STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

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ATTORNEY GENERAL OPINION NO. 81- 50

The Honorable Paul Hess
State Senator, 30th District
State Capitol, Room 123-S
Topeka, Kansas 66612

Re: Cities and Municipalities--Public Officers--Acting as Attorney Adversely to City's Interests

Synopsis: An attorney who has been appointed to any board, commission or authority of a city is a "public officer" under K.S.A. 12-1601, and is therefore precluded from representing a client in any litigation or controversy in which the city is interested, either directly or indirectly. This preclusion extends to even those matters which do not involve the particular body to which the individual has been appointed, but does not include other members of a law firm of which he or she may be a part. Cited herein: K.S.A. 12-1601, 12-1602.

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Dear Senator Hess:

You request the opinion of this office regarding the scope of K.S.A. 12-1601, which is commonly known as the conflict of interest law. You posit a situation where an attorney is appointed as a member of a board, commission or authority in a Kansas city, and wish to know whether the scope of K.S.A. 12-1601 prevents such a person from representing clients in any legal matter, even one distinct from the

area of authority of the particular body on which he or she is serving. In our opinion, such a result is mandated by the statute as it is presently worded.

As revised in 1970 (L. 1970, ch. 366, §7), K.S.A. 12-1601 states:

> "It shall be unlawful for any elected or appointed public officer of any city to act as attorney, counselor or adviser adversely to such city in any litigation or controversy in which said city may be directly or indirectly interested."

Prior to being amended, the statute covered only mayors and elected members of city commissions or councils, and extended only to actual litigation. However, today, in addition to the more expansive prohibitions of 12-1601, K.S.A. 12-1602 further forbids any individual covered by the above to "appear and be heard" in any court in which litigation involving the city has been brought.

An essential element in the application of this statute is the determination of whether a member of an appointive city board, commission or authority should be considered a "public officer" for the purposes of K.S.A. 12-1601. In Sowers v. Wells, 150 Kan. 630, 633 (1939), the Court stated thus:

> "What is a 'public office' and who is a 'public officer'? While the authorities are not in complete harmony in defining the term 'public office,' or 'public officer,' it universally has been held that the right to exercise some definite portion of sovereign power constitutes an indispensable attribute of 'public office.' . . . In Kingston Associates v. La Guardia, 281 N.Y.S. 390, 156 Misc. 116, in distinguishing between 'public office,' and an 'employment,' the New York court said:
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> "'There is, however, one indispensable attribute of public office, namely, the right to exercise some portion of the sovereign power. 'Public office' has been defined by Mechem in his work on Public Officers, . . . as 'the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating

> power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.'"

And, in Miller v. Ottawa County Comm'rs, 146 Kan. 481, 484 (1937), the court states other helpful criteria thus:

> "The distinction between an officer and an employee is that the responsibility for results is upon one and not upon the other. There is also upon an officer the power of direction, supervision and control."

Finally, in State v. Ottawa, 84 Kan. 100, 105 (1911), an office was distinguished from employment in that the former involved tenure, duration, emolument and duty. See also McQuillin, Municipal Corporations §12.29, 3rd rev. ed. (1973).

While no specific Kansas authority exists as to whether members of appointive bodies such as a park board, planning commission or housing authority would be public officers of the city, in our opinion such must be the case. The purpose of such bodies is to exercise "some definite portion of sovereign power" which has been allocated to them by statute or ordinance, and which, in their absence, would have to otherwise be exercised by elected city officials. Members of such bodies are responsible for the operation of the bodies or functions which have been entrusted to them by the city, are appointed for a definite term and are held accountable by those who appointed them, i.e., mayor or city commission or council. All of these factors separate the members of such bodies from mere employees, such as an attorney who may be hired to render advice or counsel, or from members of autonomous bodies whose authority derives from state statute and which are merely "triggered" into existence by city action. See, e.g., K.S.A. 27-315 et seq. (airport authority). Additionally, it is to be noted that other jurisdictions have reached this same result in numerous instances. McQuillin, supra at §12.31, n. 42.

Given the above conclusion that attorneys who are appointed to city boards, commissions or authorities are public officials of the city, how far does the statute go to preclude them from representing clients who are involved in controversies or litigation with the city? In view of the plain language of the statute, which bars adverse action in "any" litigation or controversy in which the city has an interest, direct or indirect, we see virtually no area where they may act, even if the matter involves only a traffic ticket in municipal court. While it might be reasonable to do so, no distinction is made between matters

involving the specific body on which they sit and others partially or totally apart from their area of concern. Also, while initial representation of a client might not involve litigation, it is our opinion that any disputed claim against the city would constitute a controversy of the type included in the statute, and would be barred.

It would further be our opinion that the statutorily imposed disability extends no further, and does not include partners or associates of the firm in which the individual might be a member. Thus, solely by virtue of K.S.A. 12-1601 and 12-1602, members of that firm are not disqualified from participating as attorneys, counselors or advisors adversely to the city in any litigation or controversy in which the city may be directly or indirectly involved. However, inasmuch as this issue also raises a question concerning the Canons of Professional Responsibility for Attorneys, concerning which this office is not authorized to issue opinions, our conclusion is limited solely to the reach of the statutes themselves.

In conclusion, an attorney who has been appointed to any board, commission or authority of a city is a "public officer" under K.S.A. 12-1601, and is therefore precluded from representing a client in any litigation or controversy in which the city is interested, either directly or indirectly. This preclusion extends to even those matters which do not involve the particular body to which the individual has been appointed, but does not include other members of a law firm of which he or she may be a part.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Jeffrey S. Southard

Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:phf