



JUDICIAL INVESTIGATION COMMISSION

Room E-400, State Capitol

Charleston 25305

September 23, 1992

JIC Advisory Opinion 1992-21

Dear Magistrate :

Your letter to _____ dated August 10, 1992, was referred to the Judicial Investigation Commission for consideration and review. In that correspondence you state that your wife now works as the secretary for _____ who was recently appointed as an assistant prosecuting attorney in _____ County and who will become the prosecuting attorney for that county on January 1, 1993. You asked whether it would be proper for you to preside over criminal cases in which Mr. _____ is acting as prosecutor since your wife is his secretary.

Canon 3C (1) of the Judicial Code of Ethics would control the response to your inquiry. That section of Canon 3 states:

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 . . .

Magistrate

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Based upon the language contained in this Canon, it is the opinion of the Commission that you should not preside over criminal cases in which Mr. is acting as prosecutor unless the language of Canon 3D is followed.

Canon 3D provides that under certain circumstances a judge who may be disqualified may instead of withdrawing from the proceeding, disclose the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial, the judge is no longer disqualified and may participate in the proceeding. The agreement signed by all parties and lawyers shall be incorporated into the file of the proceeding.

After review of your inquiry at its meeting and after an examination of language contained in the above-mentioned Canon, it is the opinion of the Judicial Investigation Commission that absent the disclosure of your relationship and the agreement in writing of the parties and lawyers after the disclosure is made you could not sit on any cases involving Mr. or his office as prosecutor.

It is hoped that this advisory opinion has answered your inquiry; and if there are any further questions regarding this matter, you contact the Commission.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Fred L. Fox, II", written over the typed name.

Fred L. Fox, II, Chairman

FLF,II/bl