

ADVISORY OPINION NO. 91-30

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON MAY 2, 1991

GOVERNMENTAL BODY SEEKING OPINION

An Attorney for the Supreme Court of Appeals

OPINION SOUGHT

Whether the six month prohibition against appearing before their former governmental agency applies to the Assistant Director for Magistrate Courts, Law clerks, Per curiam clerks and Writ clerks employed by the Supreme Court of Appeals?

FACTS RELIED UPON BY THE COMMISSION

The State Supreme Court employs law school graduates to fill certain positions. **Law clerks** to individual Justices assist in the research and preparation of opinions in cases assigned to that Justice. They also review some of the applications for appeal and opinions that have been prepared by other Justices. Another position is the **per curiam clerk** who researches and prepares per curiam opinions under the direction of a supervising Justice.

Writ clerks are assigned to review applications for appeal or extraordinary applications such as mandamus, prohibition and habeas corpus, which are filed with the Court. After a review of the case file, they present the case to the full Court at a writ conference. The Court then decides whether to accept or reject the case.

The requestor is employed by the Court Administrator's Office. This office supervises and renders assistance to all courts in the State. His official title is **Assistant Director for Magistrate Courts** and his duties include administration of the Magistrate Court system and development of educational conferences for all Magistrate Court employees. He does not represent the Court or the Court Administrator's office as an attorney, nor does he make court appearances.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(g) states in pertinent part that...no full-time **staff attorney**...shall, during his...public employment or for a period of six months after the termination of his...public employment with a governmental entity authorized to hear contested cases or promulgate regulations **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 regulation;
- (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.

West Virginia Code Section 6B-2-5(g)(5) states in pertinent part that...a full-time staff attorney...who would be adversely affected by the provisions of this subsection (g) may apply to the Ethics Commission for an exemption from the six months 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...

ADVISORY OPINION

Pursuant to subsection 6B-2-5(g) of the Ethics Act, a staff attorney, for a period of six months after the termination of his employment, may not appear in a representative capacity before the public entity with which he served. This prohibition is applicable to governmental entities which are authorized to hear **contested cases or promulgate regulations**.

The Commission would note that pursuant to subsection 6B-2-5(g) of the Ethics Act, the amount of personal participation by a staff attorney is irrelevant. Simply stated, government staff attorneys can not appear in a representative capacity before their employer, (in this case the Supreme Court) for a period of six months **if** the Court has jurisdiction over any of the five categories outlined in sections 6B-2-5(g)(A) - (E) of the Ethics Act.

West Virginia Code §51-1-3 states in pertinent part that the Supreme Court of Appeals shall have original jurisdiction in cases of habeas corpus, mandamus and prohibition. It has appellate jurisdiction in civil cases where the matter in controversy is of greater value or amount than one hundred dollars; in controversies concerning the title or boundaries of land, the probate of wills, the appointment or qualifications of a personal representative, guardian, committee or curator, or concerning a mill, road, way, ferry or landing, or the right of a corporation or county to levy tolls or taxes; in cases of quo warranto, habeas corpus, mandamus, certiorari and prohibition, and in cases involving freedom or the constitutionality of a law. It has appellate jurisdiction in criminal cases where there has been a conviction for felony or misdemeanor in a circuit court, and where a conviction has been had in any inferior court has been affirmed in a circuit court and in cases relating to the public revenue.

It is the Commission's opinion that the Supreme Court of Appeals is authorized to hear contested cases as meant by subsection 6B-2-5(g) of the Ethics Act. Specifically, it has jurisdiction over contested cases involving administrative sanctions, actions or refusals to act.

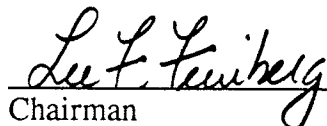
Therefore, the six month prohibition against appearing before their former governmental agency would apply to the Assistant Director for Magistrate Courts, Law clerks, Per curiam clerks and Writ clerks employed by the Supreme Court of Appeals if these positions are considered "staff attorney" positions.

The next question considered by the Commission is whether the lawyers employed by the Supreme Court are considered "staff attorneys".

The requestor states that neither he nor the other persons listed in the request letter represent the Court or the Court Administrator's Office as attorneys, nor do they make court appearances. The requestor does not have access to confidential information and the Administrator's office does not adjudicate cases. Further, their official responsibilities do not include the practice of law within and related to the functions of the Administrative Offices of the Supreme Court.

The Commission finds that neither the requestor's public position nor the other positions outlined in the request letter would be considered staff attorney positions under the meaning of the Ethics Act since they do not act in a representative capacity on behalf of the Supreme Court.

Therefore, the six month prohibition against appearing before their former governmental agency does not apply to the Assistant Director for Magistrate Courts, Law clerks, Per curiam clerks and Writ clerks employed by the Supreme Court of Appeals since these are not considered "staff attorney" positions.


Chairman