

ADMINISTRATIVE LAW JUDGE ADVISORY OPINION NO. 2007-01

Issued on November 1, 2007 By the

WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON STANDARDS OF CONDUCT FOR ADMINISTRATIVE LAW JUDGES

OPINION SOUGHT

An Administrative Law Judge (ALJ) asks if it is a violation of the Code of Conduct for Administrative Law Judges for him to continue to consult as counsel on a specific case while maintaining his position as a full time ALJ. He generally asks whether he may engage in the practice of law so long as any such work complies with the restrictions contained in the Code of Conduct for Administrative Law Judges.

FACTS RELIED UPON BY THE COMMISSION

The Requester, an attorney, began work as a full time ALJ for a state agency on August 31, 2007. The agency is charged with resolving problems arising in the respective employment relationships within various government agencies. As an ALJ, he only hears cases involving public employees and government employers.

When the agency hired the requesting ALJ, he was already counsel of record in a case that is presently pending before the West Virginia Supreme Court of Appeals. According to the Requester:

... I was engaged to consult on the appellate stage of the case after trial counsel petitioned for appeal. The appeal petition was granted, and the case now awaits briefing. My co-counsel will argue it in the January term of court. I have withdrawn from other cases in which I was counsel before my appointment as an ALJ, but I remain of record in the referenced case, and I have been asked to continue to consult on it through briefing and oral argument. No state agency or employee is involved in the case, as a party or otherwise. (It is a dispute over an oil and gas lease among private parties and a church.)....

The Requester's supervisor has advised him that his agency has a longstanding prohibition against allowing its ALJs to practice law for remuneration, although he has seen no such written policy. Further, according to the Requester, no such prohibition is contained within the statutory provisions nor legislative rules related to his agency.

CODE PROVISIONS AND LEGISLATIVE RULES RELIED UPON BY THE COMMISSION

Legislative Rule 158 C.S.R. 13 § 4.5.g.1 (2005), reads:

Subject to applicable law and relevant agency rules, an administrative law judge may practice law if such activity would neither affect the independent professional judgment of the administrative law judge nor the conduct of the judge's official duties. An attorney who is an administrative law judge shall not accept the representation of a client who is a litigant before the tribunal for whom the administrative law judge serves or if there is a likelihood that such person will appear before the judge. An administrative law judge shall not practice law before the administrative tribunal for which the judge serves.

Other relevant provisions, found at 158 C.S.R. 13 § 4.5.d.1 and 3 (2005), read:

4.5.d.1 An administrative law judge shall refrain from financial and business dealings that tend to reflect adversely on impartiality, interfere with the proper performance of judicial duties, exploit the judge's official position or involve the judge in frequent transactions with lawyers or persons likely to come before the agency in which the judge serves.

4.5.d.3 An administrative law judge shall manage the judge's ... financial interests to minimize the number of cases in which the judge is disqualified. As soon as judges can do so without serious financial detriment, judges shall divest themselves of ... financial interests that might require frequent disqualification.

ADVISORY OPINION

Effective July 1, 2005, Administrative Law Judges are governed by the Code of Conduct for Administrative Law Judges. As such, the requesting ALJ is subject to the provisions of the Code of Conduct for Administrative Law Judges.

According to the Preamble to the American Bar Association's Model Code of Judicial Conduct for State Administrative Law judges, the Code contains rules of reason. "They should be applied consistent with constitutional requirements, statutes, administrative rules, and decisional law and in the context of all relevant circumstances." Further, the Commentary to the provision in the ABA's Model Code concerning the outside practice of law reads: "As long as the professional judgment of the administrative law judge is not impaired by such unrelated activities and no appearance of impropriety occurs, such ancillary legal practice should be permitted."

Remaining On Present Case

According to the Requester, no state agency or employee is involved in the case. Further, the nature of the lawsuit is completely unrelated to the nature of cases the ALJ hears and adjudicates.

