MISSOURI ETHICS COMMISSION
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Elizabeth L. Ziegler
Executive Director

October 10, 2019

Re: Advisory Opinion No. 2019.10.CI.007

Dear

At the October 10, 2019 meeting of the Missouri Ethics Commission, your request for an advisory opinion was discussed.

Opinion

Pursuant to section 105.955.16, RSMo, the Missouri Ethics Commission (MEC or Commission) may issue a written opinion regarding any issue on which the Commission may receive a complaint. Section 105.957.1(5), RSMo, authorizes the Commission to receive complaints alleging violations of "the conflict of interest laws contained in sections 105.450 to 105.468 and section 171.181." The Commission issues this opinion within the context of Missouri's laws governing such issues, assuming only the facts presented by you in your letter and other such facts that are generally available to the public.

The question presented and the Commission's opinion appears below.

Would it be a legal or ethical violation under § 105.456.1(3), RSMo, for an elected official – who was hired for compensation as an attorney to prepare and file an injunction or original writ under § 536.150, RSMo, against a state agency – to enter into preliminary negotiations/conferences with the state agency prior to filing the injunction or original writ?

Section 105.456.1(3), RSMo, provides that no member of the general assembly and no statewide elected official shall:

> Attempt, for compensation other than the compensation provided for the performance of his or her official duties, to influence the decision of any agency of the state on any matter, except that this provision shall not be construed to prohibit such person from participating for compensation in any adversary proceeding. . . . This subdivision shall not be construed to prohibit any inquiry for information or the representation of a person without consideration before a state agency or in a matter involving the state if no consideration is given, charged or promised in consequence thereof.

Accordingly, negotiation with the state agency under the circumstances set out in your letter, is generally prohibited unless that activity fits into the exceptions listed in § 105.450(1), RSMo, which defines adversary proceeding. Such prohibition is consistent with Missouri's Rules of Professional Conduct, which provide that "A lawyer holding public office shall not attempt to influence any agency of any political subdivision of which such lawyer is a public officer, other than as a part of his or her official duties or except as authorized in sections 105.450 to 105.496, RSMo." Rule 4-1.11(e).

Your question assumes you have been hired to file a petition pursuant to the authority in § 536.150, RSMo. That statute authorizes judicial review via "suit for injunction, certiorari, mandamus, prohibition or other appropriate action" when an administrative body has "rendered a decision which is not subject to administrative review." *Id.* The question then is whether "preliminary negotiations/conferences with the state agency prior to filing" a petition pursuant to § 536.150, RSMo, are part of an "adversary proceeding" and therefore an exception to the general prohibition.

Turning to those exceptions, "adversary proceeding" in § 105.450(1), RSMo, is defined as "any proceeding":

> in which a record of the proceedings may be kept and maintained as a public record at the request of either party by a court reporter, notary public or other person authorized to keep such record by law or by any rule or regulation of the agency conducting the hearing;
>
> or from which an appeal may be taken directly or indirectly, or any proceeding from the decision of which any party must be granted, on request, a hearing de novo;
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> or any arbitration proceeding;
>
> or a proceeding of a personnel review board of a political subdivision;
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> or an investigative proceeding initiated by an official, department, division, or agency which pertains to matters which, depending on the conclusion of the investigation, could lead to a judicial or administrative proceeding being initiated against the party by the official, department, division or agency.

It is reasonable to presume that this list of exceptions is finite, because the statute does not use any language suggesting otherwise, and "[w]hen statutory exceptions are plainly expressed, courts cannot add to the exceptions or exclusions beyond those explicitly provided. The applicable rule of statutory construction is that the express mention of one thing implies the exclusion of another." *Smith v. Mo. Local Gov't Employees Ret. Sys.*, 235 S.W.3d 578, 582 (Mo. App 2007) (internal citation omitted).

Applying the particulars proposed by your question, the statutory definition of "adversary proceeding" would not appear to include "preliminary negotiations/conferences with the state agency prior to filing" a petition pursuant to the authority in § 536.150, RSMo. Because negotiations do not involve hearings, there is no proceeding, no record, and no right to appeal or a hearing de novo. Similarly, preliminary negotiations are not arbitration proceedings and are not proceedings of a personnel review board. Finally, the facts of your letter suggest there is no ongoing investigative proceeding that could lead to judicial or administrative action, because the filing of a petition for review pursuant to § 536.150, RSMo, assumes that the agency has already made a decision.

The lingering question then is whether such preliminary dealings as pre-filing negotiations and conferences with an agency are an inherent part of any of the proceedings that are an exception to the general prohibition.

While the term "proceeding" is not defined in the conflict of interest statutes, it has been interpreted by a Missouri court in a related context. In *State v. Shell*, the Court of Appeals provided interpretation of a conflict of interest statute to answer the question of whether an agency hearing was a "case" or "proceeding." 571 S.W.2d 798 (Mo. App. 1978). The court concluded that "'case' and 'proceeding' may

be said to mean matters before the state agency which call for the consideration or the decision of the agency." *Id.* at 801. This meaning suggests a situation where the agency is statutorily required to render a decision, a circumstance inapplicable to settlement negotiations.

Additionally, courts will often consult the dictionary to ascertain statutory meaning from the plain and ordinary usage of undefined statutory terms. Black's Law Dictionary defines "proceeding" as follows:

1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment;
2. Any procedural means for seeking redress from a tribunal or agency;
3. An act or step that is part of a larger action;
4. The business conducted by a court of other official body; a hearing.

In light of these sources, the Commission concludes that the term "proceeding," as used in the statutory definition of "adversary proceeding," references a matter that contains some procedural formality such as the filing of a complaint or a petition or similar action that would require the consideration or the decision of the agency.

Accordingly, negotiation with a state agency prior to the formal initiation of an adversary proceeding would be prohibited under § 105.456.1(3), RSMo. However, nothing in the statute would prohibit you from negotiating with a state agency *after* initiating an adversary proceeding. Similarly, the statute expressly allows for "the representation of a person without consideration before a state agency or in a matter involving the state if no consideration is given, charged or promised in consequence thereof." § 105.456.1(3), RSMo.

Sincerely,

Elizabeth L. Ziegler
Executive Director