

ADMINISTRATIVE LAW JUDGE ADVISORY OPINION NO. 2008-02

Issued on September 4, 2008 By the

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

OPINION SOUGHT

An attorney who represents public employees asks if the Code of Conduct for Administrative Law Judges prohibits her from engaging primarily in mediation as a part time, contract Administrative Law Judge (ALJ) with a state agency. The Requester also asks, if she divests herself of all public employee cases, whether and when she could act in an adjudicative capacity as an ALJ for the state agency without violating the Code of Conduct.

FACTS RELIED UPON BY THE COMMISSION

The Requester has recently applied for a part time, contract ALJ position for a state agency. The agency is charged with resolving problems arising in the respective employment relationships within various government agencies. Although her title is Administrative Law Judge, the Requester has been hired to mediate cases. She will not preside over any cases as an ALJ.

The Requester is in a period of transition; her law firm has dissolved. Her practice primarily consisted/consists of representing members of a large labor association of public employees. The Requester has nine open cases: two cases on appeal from the employing state agency, two cases pending before the employing state agency, and five other miscellaneous public employment matters that do not now involve the jurisdiction of the employing state agency. She is also doing administrative work to help resolve a former partner's federal black lung cases.

She asks if the Code of Conduct will allow her to serve as a part time mediator so long as all parties to any mediation: 1) are apprised of her current and past cases, 2) are neither past nor present clients, and 3) agree to proceed with her as mediator.

As it relates to her second request, the Requester has indicated that before acting in an adjudicative capacity, she would divest herself of **all** public employee cases.

**CODE PROVISIONS AND LEGISLATIVE RULES RELIED UPON BY THE
COMMISSION**

W.Va. Code § 6B-2-5a reads:

Code of conduct for state administrative law judges.

(a) As used in this section, "state administrative law judge" means any public employee, public officer or contractor functioning as a hearing officer, referee, trial examiner or other position in state government to whom the authority to conduct an administrative adjudication has been delegated by an agency or by statute and who exercises independent and impartial judgment in conducting hearings and in issuing recommended decisions or reports containing findings of fact and conclusions of law in accordance with applicable statutes or rules, but does not include any person whose conduct is subject to the code of judicial conduct promulgated by the West Virginia Supreme Court of Appeals.

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.

ADVISORY OPINION

Mediation

In A.L.J. A.O. 2008-01, considering nearly identical facts, this Committee concluded that an ALJ who solely provides mediation services to a state agency is **not** subject to the provisions of the Code of Conduct for Administrative Law Judges since he does not conduct hearings, adjudicate contested matters, or issue judicial decisions. Likewise here, notwithstanding her ALJ title, so long as the Requester only mediates cases, she is not subject to the Code of Conduct.

Adjudicating

There is no question, however, that were the Requester to adjudicate cases, she would be subject to the Code of Conduct. Thus, the question of whether and when she may act as a contract ALJ in an adjudicative capacity for the state agency is properly before this Committee. In order for the Requester to serve in an adjudicative capacity, she

may not practice law before the state agency. Further, she may not accept the representation of a client who is a party before the state agency if there is a likelihood that such person will appear before the agency. The Requester has indicated that she would divest herself of all public employee cases in the event that her duties expanded to include the adjudication of cases. Thus, so long as the Requester relinquishes her practice of representing public employees, she may adjudicate cases for the state agency.¹

The second part of her second question concerns when the Requester would be eligible to serve as an adjudicator. Unlike the Ethics Act, there is no revolving door provision in the Code of Conduct. Thus, upon divesting herself of her practice of representing public employees, the Requester may adjudicate cases for the state agency without delay, under the condition that she:

- recuse herself from cases that involve attorneys, within the last two years: with whom she practiced; against whom she practiced; to whom she referred a case; or from whom she received referral of a case;
- recuse herself from hearing any cases in which a former or present client is a party; and
- recuse herself from hearing any cases in which she or an associate served as a lawyer in the case.

See 158 C.S.R. 13 § 4.3.d.

As set forth in the ALJ Code of Conduct, 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 her agency to determine what the agency's policy is regarding her service as a contract mediator while continuing to represent public employees before the agency, and what the agency's policy is regarding whether and when she would be allowed to serve as an adjudicative ALJ given her present (and recent past) employment situation.

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.



Jon Turak, Committee Chair

¹ If the Requester accepts employment with an employer, including a law firm, whose clients appear before the agency, she would **not** be able to adjudicate cases for the same agency without violating the Code of Conduct.