

ADVISORY OPINION NO. 2007-13

Issued on November 1, 2007 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An Administrative Law Judge (ALJ) asks if it is a violation of the Ethics Act for him to continue to consult as counsel on a case while maintaining his position as a full time ALJ. He further asks whether it is a violation of the Ethics Act for him to engage in the general practice of law.

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 I have withdrawn from other cases in which I was counsel before my appointment as an ALJ, but I remain of record in the referenced case, and I have been asked to continue to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

W.Va. Code § 6B-2-5(b)(1) reads:

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. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in *de minimis* private gain does not constitute use of public office for private gain....

Legislative Rule 158-6-5.2 reads, in pertinent part:

Public employees shall not use government property for personal projects or activities that result in private gain. This subsection does not apply to the *de minimis* use of government property.

Legislative Rule 158-6-8 reads, in pertinent part:

Full-time ... public employees may not receive private compensation for performing private work during public work hours. This section shall not apply to *de minimis* private work.

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

No present ... 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 compensation on behalf of any person in a contested case ... 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. A staff attorney, accountant or other professional employee who has represented a government agency in a particular matter shall not thereafter represent another client in the same or substantially related matter in which that client's interests are materially adverse to the interests of the government agency, without the consent of the government agency....

ADVISORY OPINION

In Advisory Opinion 2006-03, the Ethics Commission answered a similar question: Is it a violation of the Ethics Act for an attorney employed by a State Agency to continue his outside law practice and volunteer activities while maintaining his position as a full time ALJ. The analysis in that opinion is instructive to answer the two questions the Requester has posed.

Private Gain

Pursuant to W. Va. Code §6B-2-5(b)(1) public officials may not use their offices or the prestige of their offices for their own private gain or for the private gain of another. Therefore, the Requester may not use his public position as an ALJ to influence, obtain, increase or promote business for his outside practice of law. Further, the Requester may not use public time, equipment and resources for such private activities beyond the incidental use allowed by law.

The Commission has held that the prohibition against using one's public office for private gain bars the acceptance of private payment for providing information or services which are expected to be provided by the public employee in the course of fulfilling one's official duties. Thus, the Requester may not accept referrals of clients with potential claims before that agency.

Representing Clients

Pursuant to W. Va. Code § 6B-2-5(f) no present public employee may during his public employment represent a client in a contested case or other particular matter involving a specific party or parties which arose during his employment and in which he personally and substantially participated in a decision-making, advisory or staff support capacity, unless the appropriate government agency, after consultation, consents to such representation.

Thus, since none of the parties are or have been parties to an action at the Requester's agency, he may continue to consult as counsel on the case presently pending before the West Virginia Supreme Court of Appeals.

Since the Requester has not identified the area of law that he intends to practice, it is difficult for the Commission to determine the potential for conflicts that would cause the Requester to run afoul of the Ethics Act. If, however, an individual who within the preceding twelve months appeared before the ALJ subsequently sought to retain the Requester as an attorney, the Requester would be prohibited from such representation. Further, if a present or former client files a complaint with the Requestor's agency, the Requestor shall recuse himself from hearing such complaint; similarly, if a present or former client is named as a Respondent in a complaint with the Requestor's agency, the Requestor shall recuse himself from hearing such complaint. Additionally, the Requester shall otherwise comply with the requirements of the Code of Conduct for Administrative Law Judges.¹

¹ The WV State Bar regulates the conduct of attorneys. As the Requester may be aware, it may be advisable to obtain the opinion of the State Bar as to whether a proposed course of action under the circumstances described is consistent with the Standards of Professional Conduct.

Therefore, it would not violate W. Va. Code §6B-2-5(f) for the Requester to maintain a private law practice while maintaining his state employment as an ALJ, so long as the foregoing conditions are met. Nothing in the Ethics Act, however, prohibits an agency from imposing a stricter code of conduct for its employees. 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.

This advisory opinion is limited to questions arising under the Ethics Act, W.Va. Code § 6B-1-1, *et seq.*, and does not purport to interpret other laws, rules or agency policies. 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.



R. Kemp Morton, Chair