

Administrative Law Judge Advisory Opinion 2019-01-R

Issued on November 7, 2019, by The

West Virginia Ethics Commission

Committee on Standards of Conduct for Administrative Law Judges

[Pursuant to the Requester's request for reconsideration of ALJ Advisory Opinion 2019-01, which was issued on October 3, 2019, the following Advisory Opinion is being issued. This Advisory Opinion, 2019-01-R, replaces ALJ Advisory Opinion 2019-01, which is now void and will not be published by the Ethics Commission.]

Opinion Sought

An incoming **Chief Administrative Law Judge** asks how long he must abstain from reviewing, or taking official action upon, adjudication involving his former law firm.

Facts Relied Upon by the Committee

The Requester retired as a member of his former law firm on December 31, 2018, and ceased drawing profit from the firm on that date. The Requester does, however, continue to receive a set retirement payout from the firm until at least through December 31, 2020. The Requester states that it is possible he may receive retirement payouts a few months after that date pursuant to the terms of a membership agreement. He states that the retirement payout amount is not dependent upon profit or loss of the firm. The payout instead is a fixed amount based on a fixed percentage of the best financial year the Requester had in his final five years with the law firm. As a result, the Requester would have no financial interest in any specific matter involving his former law firm that may come before him as Chief ALJ.

The Requester's appointment as Chief Administrative Law Judge ("Chief ALJ") will begin on December 2, 2019. The Requester asks how long he needs to abstain from reviewing, or taking official action upon, adjudication involving matters handled or submitted by his former law firm. The Requester further states that he assumes that the issuance of routine correspondence, such as Acknowledgement (of protest) and Time Frame Orders, issued under the Chief ALJ's printed, boilerplate signature would not constitute ethical violations. The Requester explains that acknowledgements are governed by statute and that Time Frame Orders are non-discretionary and set pursuant to Procedural Rules.

The Requester finally states that Chief ALJs traditionally have not presided over any hearings or authored final decisions, but the Requester would like to keep that option available because a reduction in staff may be necessary due to a decrease in workload. The Requester states that the number of matters before his agency has dropped from about 50,000 per year to about 2,000 per year.

Provisions Relied Upon by the Committee

W. Va. Code § 68-2-5a, Code of conduct for state administrative judges, states:

(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.

(b) In accordance with the provisions of chapter twenty-nine-a of this code, the commission, in consultation with the West Virginia state bar, shall propose rules for legislative approval establishing a code of conduct for state administrative law judges, which shall incorporate the following major provisions:

- (1) A state administrative law judge shall uphold the integrity and independence of the administrative judiciary;
- (2) A state administrative law judge shall avoid impropriety and the appearance of impropriety in all activities;
- (3) A state administrative law judge shall perform the duties of the office impartially and diligently;
- (4) A state administrative law judge shall regulate the judge's extra-judicial activities to minimize the risk of conflict with judicial duties;
- (5) A state administrative law judge shall refrain from political activity inappropriate to the office; and
- (6) Appropriate civil penalties and sanctions for violations. In proposing the rules, the commission shall consider the model codes of judicial conduct for state administrative law judges as drafted by the National Association of Administrative Law Judges and the American Bar Association.

W. Va. Code R. § 158-13-4 states, in pertinent part:

4.1. A state administrative law judge shall uphold the integrity and independence of the administrative judiciary.

4.2. A state administrative law judge shall avoid impropriety and the appearance of impropriety in all activities.

4.3. A state administrative law judge shall perform the duties of the office impartially and diligently.

4.3.d. Disqualification.

4.3.d.1. An administrative law judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

4.3.d.1.A. the administrative law judge has a personal bias or prejudice concerning a party or a party's lawyer or other representative involved in the proceeding;

4.3.d.1.B. the administrative law judge served as lawyer or representative in the matter in controversy, or a lawyer with whom the judge practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it. Ordinarily, a lawyer in a governmental agency is not considered to have an association with other lawyers employed by that agency within the meaning of this provision;

4.3.d.1.C. the administrative law judge has served in other governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

4.3.d.1.D. the administrative law judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a more than de minimis financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

4.3.e. Remittal of disqualification.

4.3.e.1. An administrative law judge disqualified by the means of §4.3.d. may, instead of withdrawing from the proceeding, disclose on the record the basis of the disqualification. If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers or representatives, independently of the judge's participation, all agree that the judge should not be disqualified and the judge is willing, the administrative law judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Advisory Opinion

"The [ALJ] Code of Conduct seeks to uphold the highest standards of conduct to preserve the integrity and honor of the administrative judiciary." ALJ AO 2010-01. Administrative Law Judges ("ALJs") are required to "avoid impropriety and the

appearance of impropriety

in all activities" and to "perform the duties of the office impartially and diligently." W. Va. Code R. §§ 158-13-4.2 and 4.3. The ALJ Code of Conduct requires an ALJ to "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." W. Va. Code R. § 158-13-4.3.d.1.

