



JUDICIAL INVESTIGATION COMMISSION

Building 1, Room E400
1900 Kanawha Boulevard, East
Charleston, WV 25305-0834

June 16, 1993

Re: JIC Advisory Opinion 1993-11

Dear

Your recent request for an advisory opinion was discussed by the Judicial Investigation Commission at its most recent meeting. In that correspondence you request a formal opinion as to whether or not a conflict of interest exists for the Mental Hygiene Commissioner in your county to continue to serve in such capacity when his partner in the private practice of law has been appointed to serve as a part-time Assistant Prosecuting Attorney for County. You were kind enough to provide the Commission with a detailed explanation of the situation with which you are confronted in County regarding the Mental Hygiene Commissioner and the part-time Assistant Prosecuting Attorney.

You indicated that the Mental Hygiene Commissioner in question was appointed by the Court on March 31, 1977, and that his service since that time has been exceptional. He has been in private practice for many years with an attorney who has served three terms as Prosecuting Attorney and who in February, 1993, was asked if he would serve as a part-time Assistant Prosecuting Attorney with primary responsibility for advising the County Commission and handling juvenile cases. At that time, because of your concerns, about a possible conflict of interest, the Mental Hygiene Commissioner stopped hearing mental hygiene cases pending a resolution of any conflicts which may exist.

The compensation received by the Mental Hygiene Commissioner has been a very minimal part of his total income as a practicing attorney. The mental hygiene caseload in your circuit averages about two or three filings a month. On those occasions when the Mental Hygiene Commissioner has been unable to hear a matter, you have presided over the hearings.

You have stated to the Commission that if a conflict of interest does exist, there are other problems which need to be addressed. You stated that in your county there are 17 lawyers: Three are in the office of the prosecuting attorney; one is retired; one is not practicing at the present time; one is in only office practice; one is located about eight to ten miles from the courthouse and is in part-time practice; another is in part-time practice; one is disqualified by reason of family relationship to an assistant prosecuting attorney; and one is Mental Hygiene Commissioner. The county is left with seven attorneys to serve as guardians-ad-litem in mental hygiene cases; and at times because of prior commitments, none of the seven would be available at the exact time of a scheduled mental hygiene hearing. You indicated that if the Mental Hygiene Commissioner were disqualified from service and Court appointed a member of the Bar who was willing to serve as Mental Hygiene Commissioner then the pool of possible guardians-ad-litem would be reduced to five (including the current Mental Hygiene Commissioner) because two other attorneys would be disqualified because of a professional relationship to the new Commissioner. You stated that the current Mental Hygiene Commissioner could serve as a guardian-ad-litem but would be disqualified in most every case for a substantial period of time. That would leave the Court with a guardian-ad-litem pool of four.

Your letter presented a classic dilemma which exists in several rural areas of West Virginia, and the Commission appreciates the difficulties encountered by you and other circuit judges in these situations. After reviewing the information which you have provided and discussing the difficulties which you have enumerated, the Commission feels that the rule of necessity would be a factor in arriving at an opinion in this case.

Based upon the facts as presented in your correspondence to the Commission and the difficulties which you have outlined in that letter, the Commission feels that the current Mental Hygiene Commissioner could continue to serve in that position if his law partner did not handle any cases which would have to be heard by the Mental Hygiene Commissioner. The rule of necessity would permit this

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arrangement which is not ideal, but would be permitted because of those matters which you have raised with the Commission. If there is any further question concerning this matter, do not hesitate to contact the Commission.

Very truly yours,

Fred L. Fox, II

Fred L. Fox, II, Chairman

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