ADVISORY OPINION NO. 2011-01

Issued On February 3, 2011 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Council Member** requests guidance on several issues relating to two businesses she owns, both of which interact regularly with County officials.

(1) May a County Council Member who is also a Certified Personal Property Appraiser appraise estates that may later be probated in the County in which she serves as a County Council Member? If so, is she required to recuse herself from any probate matters coming before the County Council when she has appraised the estate that is being probated?

(2) May a County Council Member who is also a Certified Personal Property Appraiser appear on a list of appraisers that the Office of the Fiduciary Supervisor, an arm of the County Council, prepares and provides to people interested in obtaining such expert assistance for estate matters that may later be probated in the County in which she serves as a County Council Member?

(3) If a County Council Member appraised an estate, the value of which and/or her compensation therefor, is later challenged, may she appear in any capacity, including being called as a witness to the value of the estate and/or the amount of her requested compensation? Indeed, may she ever appear in any estate proceeding before the County Council, its Fiduciary Supervisor, or any County Council appointed Fiduciary Commissioner?

(4) May a County Council Member who owns a nursing home accept the placement of "protected persons" in her facility by a Sheriff who is their court appointed conservator?

FACTS RELIED UPON BY THE COMMISSION

In West Virginia, as in other states, there are specific statutory provisions that govern the administration of a decedent's estate. In the Requester's county, a Fiduciary Supervisor oversees parts of the probate process pursuant to W. Va. Code§ 44-3A-1 *et seq.* The County Council or County Clerk appoints an administrator to serve as the fiduciary of the estate. W. Va. Code§ 41-5-1 or§ 44-1-4. Under certain circumstances, the County Council may appoint the Sheriff to administer an estate. W. Va. Code§ 44-1-11. The Sheriff's fee is based on the value of the estate. kl

An administrator may be a personal representative. W. Va. Code§ 42-1-1(29). A personal representative shall appraise the deceased's real estate and personal probate

property. W. Va. Code§ 44-1-14(a). A personal representative, including the Sheriff in his capacity as appointed estate administrator, may hire an expert to appraise the deceased's property. W. Va. Code§ 44-1-14(i). The administrator or personal representative files a final settlement report of the estate with the County Clerk. W. Va. Code§ 44-4-14a. The County Clerk sends the final report to the County Council for approval. W. Va. Code § 44-4-18. "An expert so retained [to appraise the estate] shall be compensated a reasonable sum by the personal representative from the assets of the estate. The compensation and its reasonableness is subject to review and approval by the county [council], upon recommendation of the fiduciary supervisor." W. Va. Code § 44-1-14(a).

The Requester is a newly elected member of an elected County Council which has the same duties and responsibilities as a County Commission. The member and her husband jointly own a business related to the administration and probate of estates. The business assists clients in the filing of probate forms and in other ways associated with probating an estate. Like County Commissions, the County Council has jurisdiction over estate related disputes. See *generally* W. Va. Code§ 7-1-3. Additionally, the Office of the Fiduciary Supervisor, an arm of the County Council, prepares a list of local businesses willing and qualified to appraise property and assist with probate matters; it provides the entire list to people interested in obtaining such expert assistance. The Requester's name is on the list.

When a personal representative retains the Requester as an expert appraiser-either because of selection from the Fiduciary Supervisor's list, or independent thereof-the Requester's role relative to the probate of the estate is limited to assisting and advising the personal representative in appraising any asset or property. She does not appear before the County Council, County Clerk, Fiduciary Commissioner or Fiduciary Supervisor in any probate proceeding-contested or uncontested-in the traditional sense of representing a party.

In the event that there is a challenge to the Requester's appraised value of an estate or to the amount of compensation the Requester seeks, then the Requester is involved in the proceedings to resolve such disputes. While she does not appear in a representative capacity, she does appear as a witness to explain or justify either her appraisement or amount of requested compensation, or both, and to answer any questions put to her by the County Council, Fiduciary Commissioner or Fiduciary Supervisor in any such probate proceeding.

The Requester also owns a nursing home which accepts "protected persons" as residents. A "protected person" is "[a]ny person determined to be 'mentally incompetent', 'intellectually disabled' or 'mentally handicapped' ...." W. Va. Code §44A-1-2. The County Council has no jurisdiction or involvement in such matters. At times, however, a court appoints the Sheriff as conservator over the interests of a protected person. W. Va. Code§ 44A-1-8. The Sheriff is authorized to select which nursing home to place a person under his care, pursuant to W. Va. Code§ 44A-3-1(a), although the Sheriff makes all payments through private, not public, funds.

