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JUDICIAL INVESTIGATION COMMISSION

212 Dickinson Street
Post Office Box 1629
Charleston, West Virginia 25326-1629
(304) 558-0169 FAX (304) 558-0831

May 16, 1995

Re: JIC Advisory Opinion 1995-07

Dear

Your recent request for an advisory opinion has been reviewed by members of the Judicial Investigation Commission. In that letter you indicated that your wife may be accepting a position of Office Assistant III with the West Virginia State Police, Detachment. In a subsequent conversation you indicated that the position involved secretarial work such as typing reports and other similar duties. You asked whether it would be proper for you to preside over criminal cases in which the arresting or investigating officers were members of the West Virginia State Police.

The language in Canon 3E (1) of the Code of Judicial Conduct states generally that "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . ." The language is then followed by enumerated specific instances when disqualification is required. However, the enumerated instances are not considered exclusive. The commentary to Canon 3E (1) also states that a judge should disclose on the record any information that the judge believes the parties or their attorneys might consider relevant to the question of disqualification even if the judge believes there is no real basis for disqualification.

The Supreme Court of Appeals of West Virginia recently discussed language which is virtually identical to the language cited in the Code of Judicial Conduct in Brown v. Dietrick, 191 W.Va. 169, 444 S.E. 2d 47 (1994). In this case

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the Court considered whether the circuit court was correct in holding that a search warrant issued by a magistrate was void because the magistrate was married to the chief of police and one of his officers had obtained the warrant. The Court, after discussing cases from other jurisdictions, stated that those cases and the language of Canon 3C (1) and 3C (1) (d) and (i) of the Judicial Code of Ethics relating to the disqualification of a judicial official when his or her impartiality might reasonably be questioned if the official's spouse is a party to the proceeding would foreclose a magistrate from issuing a warrant sought by his or her spouse who is a police officer. However, the situation presented in the case was different.

The warrant had been issued at the request of another officer in the police department not the spouse of the magistrate. The spouse's name did not appear in the affidavit nor was there any discussion about her husband with the other officer. The Court stated that while involvement by the magistrate's spouse would preclude the magistrate from hearing any matters, the extension of a per se rule with regard to other officers in the police department was not made. Involvement by other officers in the police department would not automatically disqualify the magistrate if the magistrate were otherwise neutral and detached. The Court did say that prudence dictated that the magistrate's involvement with warrants from the police force should be severely curtailed. The case was remanded for a further hearing with regard to the warrant to enable the parties to challenge it on the basis that there were other additional facts other than the marriage of the magistrate to the police chief which demonstrated the magistrate was not neutral and detached.

Based on the language contained in the Brown decision, it would appear that you would not be disqualified per se from presiding over criminal cases in which the arresting or investigating officers would be members of the West Virginia State Police. However, the possibility of additional hearings in those cases exists if a party would challenge your presiding because you were not neutral and detached because of your wife's employment by the West Virginia State Police. You should disclose your wife's employment to parties and Counsel when the State Police are involved in a case. A copy of the Brown decision is enclosed for your review.

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If there is any additional question regarding your inquiry, do not hesitate to contact the Commission.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Fred L. Fox, II". The signature is stylized with a large, sweeping initial "F" and a distinct "II" at the end.

Fred L. Fox, II, Chairman

FLF, II/bl
Enclosure