

Advisory Opinion 2019-27

Issued on November 7, 2019, by

The West Virginia Ethics Commission

Opinion Sought

A **City Council Member** asks whether he may represent clients in the city's municipal court as a private attorney.

Facts Relied Upon by the Commission

The Requester, a City Council member and private attorney, asks whether he (and members of his law firm) may provide legal representation to private clients before the City's municipal court on matters such as traffic code violations. In those cases, city police officers often issue a traffic citation and testify as witnesses against the Requester's clients.

As a member of City Council, the Requester does not have direct authority over any specific employee but, as part of the nine-member Council, has oversight over the city manager. All other employee positions, including municipal judges, are overseen by the city manager, the police chief or the mayor. The Mayor has appointed two part-time municipal judges.

City Council as a body considers the budget, level of staffing, employee rules and regulations, and ordinance changes that may impact the municipal court system and local law.¹ City Council also appoints various boards and commissions of the city, including the policemen's civil service commission.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(f) *Prohibited representation.*

No present or former elected or appointed public official or public employee shall, during or after his or her public employment or service, represent a client or act in a representative capacity with or without

¹The city charter provides that City Council has the power "to prescribe and impose reasonable fines, penalties, and imprisonment in the County jail for a term not exceeding thirty days, for violations [of orders, bylaws, ordinances, resolutions, rules and regulations]. Such fines, penalties and imprisonment shall be recovered and enforced under the judgment of the Mayor of said Town, or the person lawfully exercising the functions of Mayor. And the authorities of said Town may, with the consent of the County Court of _____[redacted] County, entered of record, use the jail of said County for any purposes for which the use of a jail may be needed by them, under the acts of the Council or of the State." City Charter, Section 23.

compensation on behalf of any person in a contested case, rate-making proceeding, license or permit application, regulation filing or other particular matter involving a specific party or parties which arose during his or her period of public service or employment and in which he or she personally and substantially participated in a decision-making, advisory or staff support capacity, unless the appropriate government agency, after consultation, consents to such representation. . . .

W. Va. Code § 6B-2-5(g) *Limitation on practice before a board, agency, commission or department.*

Except as otherwise provided in §8A-2-3, §8A-2-4, or §8A-2-5 of this code:

(1) No elected or appointed public official and no full-time staff attorney or accountant shall, during his or her public service or public employment or for a period of one year after the termination of his or her public service or public employment 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 or served or is or was employed in the following matters:

(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.

...

(5) An elected or appointed public official, full-time staff attorney or accountant who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the one year prohibition against appearing in a representative capacity, when the person's education and experience is such that the prohibition would, for all practical purposes, deprive the person of the ability to earn a livelihood in this state outside of the governmental agency. The Ethics Commission shall, by legislative rule, establish general guidelines or standards for granting an exemption or reducing the time period, but shall decide each application on a case-by-case basis.

Advisory Opinion

The Ethics Commission must determine whether the Requester is prohibited by the Ethics Act from representing clients in the city's municipal court as a private attorney. Two provisions of the Ethics Act are applicable: W. Va. Code §§ 6B-2-5(f) and (g).

W. Va. Code § 6B-2-5(f) prohibits certain public officials and employees, including the Requester as a member of City Council, from representing a client in a contested case or other matter involving his client which arose during his public service and in which he personally and substantially participated in a decision-making capacity. The Requester states that City Council members do not personally participate in contested cases, such as traffic code violations, pending in municipal court. **Therefore, W. Va. Code § 6B-2-5(f) is not an issue here.**

The other provision of the Ethics Act, W. Va. Code § 6B-2-5(g), prohibits elected officials, such as the Requester, from appearing in a “representative capacity before the governmental entity in which he or she serves or served.” This provision is commonly referred to as the “revolving door” prohibition because it continues in effect for one year after the termination of an official’s public service. The purpose of subsection (g) is “to prohibit a public servant from exploiting the personal prestige he may have established as a former [or current] official in an agency.” Advisory Opinion 2005-22. The pivotal question under (g) is whether, as a City Council member, the Requester also “serves” the municipal court.

In Advisory Opinion 2019-09, the Commission held that a City Council member did not “serve” the Board of Zoning Appeals (“BZA”) simply as a result of being a member of City Council. The Commission acknowledged that City Council has statutory duties related to the BZA, such as appointing BZA members, setting salaries for employees of the BZA and appropriating funds to it. Further, City Council has the power to create and modify the ordinances upon which adjudications are made by the BZA. The Commission found determinative, however, the fact that adjudications made by the BZA are made without any input, approval or review by the City Council. It held that the BZA was therefore independent of the city for purposes of W. Va. Code § 6B-2-5(g).

Based upon the foregoing, the Ethics Commission finds that adjudications made by the municipal court are also made without input, approval or review of City Council. **As a result, the Ethics Commission finds that the Requester does not “serve” the municipal court pursuant to W. Va. Code § 6B-2-5(g) simply as a result of being a member of City Council. The Ethics Commission therefore holds that W. Va. Code § 6B-2-5(g) does not prohibit the Requester or members of his law firm from representing clients before the City’s municipal court.** ²

This finding is also supported by the Commission’s previous finding that a planning commission was a separate governmental entity from a Board of Zoning Appeals for purposes of subsection (g). In Advisory Opinion 2000-22, the Commission held that a BZA member was not prohibited from appearing before the planning commission as a licensed engineer. See *also* Advisory Opinion 2005-22 (holding that the former general

² The Requester is advised to consider the relevant provisions of the West Virginia Rules of Professional Conduct, including but not limited to, Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees).

counsel for a cabinet secretary of a state department was not prohibited from appearing before the various agencies within the department, unless he had been specifically assigned to a particular division or entity.)

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, at W. Va. Code §§ 6B-1-1 through 6B-3-11 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 by public servants and other persons unless and until it is amended or revoked or the law is changed.

/s/ Lawrence J. Tweel
Lawrence J. Tweel, Acting Chairperson
West Virginia Ethics Commission