The Sheriff is an elected County official. His department's budget, as with all County officials, must be approved by the County Council. W. Va. Code§ 7-7-7.

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.

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

> (1) In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no elected ... public official ... 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 ... may have direct authority to enter into, or over which he or she may have control....

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

> Except as otherwise provided in section three, four or five, article two, chapter eight-a of this code: (1) No elected ... public official ... shall, during his or her public service ... with a governmental entity authorized to hear contested cases or promulgate or propose rules, appear in a representative capacity before the governmental entity in which he or she serves ... in the following matters:
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> (A) A contested case involving an administrative sanction, action or refusal to act;
> (B) To support or oppose a proposed rule;
> (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.
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> (2) As used in this subsection, "represent" includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person: *Provided,* That nothing contained in this subsection shall prohibit, during any period, a former public official or employee from being retained by or employed to represent, assist or act in a representative capacity on behalf of the public agency by which he or she was employed or in which he or she served....

W. Va. Code § 6B-2-5U) reads in relevant part

> (1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, may not vote on a matter:
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> (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.
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> (3) For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue.

W. Va. Code§ 61-10-15 reads, in relevant part:

> (a) It is unlawful for any member of a county commission... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member... he or she may have any voice, influence or control....

ADVISORY OPINION

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.

Both the Ethics Act, W. Va. Code§ 6B-2-5(d)(1), and a separate criminal misdemeanor statute, W. Va. Code§ 61-10-15, prohibit county officials from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public servants away from inherently questionable situations. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

Question #1

The Requester must exercise caution in performing the duties of her appraisal business

so as to avoid any appearance of impropriety to avoid violating W. Va. Code § 6B-2-5(b). In those instances when the Requester has appraised an estate, then she should recuse herself from any matters coming before the County Council involving the probate of the subject estate. The Ethics Commission recommends full recusal in all such situations. Full recusal requires, when the Council addresses an agenda item requiring it to consider probating estates which includes one or more the Requester has appraised, that the Requester disclose the fact that she has appraised one or more of the estates now pending before the Council, and then physically remove herself from the room during the discussion, deliberation, and disposition of all such estates that she has appraised. *See* W. Va. Code§ 6B-2-5U).

Under certain circumstances, the County Council may appoint the Sheriff to administer an estate. W. Va. Code§ 44-1-11. The Sheriff's fee is based on the value of the estate. kl The Sheriff, as estate administrator, may retain the services of an expert to appraise the deceased's property. W. Va. Code§ 44-1-14(i).

Since the County Council is the ultimate decision-maker over the Sheriff's budget, the Commission must determine whether the Requester may appraise any estates over which the Sheriff has been appointed by the County Council as the administrator. The Ethics Act prohibits an interest in a contract over which the Requester "may have direct authority to enter into, or over which he or she may have control." W. Va. Code§ 6B-2-5(d). Here, the County Council, although it exercises general control over the Sheriff's budget and appoints him as administrator of estates, does not directly control his selection of an appraiser of an estate. As a result, the Ethics Act's prohibition against having an interest in a public contract does not preclude the Requester from serving the Sheriff in that capacity.

The provisions of W.Va. Code§ 61-10-15, a criminal misdemeanor statute, however, are stricter, and prohibit the Requester from being pecuniarily interested, directly or indirectly, in any contract over which she may have any voice, influence or control. Any person who violates this provision is guilty of a misdemeanor and may be removed from public office. *See generally* Alexander v. Ritchie, 53 S.E.2d 735 (W. Va. 1949). The Ethics Commission has held in the past that an Elected County Official's power to appoint constitutes " voice, influence or control" over public contracts administered by the Board or Authority over which the County Official has appointment power. *See* Advisory Opinion 2004-10a and Advisory Opinion 2004-1Ob. The situation presented here is unique, however, since the appointment power is over a co-equal elected county official.

Nonetheless, since she is a member of the body that both controls the Sheriff's budget and appoints the Sheriff as administrator, the Commission finds that the Requester has the requisite voice, influence or control sufficient to prohibit her from contracting with the Sheriff to perform appraisals of estates. The Commission also notes that the private gain provision of the Ethics Act compels this same result, since the Sheriff's fee is based on the value of the estate.

