



JUDICIAL INVESTIGATION COMMISSION

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

Re: JIC Advisory Opinion 1995-37

December 15, 1995

Dear

Your letter to Counsel for the Judicial Investigation Commission was reviewed by the Commission at its recent meeting. In your correspondence, you stated that your son, who is a practicing attorney, has opened a law office in your circuit and will be practicing law there. You stated that, assuming that he practices there and will have cases in at least one of the three counties in your circuit, you would anticipate various problems. Subsequent to receiving your request for an advisory opinion, the Commission obtained a copy of an Administrative Order which was signed by the Chief Justice of the Supreme Court of Appeals and which dealt with some of the situations which you asked about in your letter. The Commission reviewed your request for an advisory opinion and the Administrative Order of the Supreme Court in arriving at its opinion.

You asked initially about whether your son could be placed on the appointment list and, if so, what kind of appointments he could receive and whether you should disqualify yourself from a matter before he was actually appointed. In reviewing that part of your inquiry, the Commission looked to the language set forth in Canon 3C(4) and 3E(1)(d)(ii) of the Code of Judicial Conduct. Canon 3C(4) states that a judge shall not make unnecessary appointments and shall exercise the power of appointment impartially and on the basis of merit. It further requires a judge to avoid nepotism and favoritism. Canon 3E(1)(d)(ii) requires a judge to disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned, including those cases in which a person within the third degree of relationship of the judge is acting as an attorney in a proceeding.

December 15, 1995
Page Two

Based upon the language set forth in those Canons, it is the opinion of the Commission that the appointment process should be done strictly on a rotation basis and that orders appointing your son in any matters should be signed by a special judge who would be hearing proceedings involving him. The Administrative Order signed by the Chief Justice states that a sitting circuit judge is assigned to preside in all cases or proceedings in which your son is counsel of record. It further states that in the event that the sitting circuit judge is disqualified from hearing any of those cases, two senior status judges would serve on a rotating basis. One of those judges should sign an order appointing your son in any matter.

You further asked whether you could charge the grand jury or direct them during a period of time when your son was representing a criminal defendant. It is the opinion of the Commission that any instruction which you would give the grand jury would be standard instructions given to cover all cases which may be considered in a given term and would not relate specifically to any case or charge involving one or your son's clients or cases. Since there would not be a specific proceeding over which you would be presiding in addressing the grand jury, the Commission feels that there would be no violation of the Code of Judicial Conduct based on his being an attorney in a matter over which you were presiding.

You also asked about the selection of petit juries and the instructions given to them concerning their duties and responsibilities. You indicated that, in your circuit, all petit juries are generally chosen in one day. During the selection process, you would indoctrinate the jury concerning their duties and responsibilities. You asked whether you could preside over jury indoctrination or selection in cases in which your son was representing a criminal defendant or a party in a civil action.

It is the opinion of the Commission that you could conduct the general indoctrination of the whole jury panel as to their duties, responsibilities, etc., so long as the indoctrination is generic and not specific with regard to cases. However, because of a certain latitude of discretion given to circuit judges in the selection of petit juries, you should not participate in selection of any petit jury when your son is representing either a criminal defendant or a party in a civil action. All matters relating to the selection of a petit jury in those instances should be handled by one of the special judges who would otherwise preside in all cases and proceedings in which your son is counsel of record.

If you have any other questions concerning these matters, do not hesitate to contact the Commission.

December 15, 1995
Page Three

Very truly yours,

A handwritten signature in dark ink, appearing to read "Fred L. Fox, II". The signature is stylized with a large, bold "F" and "L", and a smaller "Fox, II".

Fred L. Fox, II
Chairman

CMcL