

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 05-13

March 30, 2005

RE May former employee begin environmental consulting business?

DECISION: Yes, but must wait one year before representing clients before the state in matters in which he was directly involved.

This opinion is issued in response to your March 1, 2005 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the March 30, 2005 meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. You recently retired after 32 years of employment with the Commonwealth. You began your employment with the Division of Forestry as a service forester, and subsequently transferred to the Bureau of Surface Mining as a forester and later as an environmental technologist. Your final years of employment were with the Division of Mine Permits in the Operations Support Section of the Department for Natural Resources, Environmental and Public Protection Cabinet (the "Cabinet"), where you reviewed and processed objections from individual citizens, landowners, and other coal companies who felt aggrieved with recently issued coal mine permits or proposed permit applications.

You are interested in beginning an environmental consulting practice and previously consulted the Cabinet's Office of Legal Services concerning such a possibility. You are familiar with representation restrictions in your post-employment, but believe that you immediately could represent a new client with whom you have not had previous involvement.

You propose to primarily assist individuals who allege they have been damaged by a coal company operating, or proposing to operate, a mining permit within the boundary of their surface property or within the vicinity of influence of the mining operation. It is your intention to investigate the client's allegations, document your findings, and present your findings to the appropriate state or federal regulatory agency. You propose to monitor the regulatory agency review of the allegations and keep the client's interest foremost.

Further, you propose to cite applicable state and federal statutes, regulations, and policy, but not case law, as you are not an attorney. You propose to document events where the state regulatory agency has approved permit conditions contrary to their own laws and regulations or has failed to enforce laws and regulations where such action, or lack of action, by the state led to damages suffered by your client. You believe that your personal testimony and report of the client's allegations will be useful in litigation, if needed.

You believe, if an attorney representing a client before a state agency requests your assistance in preparing and presenting allegations, that KRS 11A.040(7) would apply to your acceptance of compensation from the attorney, but not from the client. You also believe if the attorney's client contacts you directly and asks you to coordinate your investigation with the attorney, that KRS 11A.040(7) would then apply to your acceptance of compensation from the client.

You ask the Commission whether you may start an environmental consulting business to represent individuals affected by the coal industry or regulatory agencies, and whether your proposed assumptions regarding your future activities are correct.

Please find enclosed the brochure entitled "*Leaving State Government?*" which provides the following from KRS 11A.040:

(7) A present or former officer or public servant listed in KRS 11A.010(9)(a) to (g) shall not, within six (6) months following termination of his office or employment, accept employment, compensation, or other economic benefit from any person or business that contracts or does business with, or is regulated by, the state in matters in which he was directly involved during the last thirty-six (36) months of his tenure. This provision shall not prohibit an individual from returning to the same business, firm, occupation, or profession in which he was involved prior to taking office or beginning his term of employment, or for which he received, prior to his state employment, a professional degree or license, provided that, for a period of six (6) months, he personally refrains from working on any matter in which he was directly involved during the last thirty-six (36) months of his tenure in state government. This subsection shall not prohibit the performance of ministerial functions including, but not limited to,

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filing tax returns, filing applications for permits or licenses, or filing incorporation papers, nor shall it prohibit the former officer or public servant from receiving public funds disbursed through entitlement programs.

...

(9) A former public servant shall not represent a person or business before a state agency in a matter in which the former public servant was directly involved during the last thirty-six (36) months of his tenure, for a period of one (1) year after the latter of:

(a) The date of leaving office or termination of employment; or

(b) The date the term of office expires to which the public servant was elected.

As a forester and environmental technologist, you were not considered an "officer" as defined in KRS 11A.010(7), and thus immediately upon your retirement you may begin an environmental consulting business. You are not subject to the provisions on KRS 11A.040(7) above, and may accept compensation in your consulting from any person or business.

However, as a former public servant, you are subject to the provisions in KRS 11A.040(9) above that prohibit you, **for one year**, from representing a person or business before the **state** in matters in which you were directly involved the last three years of your state employment. You are correct in your assumption that you immediately may represent new clients with whom you had no involvement during your previous employment. But, you must wait one year (not six months) before you may represent any clients in cases that involve any matters with which you had direct involvement the last three years of your employment.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: James S. Willhite

Enclosure: *Leaving State Government?*