not exceed “ten percent of the partnership or the outstanding shares of a corporation.” In 2008, the West Virginia Legislature changed W. Va. Code 6B-2-5(d)(2) to read as follows:

In the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having a prohibited financial interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is awarded a public contract. A limited interest for the purposes of this subsection is:

- (A) An interest which does not exceed one thousand dollars in the profits or benefits of the public contract or contracts in a calendar year;
- (B) An interest as a creditor of a public employee or official who exercises control over the contract, or a member of his or her immediate family, if the amount is less than five thousand dollars.

decision affecting his or her financial or limited financial interest. Public officials shall also comply with the voting rules prescribed in subsection (j) of this section.

This subdivision was enacted by the West Virginia Legislature in 2008. Its application to the instant situation is a matter of first impression for the Commission.<sup>4</sup>

The restriction does not define what constitutes an “interest” for purposes of requiring a public official or public employee to remove him or herself from the contract award process. The Commission finds, based upon the totality of the circumstances, that the Requester has an interest requiring her removal from the contract award process. The law firm has a legal obligation to pay both its employees and members. Even if a member who has an ownership interest in a law firm does not derive direct benefits from the contract, the member/owner still has a financial interest in the financial stability of the law firm. Moreover, the spouse, as an owner, has a financial interest arising from the law firm’s legal obligation to compensate him under the terms of the payout agreement. The law firm has an ongoing financial relationship with an outgoing owner under a payout agreement until the law firm pays the money owed to the outgoing owner in full. This financial obligation, hence, continues even after a member withdraws as an ownership member.<sup>5</sup>

**The Ethics Commission holds that the Requester may not participate in selecting a law firm to provide legal services to her State Board employer if her spouse’s law firm submits a bid because she has an interest in the contract for purposes of the restrictions in W. Va. Code § 6B-2-5(d)(3).**

The Requester has offered that her spouse may arrange for his law firm to exclude from his ownership earnings any money paid by the State Board to his law firm. The Requester offers this alternative because she wants to assist the State Board in the transition process triggered by her retirement. Her intent is to help her State Board transition not to steer work to her spouse’s law firm. Nevertheless, this scenario does not change the Ethics Commission’s holding.

**Therefore, the Ethics Commission holds that the Requester would have a financial interest in the State Board’s contract for outside legal services should**

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<sup>4</sup> In Advisory Opinion 2001-07 cited above, the Commission found that “[n]o other provision of the Ethics Act prohibits the Project Coordinator from managing a project merely because it involves her husband’s employer.” The enactment of W. Va. Code § 6B-2-5(d)(3)(2008) diminishes the relevance of the holding in Advisory Opinion 2001-07. The question addressed in 2001-07 is, nevertheless, distinguishable from the present case because the public servant’s spouse did not have an ownership interest in the business.

<sup>5</sup> The Act also states that a financial interest in a public contract exists if a public employee or public official or his or her spouse is a creditor of a business awarded a public contract. W. Va. Code § 6B-2-5(d)(2) and W. Va. Code R. § 158-8-3.1.b. The Requester’s spouse will receive a payout from the law firm based upon his equity capital account accruals: this fact appears to make the creditor restrictions applicable to the situation presented.

**her spouse's law firm submit a bid. The contract between the State Board and the Requester's spouse's law firm would not be prohibited, but the Requester must remove herself from participating in the RFI process if her spouse's law firm submits a bid.**

*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 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 public servants and other persons unless and until it is amended or revoked or the law is changed.*

/s/ Terry L. Walker  
Terry L. Walker, Acting Chairperson  
West Virginia Ethics Commission