As the Committee noted in ALJAO 2006-01, the Code of Conduct for Administrative Law Judges specifically allows full time ALJs to engage in the outside practice of law so long as it does not affect the ALJ's independent professional judgment or the conduct of the ALJ's official duties. Based on the foregoing facts, the Committee finds that it is unlikely that an actual conflict or perceived conflict would arise in the present case. Therefore it would not violate the Code of Conduct for Administrative Law Judges for the requesting ALJ to continue to consult as counsel on the present case described above while maintaining his position as a full time ALJ.

General Outside Practice of Law

In his second request, the Requester generally inquires about the suitability of engaging in the private practice of law while serving as an ALJ. As noted above, the Code of Conduct may not be interpreted to require the requesting ALJ to refrain from the private practice of law altogether. Indeed, 158 C.S.R. 13 § 4.5.g.1 allows such a practice so long as the Requester complies with the relevant provisions of the Code of Conduct.

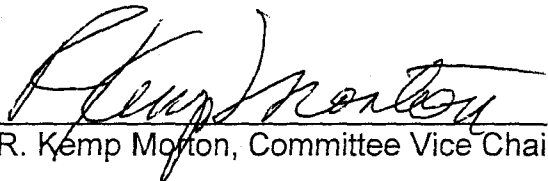
Therefore it would not violate the Code of Conduct for Administrative Law Judges for the requesting ALJ to maintain a private practice of law so long as he satisfies the following conditions:

- does not represent anyone who appeared before him in his capacity as an ALJ in the preceding twelve months. W. Va. Code § 6B-2-5(h)(1)(A)
- does not represent a client in any matter which involves or is likely to involve the agency by which he is presently employed. 158 C.S.R. 13 § 4.5.g.1.
- does not practice before any state agency, department, board, commission, college, university, institution, state board of education, department of education, county board of education, regional educational service agency or multi-county vocational center, as these are government employers who are likely to appear before the Requester's agency. 158 C.S.R. 13 § 4.5.g.1.
- does not counsel or advocate for a client against any interest of the State of West Virginia, since the State regularly appears before his agency. 158 C.S.R. 13 § 4.5.g.1.
- does not use State letterhead, office space, resources, materials, office supplies, email, mail service, or equipment (such as computers, fax or copy machines) beyond a *de minimis* use. W. Va. Code § 6B-2-5(b)(1)
- does not perform work related to his private practice on State time. W. Va. Code § 6B-2-5(b)(1)

- does not ask subordinates to perform legal research or any other tasks related to his private practice. W. Va. Code § 6B-2-5(b)(1)
- does not accept any subordinate's voluntary offer of any assistance on tasks related to his private practice. W. Va. Code § 6B-2-5(b)(1)
- recuses himself from cases that involve attorneys, within the last two years: with whom he practiced; against whom he practiced; to whom he referred a case; or from whom he received referral of a case. 158 C.S.R. 13 § 4.3.d.
- recuses himself from hearing any cases in which a former or present client is a party. 158 C.S.R. 13 § 4.3.d.
- does not allow his private practice to take precedence over his judicial duties. 158 C.S.R. 13 § 4.3.a.

As set forth in the ALJ Code of Conduct, however, governmental agencies are granted leeway regarding the outside practice of law by their ALJs. As § 4.5.g.1 provides, "Subject to applicable law and relevant agency rules, an administrative law judge may practice law..." Thus, the Requester's agency is entitled to impose stricter standards on its ALJs than those imposed by the Code of Conduct. Accordingly, the Requester should consult with his agency to determine what the agency's policy is regarding whether employees are allowed to engage in the private practice of law for remuneration. If the Requester's agency advises the Requester that he may engage in the private practice of law for remuneration, the Requester should request the agency's policy on how, as a newly employed ALJ, the Requester may handle his cases without interfering with his official duties as an ALJ.

This advisory opinion is limited to questions arising under the Code of Conduct for Administrative Law Judges, Legislative Rule 158 C.S.R. 13 § 1-1 (2005), *et seq.*, and does not purport to interpret other laws, rules or agency policies. This opinion has precedential effect and may be relied upon in good faith by other administrative law judges, unless and until it is amended or revoked, or the law is changed.


 R. Kemp Morton, Committee Vice Chair