Question #2

The County Council's Office of the Fiduciary Supervisor prepares a list of local businesses willing and qualified to appraise property and assist with probate matters; it provides the entire list to people interested in obtaining such expert assistance. The Requester's name is on the list along with a number of other comparable businesses.

Upon information and belief, there is nothing on the list that identifies the Requester as a County Council Member neither is her business highlighted or otherwise given preferential treatment on the list or during the distribution thereof. Notwithstanding the foregoing, the Commission finds that the mere appearance of the Requester's business on the list provides the opportunity for the public to perceive an appearance of impropriety. For example, an estate executor may select the Requester's business over an equally qualified competitor in the mistaken assumption that s/he will receive more favorable treatment from the County Council as a result. This is the type of conflict of interest that the Ethics Act attempts to eliminate. As a result, the Requester's business should be removed from the Fiduciary Supervisor's list.

Question #3

In the event that any estate that she has appraised results in a hearing or other proceeding before the Council, the Requester must also recuse herself as outlined above. Further, if any person, or the County Council, challenges or questions the value of an estate she has appraised and the Council is called upon to determine the value thereof, then the Requester may **not** appear, even as a witness, before the Council, for to do so would violate W. Va. Code§ 6B-2-5(b).

Similarly, she may neither appear in a representative capacity or as a witness when the Council determines the amount of compensation to which the Requester is entitled for her services as an expert. This situation is different from the facts presented in Advisory Opinion 2009-13 wherein the Commission ruled that a Staff Attorney for a State Regulatory Agency was permitted to represent himself before the agency on behalf of his own interests. There, the Requester was merely a Staff Attorney and the decision-makers were his superiors. Here, the Requester is an equal of the decision-makers before whom she would otherwise appear. Thus, the opportunity to use her public position for private gain is greater than that of a mere Staff Attorney who has no vote in matters pending before his Agency.

As a result, although the Requester may continue to conduct her appraisal business, she must comply with the conditions hereinabove set forth.

Question #4

The Requester owns and operates a nursing home. At times, the Sheriff, as court appointed conservator, will place "protected persons" in the Requester's nursing home. Although the payment for the expenses related thereto comes from private funds, the

Sheriff acts in his official capacity, having been appointed by virtue of his official position.

The Ethics Act prohibits an interest in a contract over which the Requester "may have direct authority to enter into, or over which he or she may have control." W. Va. Code § 68-2-5(d). As earlier noted, the County Council is the ultimate decision-maker in the Sheriff's budget. The County Council is not responsible for appointing the Sheriff as conservator of "protected persons", nor does it control his selection of a nursing home for any protected persons. As a result, the Ethics Act does not preclude the Requester from accepting protected persons from the Sheriff for placement in her nursing home.

The Commission must next analyze whether the provisions ofW.Va. Code§ 61-10-15 prohibit the Requester from accepting protected persons from the Sheriff. In Advisory Opinion 99-29, when asked to apply the limitations in§ 61-10-15 to the question of whether a County School Board Member's business could contract with a training center with which the School Board had a close relationship, the Commission stated that, in weighing various factors, "[T]he Commission finds this to be a close question." Similarly, here, the Commission finds it to be a close question.

Since the County Council is the ultimate decision-maker over the Sheriff's budget and the Sheriff serves as conservator by virtue of his **official** position, the Commission finds that these factors are sufficient to conclude that the Requester, as a County Council Member, **has** the requisite voice, influence or control in the Sheriff's contracts with her nursing home.

Thus, W.Va. Code§ 61-10-15 prohibits the Requester from accepting protected persons from the Sheriff for placement in her nursing home. As a result, the Requester may only accept the placement of a protected person in her nursing home if the Sheriff seeks and receives a contract exemption. In order to obtain a contract exemption, the Sheriff needs to demonstrate that the Commission's decision herein creates an undue hardship, substantial interference in government operations, or excessive cost.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 68-1-1, *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§ 68-2-3, 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.

Pursuant to W. Va. Code § 68-2-3, any person acting in good faith reliance on an advisory opinion issued by the Ethics Commission is immune from the sanctions of W. Va. Code§ 61-10-15, and shall have an absolute defense to any criminal prosecution for actions taken in good faith reliance upon such opinion.

/s/ Jonathan Turak, Chairperson
West Virginia Ethics Commission