ADVISORY OPINION NO. 2011-08

Issued On June 2, 2011 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Part-Time Prosecuting Attorney** asks whether it is permissible to use public resources, including office space, staff, and equipment, without reimbursement to the county, in furtherance of his private law practice?

FACTS RELIED UPON BY THE COMMISSION

Shortly after the passage of the Ethics Act in 1989, the Commission held that part-time elected prosecuting attorneys may use their public office and resources in furtherance of their private law practices. *See* Advisory Opinion 89-15. At the time, there were approximately 41 part-time elected county prosecuting attorneys throughout the State, and counties were struggling to find attorneys willing to give up their private law practice for full-time public employment. [1]

Since then, the Legislature and county commissions throughout the State have moved towards having full-time elected county prosecutors. The result has been a decline in the use of part-time prosecutors. According to the Requester, only seven (7) counties now have an elected part-time prosecutor.

The Requester is an elected part-time prosecutor. In addition to his public duties, he maintains a private law practice which he operates out of his courthouse office. According to the Requester, the Circuit Court Judge requested he move his private office to the Courthouse.

Although he uses the public office space, the Requester pays privately for staff and public resources used on behalf of his private law practice. Specifically, the Requester pays for an extra phone line, internet service, and his cell phone, even though he also uses it for his prosecutorial duties. Also, he pays his legal secretary a monthly salary, in addition to the salary she receives from the County Commission as a public employee of the prosecutor's office. The Requester states that he tracks all of his private office expenses.

[1] The Commission re-affirmed this holding in Advisory Opinions 89-27 and 91-61.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> (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. 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. . .
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> (3) The Legislature, in enacting this subsection, recognizes that there may be certain public officials or public employees who bring to their respective offices or employment their own unique personal prestige which is based upon their intelligence, education, experience, skills and abilities, or other personal gifts or traits. In many cases, these persons bring a personal prestige to their office or employment which inures to the benefit of the state and its citizens. . . . While the office or employment held or to be held by those persons may have its own inherent prestige, it would be unfair to those individuals and against the best interests of the citizens of this state to deny those persons the right to hold public office or to be publicly employed on the grounds that they would, in addition to the emoluments of their office or employment, be in a position to benefit financially from the personal prestige which otherwise inheres to them. . .

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The permissibility of part-time prosecutors conducting their private law practices out of their public office is not a matter of first impression for the Commission. Indeed, the Commission has addressed the matter on three separate occasions, and held on each occasion that it was permissible. *See* Advisory Opinions 89-15, 89-27 and 91-61. Typically, these prior Advisory Opinions would be dispositive of the Requester's question. In this matter, however, the Commission is unable to simply rely upon its prior holdings.

Given the length of time that has passed since this issue was first addressed, the decreasing use of part-time prosecuting attorneys, and the growing citizen concerns and inquiries about the practice; the Commission finds that the issue warrants re-examination.

A. Prior Advisory Opinions

A few months after the passage of the Ethics Act in 1989, the Commission was asked to opine whether part-time prosecutors could continue to maintain private law practices out of their public office. At the time, part-time county prosecutors were the norm in the state, and engagement in private law practice was a longstanding and generally accepted practice.

Given the general acceptance and the potential disruption to counties should prosecutors be ordered to immediately cease and desist, the Commission held:

> [T]he Commission believes it appropriate to grant an exemption to part-time Prosecuting Attorneys to remain in effect until this Commission has had time to consider and establish by Rule the categories of exempt public officials and public employees. Additionally, the Commission will determine by Legislative Rule which, if any, general private practice expenses the part-time prosecuting attorneys or assistant prosecuting attorneys must reimburse to the counties or pay themselves on a pro rata basis.

Advisory Opinion 89-15.

In reaching this conclusion, the Commission focused on W.Va. Code § 6B-2-5(b), which allows exemptions for certain categories of public officials who "bring to their respective public offices unique personal prestige which inures to the benefit of the State." *See* W.Va. Code § 6B-2-5(b)(3).

