



JUDICIAL INVESTIGATION COMMISSION

Room E-400, State Capitol

Charleston 25305

June 7, 1985

Re: Disqualification in Revised Uniform Reciprocal Enforcement of Support Act actions filed while you were Prosecuting Attorney for _____ County, West Virginia.

Dear Judge _____

You have asked the Judicial Investigation Commission of West Virginia to issue an Advisory Opinion on whether you should disqualify yourself from actions filed under the Revised Uniform Reciprocal Enforcement of Support Act while you were Prosecuting Attorney of _____ County, West Virginia. The issue which you raise is controlled by the language contained in Canon 3C of the Judicial Code of Ethics.

Canon 3C of the Judicial Code of Ethics states in pertinent part as follows:

CANON 3

A Judge Should Perform the Duties of His Office Impartially and Diligently

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

- (a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
- (b) He served as lawyer in the matter

June 7, 1985

in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it; . . .

Canon 3C of the Judicial Code of Ethics would require that you disqualify yourself from those actions in which you served as a lawyer in a matter in controversy, or a lawyer with whom you previously practiced law served during such association as a lawyer concerning the matter.

As you know, the Revised Uniform Reciprocal Enforcement of Support Act, set forth in W. Va. Code, §48-9-1, et seq., provides a mechanism in which a Circuit Court in West Virginia may enforce an order for child support rendered in a foreign State. The duties of the Circuit Court and officials in West Virginia as a responding State are set forth in W. Va. Code, §48-9-18, which states as follows:

(a) After the responding court [in this instance the County Circuit Court] receives copies of the petition or complaint, certificate and act from the initiating court the clerk of the court shall docket the case and notify the prosecuting attorney of his action.

(b) The prosecuting attorney shall prosecute the case diligently. He shall take all action necessary in accordance with the laws of this State to enable the court to obtain jurisdiction over the obligor or his property and shall request the court to set a time and place for a hearing and give notice thereof to the obligor in accordance with law.

W. Va. Code, §48-9-19, states further duties of the Circuit Court and officials in West Virginia when a petition is filed pursuant to the statute. That section of the Code states:

(a) The prosecuting attorney on his own initiative shall use all means at his disposal to locate the obligor or his property, and if because of inaccuracies in the petition or complaint or otherwise the court cannot obtain jurisdiction, the prosecuting attorney shall inform the court of what he has done and request the court to continue the case pending receipt of more accurate information or an amended petition or complaint from the initiating court.

(b) If the obligor or his property is not found in the county, and the prosecuting attorney

June 7, 1985

discovers that the obligor or his property may be found in another county of this State or in another state, he shall so inform the court. Thereupon, the clerk of the court shall forward the documents received from the court in the initiating state to a court in the other county or to a court in the other state or to the information agency or other proper official of the other state with a request that the documents be forwarded to the proper court. All powers and duties provided by this article apply to the recipient of the documents so forwarded. If the clerk of a court of this State forwards documents to another court, he shall forthwith notify the initiating court.

(c) If the prosecuting attorney has no information as to the location of the obligor or his property, he shall so inform the initiating court.

Under the terms of W. Va. Code, §48-9-18 and §48-9-19, you represented as Prosecuting Attorney for _____ County a party to litigation brought under the statute.⁴ Since the statute required you, as Prosecuting Attorney for _____ County, to serve as a lawyer in a matter in controversy brought under the statute, Canon 3C(b) would require you to disqualify yourself in proceedings filed while you were Prosecuting Attorney for _____ County. This would appear to be the rule even though an Assistant Prosecuting Attorney working in your office may have handled all such petitions and you had no personal knowledge or involvement in any of the petitions filed. Canon 3C(b) states that you should disqualify yourself if a lawyer with whom you previously practiced law served during such association as a lawyer concerning the matter in controversy.

Canon 3C(1) suggests that a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. Since the statute required you, as Prosecuting Attorney for _____ County, to diligently prosecute petitions filed at that time, one might reasonably question your impartiality if you were to preside as Judge on those petitions filed while you were Prosecuting Attorney. See e. g., Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11-13(1954); State v. Hodges, 305 S.E.2d 278 (W.Va. 1983); State v. Flint, 301 S.E.2d 765 (W.Va. 1983); Louk v. Haynes, 223 S.E.2d 780 (W.Va. 1976).

In Louk v. Haynes, supra, the Supreme Court of Appeals of West Virginia stated that "where a challenge to a judge's impartiality is made for substantial reasons which indicate that the circumstances offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the State and the accused, a judge should recuse himself."

Page 7
June 7, 1985

It would appear from the statutory obligation placed on you as Prosecuting Attorney for _____ County to prosecute vigorously those actions filed under the Revised Uniform Reciprocal Enforcement of Support Act that you should disqualify yourself from presiding over cases brought while you were Prosecuting Attorney. This seems to be suggested by Canon 3C of the Judicial Code of Ethics as well as the case law cited above. The Commission hopes that this correspondence adequately addresses the question which you have raised concerning this matter.

Very truly yours,

JUDICIAL INVESTIGATION COMMISSION

By: W. Craig Broadwater
W. Craig Broadwater, Chairman

¹While it is not in issue in this opinion, W. Va. Code, §48-9-12, requires the prosecuting attorney of a county to represent any person seeking enforcement of a West Virginia support decree who is bringing an action under the Revised Uniform Reciprocal Enforcement of Support Act.