The Code of Conduct for ALJs is embodied in Legislative Rule Title 158, Series 13. It provides in relevant part:

4.3.d.1. An administrative law judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

4.3.d.1.B. the administrative law judge served as lawyer or representative in the matter in controversy, or a lawyer with whom the judge practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it. Ordinarily, a lawyer in a governmental agency is not considered to have an association with other lawyers employed by that agency within the meaning of this provision

The Committee on Standards of Conduct for Administrative Law Judges has not addressed the specific situation presented by the instant request. In prior ALJ Advisory Opinions, however, it reached the following conclusions:

- ALJ AO 2007-01: Full-time ALJs may engage in outside practice of law so long as it does not affect the ALJ's independent professional judgment or the conduct of his official duties. ALJ here may continue to consult on a case which is unrelated to the nature of cases he hears as an ALJ. In his private practice, limitations apply, including that he must recuse 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." He also must recuse himself from hearing cases in which a former or present client is a party.
- ALJ AO 2008-02: An attorney who divests herself of her practice of representing public employees may adjudicate cases for the state agency before which her former clients' cases are pending under the conditions that she recuse herself from hearing any cases: (1) 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; (2) in which a former or present client is a party, and (3) in which she or an associate served as a lawyer in the case.
- ALJ AO 2009-01: An ALJ for a state agency who previously worked for a statewide union that represents public education employees must wait two years before hearing and deciding matters filed by public education employees. This restriction only applies to cases which arose during his former employment and on which he or an associate served as a lawyer. For cases which arose after ALJ's union employment, he may hear those cases after the two-year waiting

period has passed. Under different facts, a shorter time period may be reasonable.

- LJ AO 2010-01: The mere presence of a financial and business relationship between a part-time ALJ and his private law firm partner who seeks to appear in a representative capacity before another ALJ in the ALJ's employing agency tends to reflect adversely on the impartiality of the administrative judicial process. Therefore, part-time ALJ may not be employed in these circumstances.

This Committee has previously considered opinions issued by the Judicial Investigation Commission ("JIC"), which interpret the Judicial Code of Conduct, for guidance in interpreting the ALJ Code of Conduct. In JIC Advisory Opinion 2019-01, the JIC determined that a Circuit Judge could permissibly receive payments as a withdrawing member of a law firm. The JIC determined that during the pendency of the payments, the judge should disclose the same in any case involving his former firm and follow West Virginia Trial Court Rule 17 governing the disqualification and temporary assignment of judges.

The Requester here has fully retired and his retirement benefits, which are in a fixed amount, are not influenced by the profit or loss of his former law firm. The Committee hereby finds, however, that the presence of the financial relationship between the Requester and his former law firm tends to reflect adversely on the impartiality of the administrative judicial process. While there are no facts suggesting that the Requester will use his position to benefit his former firm, the Committee nonetheless finds that the financial relationship creates a situation in which the judge's impartiality might reasonably be questioned pursuant to W. Va. Code R. § 158-13-4.3.d.1.

The Committee holds that the Requester must disqualify himself from any proceedings involving his former law firm so long as he continues to receive set payouts from the firm. The Requester, instead of withdrawing from matters involving his former law firm while he is receiving payouts, may remit his disqualification to the parties and lawyers or representatives in the proceeding in accordance with W. Va. Code R. § 158-13-4.3.e.1.

The Committee also holds that pursuant to W. Va. Code R. § 158-13-4.3.d.1.B, during his full tenure as Chief ALJ, the Requester is disqualified from hearing any matters in which he or an associate¹ previously served as a lawyer in the matter. The Committee also notes that the Requester may remit his disqualification to the parties and lawyers or representatives to the proceeding in accordance with W. Va. Code R. § 158-13-4.3.e.1 so long as he subjectively believes he has no personal bias or prejudice concerning a party, the parties and lawyers or representatives.

Although the Requester has not specifically asked about matters involving former clients, the Committee will address this issue because it relates to his employment with

¹ The term "associate" as it is used here refers to any lawyer employed at the same law firm as the Respondent during the time when the Respondent was employed by the law firm.

his former law firm. In prior ALJ Advisory Opinions, the Committee has held that certain ALJs must withdraw from hearing matters in which a former client is a party during their tenure as ALJs. See ALJ AO 2007-01 and ALJ AO 2008-02. In ALJ AO 2009-01, the Committee noted, however, that the ALJ AOs interpreting the ALJ Code of Conduct "will evolve over time, especially when the application thereof is unduly harsh and/or results in unforeseen consequences." Today, the Committee concludes that requiring ALJs to withdraw from hearing matters in which a former client is a party for the entirety of their tenure is unduly harsh. The Committee finds that an ALJ's impartiality toward prior clients would not be reasonably questioned for the entirety of their tenure.

In order to determine whether a judge's impartiality might reasonably be questioned, several jurisdictions have established a bright-line period during which disqualification is required when a former client is a party to a matter before a judge. See, e.g., California Code of Civil Procedure, § 170.1 (two years); Illinois Code of Judicial Conduct (seven years); Michigan Court Rule 2.003 (two years); New York Committee on Judicial Ethics Opinion 17-100 (2017) (two-years).

The Committee finds that the use of a bright-line rule is persuasive. **Therefore, the Committee holds that the Requester must disqualify himself when a former client he represented within the preceding two years appears before his agency. The two years begin to run when the final business and financial relationship with the former client ends, including the payment of all fees owed to the Requester. The Requester instead of withdrawing may remit his disqualification to the parties and lawyers or representatives to the proceeding in accordance with W. Va. Code R. § 158-13-4.3.e.1. The Committee further finds that after two years there is no *per se* appearance of impropriety and the Requester is not required to disqualify himself when a former client appears before him.**

Finally, the Committee holds that the Requester is not required to disqualify himself from signing routine correspondence, such as Acknowledgements and Time Frame Orders. Because such actions are non-discretionary in nature, no reasonably objective person would question the Requester's impartiality in having his boilerplate signature attached to such correspondence.

This Advisory Opinion is limited to questions arising under the Code of Conduct for Administrative Law Judges, W Va. Code R. § 158-13-1 through W Va. Code R. § 158-13-11, 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.


Suzan Singleton, Committee Chairperson