In a companion Advisory Opinion issued the same day, the Commission was asked more narrowly whether part-time prosecutors could continue to use their courthouse office for their private law practice. In Advisory Opinion 89-27, the Commission noted the following:

> Many prosecutors and assistants have offices in the County Courthouse. There are many situations where the county owns part of the furniture and the prosecutors own part. In addition, many of the secretaries employed by the prosecutor are paid in part by the county and by the private practice.
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> Many prosecutors have tried to maintain separate offices but due to the constant calls, interruptions, problems, and concerns raised that must be dealt with this is completely unworkable.

The Commission re-affirmed its holding in Advisory Opinion 89-15, and allowed part-time prosecuting attorneys to operate their private law offices out of their public office without reimbursement to the County Commission.

The Commission re-visited this issue two years later in Advisory Opinion 91-61, and again re-affirmed its initial conclusion and holding.

> The Commission rules that the unreimbursed private use of public office space by part-time prosecuting attorneys, which is intended and legitimately extended as part of the emoluments of the office, does not constitute either private gain or a gift for purposes of the Ethics Act.
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> The Commission's ruling would apply as well to office furniture, equipment and office personnel, which are necessary to and provided for official use of the prosecutor, when not otherwise needed for official business. It would, of course, be inappropriate to obtain and supply at official expense any furniture, equipment or office personnel required only to accommodate the requirements of the prosecutor's private practice.

In so concluding, the Commission noted that:

> It is generally conceded that this practice is tailored to accommodate the needs of smaller counties to offer inducement to lawyers to accept the lower salaries paid for part-time prosecutors. This use of public office space during time when it would otherwise not be needed for official business is seen as a way to reduce the cost of county government. It seems also designed to allow a more efficient use of the prosecutor's time.

Advisory Opinion 91-61.

Since 1991, the Commission has not opined about the permissibility or boundaries of its initial ruling. [2] Additionally, the Commission has not established any Legislative Rule or guideline with respect to the application of the Ethics Act to a part-time prosecutor's use of public office space and resources.

B. Use of Public Office for Private Gain

Having re-examined our historical holdings, the Commission finds that portions of our prior Advisory Opinions need to be revised and/or expressly overruled.

In particular, the Commission hereby finds that the use of public equipment and resources, including staff, are not lawful emoluments of the office of prosecuting attorney. Rather, a part-time prosecutor's use of public resources in his/her private capacity constitutes a prohibited private gain to the prosecutor. W.Va. Code § 6B-2-

[2] In Advisory Opinion 92-03, the Commission was asked whether a part-time prosecutor could rent his own personal office equipment to the county for use in his public office. Although the Commission referenced and re-affirmed Advisory Opinions 89-15, 89-27 and 91-61, it found that the proposed equipment rental violated both the private gain (W.Va. Code § 6B-2-5(b)) and interests in public contract (W.Va. Code § 6B-2-5(d)(1)) provisions of the Ethics Act.

5(b). To the extent Advisory Opinions 89-15, 89-27 and 91-61 hold otherwise, those holdings are expressly overruled.

In making this finding, the Commission notes that the rationale for allowing a prosecutor to use public resources in his/her private capacity as an inducement for public office and/or a benefit to the State is no longer viable. Advancements in technology allowing access away from the office, the availability of low-cost equipment and legal resources, the Legislative intent to eliminate or minimize the use of part-time prosecuting attorneys, the increase in the number of lawyers seeking the position, and the increase in the rate of pay for an elected prosecutor reflect a significant change from the situation presented when the Commission first considered this issue. [3]

The Commission recognizes that some smaller counties may still need a part-time prosecuting attorney. Additionally, in the case of the Requester, some counties may require the part-time prosecuting attorney to conduct their private practice out of the courthouse.

