

## **ADMINISTRATIVE LAW JUDGE ADVISORY OPINION NO. 2010-01**

**Issued on April 1, 2010 By The**

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

#### **OPINION SOUGHT**

A **Chief Administrative Law Judge** asks whether the Code of Conduct for Administrative Law Judges allows the continued employment of a part-time Administrative Law Judge (ALJ) if his private law firm partner appears in a representative capacity before another ALJ in the ALJ's employing agency.

#### **FACTS RELIED UPON BY THE COMMISSION**

The Requester is the Chief Administrative Law Judge (ALJ) for a state agency which employs a number of part-time ALJs. The Requester is responsible for the supervision of the employing agency's ALJs. One of the part-time ALJs she supervises is a partner in a private law firm. A law partner of the part-time ALJ seeks to represent a party in an upcoming administrative proceeding before another agency ALJ.

The Requester notes that the Code of Conduct for Administrative Law Judges (Code) prohibits the part-time ALJ from appearing in a representative capacity before the employing agency, and asks whether that prohibition extends to members of the part-time ALJ's law firm. The Requester specifically asks: "Would there be an imputed disqualification under Rule 1.10 of the Rules of Professional Conduct?"

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

W. Va. Code § 6B-2-5a reads:

(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.

In accordance with W. Va. Code § 6B-2-5a(b), the Commission promulgated the Code of Conduct for Administrative Law Judges 158 C.S.R. 13 (2005).

158 C.S.R. 13 § 4 (2005), captures the purpose of the Code:

4.1.a. An independent and honorable administrative judiciary is indispensable to justice in our society. An administrative law judge shall participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards of conduct so that the integrity and independence of the administrative judiciary will be preserved. The provisions of this rule should be construed and applied to further that objective.

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

4.2.a. An administrative law judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the administrative judiciary.

4.2.b. An administrative law judge shall not allow family, social, political, employment or other relationships to influence judicial conduct or judgment. A judge shall not lend the prestige of the office to advance the private interests of the judge or others, nor convey or permit others to convey the impression that they are in a special position of influence. A judge shall not testify voluntarily as a character witness.

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158 C.S.R. 13 § 4.5.d (2005), in pertinent part, reads:

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.

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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.

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One relevant provision, found at 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**

As noted above, the Code of Conduct for Administrative Law Judges specifically allows 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. There is no evidence to suggest that the part-time ALJ's judgment is compromised by his outside law practice.

An administrative law judge shall not practice law before the tribunal for which the ALJ serves. 158 C.S.R. 13 § 4.5.g.1. Nothing in this section addresses whether this disqualification is imputed to the members of the ALJ's private law firm. Here, the Requester has specifically asked whether Rule 1.10 of the Rules of Professional Conduct imputes the disqualification found at section 4.5.g.1. to members of the part-time ALJ's firm.

Although the Requester's question concerns the interplay between section 4.5.g.1. and Rule 1.10 of the Rules of Professional Conduct, this Committee must

focus on the prohibitions contained within the Code of Conduct rather than on the Rules of Professional Conduct. The Rules of Professional Conduct govern the practice of law by West Virginia attorneys. The Office of Disciplinary Counsel (ODC) of the West Virginia State Bar interprets and enforces the provisions of those Rules.<sup>1</sup> Thus, this Committee has no jurisdiction over the interpretation of any provision of those Rules, and defers to ODC to answer the Requester's question about Rule 1.10.

Instead, this Committee must determine whether the Code of Conduct allows the continued employment of the part-time ALJ in the event that his private law firm partner appears in a representative capacity before another ALJ in the ALJ's employing agency. The Code of Conduct seeks to uphold the highest standards of conduct to preserve the integrity and honor of the administrative judiciary.

The Code requires ALJs to avoid impropriety **and the appearance of impropriety in all activities**. 158 C.S.R. 13 § 4.2. No one has suggested that the ALJ will use his office to benefit his law partner's case before the employing agency. Nonetheless, this Committee finds that employing an ALJ whose law partner practices before the agency would create the appearance of impropriety the Code seeks to avoid. It would undermine the public's perception of the agency's impartiality.

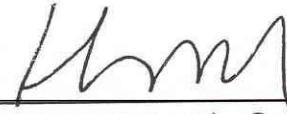
The ALJ's business dealings trouble the Committee. Indeed, the mere presence of a financial and business relationship between the two law partners tends to reflect adversely on the impartiality of the administrative judicial process. 158 C.S.R. 13 § 4.5.d.1.

Thus, pursuant to 158 C.S.R. 13 § 4.2., this Committee finds that the Code of Conduct for ALJs prohibits the continued employment of the part-time Administrative Law Judge if his private law firm partner appears in a representative capacity before another ALJ in the ALJ's employing agency. In order for the law partner to appear in a representative capacity before the Requester's agency, the part-time ALJ will have to resign his employment.

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<sup>1</sup> Past opinions of the full Ethics Commission have noted the overlap of the Rules with the Ethics Act. In those instances, the opinions encouraged the subject attorneys to seek advice from ODC. See, e.g. AOs 2007-04 and 2007-13.

This advisory opinion is limited to questions arising under the Code of Conduct for Administrative Law Judges 158 C.S.R. 13 § 1-1 (2005), *et seq.*, and does not purport to interpret other laws or rules. 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. 158 C.S.R. 13 § 5.10 (2005).



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Jonathan E. Turak, Committee Chairperson