



MISSOURI ETHICS COMMISSION
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Elizabeth L. Ziegler
Executive Director

January 23, 2020

Re: Advisory Opinion 2020.01.CI.001

Dear

At the January 23, 2020 meeting of the Missouri Ethics Commission, your request for an advisory opinion was taken up by the Commission.

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 MEC 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 questions presented and the Commission’s opinion appear below.

Does Section 105.456.1(3), RSMo, prohibit an elected official, who was hired by a client/company for compensation as an attorney, from filing an appeal and subsequently representing client/company before the Administrative Hearing Commission regarding the denial of a license by a state agency?

If not, and assuming that an appeal is filed, would a subsequent settlement discussion with the state agency be seen as “a conference upon a public document” as that phrase is used in Section 105.456.1(3), RSMo?

Section 105.456.1(3), RSMo, provides that no member of the general assembly and no statewide elected official “shall [a]ttempt 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[.]” However, there are two exceptions: such officials are not prohibited “from

participating for compensation in [1] any adversary proceeding or in [2] the preparation or filing of any public document or conference thereon.”¹ *Id.*

The first exception refers to an “adversary proceeding,” which is defined by section 105.450(1), RSMo, as:

[A]ny 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; or any arbitration proceeding; or a proceeding of a personnel review board of a political subdivision; 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.

The Commission has previously opined “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 a similar action that would require the consideration or the decision of the agency.” MEC Advisory Opinion No. 2019.10.CI.007.

Turning to the second exception, the definition of “public document” is found in section 105.450(10), RSMo, which states: a “public document” is “a state tax return or a document or other record maintained for public inspection without limitation on the right of access to it and a document filed in a juvenile court proceeding.” Clearly, documents filed in conjunction with an AHC appeal, such as is suggested by your first question, are not state tax returns nor are they documents filed in a juvenile court proceeding. That said, such documents could be “public documents” in that they might be considered “record[s] maintained for public inspection without limitation on the right of access.”

This question of whether documents filed in an AHC appeal are “public documents” could be significant because there is an important caveat to the public document exception:

The exception for a conference upon a public document shall not permit any member of the general assembly or the governor, lieutenant governor, attorney general, secretary of state, state treasurer or state auditor to receive any consideration for the purpose of attempting to influence the decision of any agency of the state on behalf of any person with regard to any application, bid or request for a state grant, loan, appropriation, contract, award, permit other than matters involving a driver's license, or job before any state agency, commission, or elected official.

¹ It is worthwhile to note that Section 105.456.1(3), RSMo 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.”

Section 105.456.1(3), RSMo.

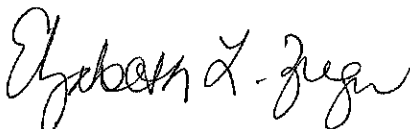
To summarize: Section 105.456.1(3) prohibits certain elected officials from accepting compensation for attempting to influence a state agency's decision. There are two exceptions. The first allows participation in an adversary proceeding and the second allows for assistance with the preparation and filing of an application, bid or request but only the preparation and the filing. It does not allow the elected official to attempt to influence the agency's decision with respect to that application, bid or request.

The circumstances presented by your first question clearly describe a situation covered by the first exception, because you describe an adversary proceeding. In other words, the filing of the complaint required to initiate an appeal with the Administrative Hearing Commission is precisely the type of formality necessary to satisfy the definition of the term "proceeding" as it is used within the statutory definition of "agency proceeding."

Turning to your second question, the Commission concludes that because your compensated representation of the client/company is allowable under the first exception, the limitations of the second exception are not applicable. That is to say, settlement negotiations with a state agency during the pendency of an appeal is not prohibited because such communication is part of an adversary proceeding.

This conclusion is consistent with the Commission's prior advice in MEC Advisory Opinion No. 2019.10.CI.007, which stated that "nothing in [section 105.456.1(3), RSMo] would prohibit you from negotiating with a state agency *after* initiating an adversary proceeding." (emphasis in original).

Sincerely,



Elizabeth L. Ziegler
Executive Director