However, the Commission is not aware of any statute mandating this dual-use of public office space. Rather, the general Legislative intent has been a move away from part-time prosecuting attorneys. *See* W.Va. Code §§ 7-7-4(e)(10) and 7-7-4A. Indeed, allowing a part-time prosecutor to operate a private practice out of his/her public office gives an appearance of a mis-use of public funds and preferential treatment by the County Commission.

While the Commission believes that part-time prosecuting attorneys should operate their private law practice in a different location outside of their public office, it is mindful that requiring an immediate cessation is impractical and unreasonable in the middle of a prosecuting attorney's term. Therefore, in light of the Legislative intent to cease the use of part-time prosecuting attorneys, the Commission strongly recommends that, when the new term of office begins, County Commissions and part-time prosecuting attorneys cease the use of public office space for the prosecuting attorney's private practice.

Although the continued use of public office space in furtherance of private practice is discouraged, the Commission is not expressly prohibiting its use by a current part-time prosecuting attorney, provided that, sufficient measures are in place to separate the public office from the private practice. In that regard, the Requester's reimbursement policy provides a good framework for compliance.

Specifically, the Commission recommends that the prosecuting attorney, at his/her own cost, establish separate phone lines, fax number, and business cards for his/her private practice. Additionally, as the Requester herein has done, the prosecuting attorney should keep an accounting of all private practice expenses and either reimburse the County Commission or pay vendors directly for the service.

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[3] In addition, the Commission has received citizen inquires about the legality of prosecutors operating their private offices out of the county courthouse.

Further, with respect to staff, those individuals who serve and assist prosecutors in their public duties may assist and work for the prosecutor in their private capacity, provided that, it is voluntary, their public employment is not conditioned on the Prosecutor's private practice work, and they are paid privately by the Prosecuting Attorney for their private work.

Accordingly, in light of the foregoing, the Commission hereby holds that part-time prosecuting attorneys may not use public resources, including specifically, staff, equipment, and phone lines, without reimbursement to the County Commission and/or direct payment to the vendor for their *pro rata* private use.

C. Office Space

With respect to the office space itself, the Commission is not requiring reimbursement to the County Commission so long as the space is used as part of his/her public duties and not solely for the use and benefit of the private law practice. Given the dual-use nature of the office, it would be difficult to attribute a percentage for the prosecutor's use in furtherance of his/her private practice. However, as the Commission expressed in Advisory Opinion 91-61, "[i]t would, of course, be inappropriate to obtain and supply at official [public] expense any furniture, equipment or office personnel required only to accommodate the requirements of the prosecutor's private practice."

D. Assistant Prosecutors

Upon review of our prior opinions, some could be interpreted to allow part-time ***assistant*** prosecuting attorneys to operate a private law practice out of the prosecutor's office. The Commission wishes to make clear that the use of public office space and resources, including staff, are, for purposes of the Ethics Act, not lawful emoluments of the position of an assistant prosecuting attorney. Rather, an assistant prosecutor's use of public resources and staff in his/her private capacity constitutes a prohibited private gain to the assistant prosecutor (W.Va. Code § 6B-2-5(b)) as well as a possible violation of W.Va. Code § 6B-2-5(o)("a public official or public employee may not solicit private business from a subordinate public official or public employee whom her or she has the authority to direct, supervise or control.").

Accordingly, to the extent that any prior advisory opinion implies that a part-time assistant prosecuting attorney may use public offices space and resources in furtherance of his/her private practice, that aspect of the prior advisory opinion is expressly overruled. The Commission hereby holds that assistant prosecuting attorneys (part-time and full-time) are expressly prohibited from using public office space and resources, including staff, in furtherance of their private law practice and/or private gain. W.Va. Code § 6B-2-5(b).

CONCLUSION

This advisory opinion, as well as the prior opinions discussed herein, only apply to ***part-time,*** not full-time, elected prosecuting attorneys.

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 only by part-time elected prosecuting attorneys unless and until it is amended or revoked, or the law is changed.

R. Kemp Morton, Chairperson