



JUDICIAL INVESTIGATION COMMISSION

Post Office Box 1629
Charleston, West Virginia 25326-1629
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June 10, 2002

Re: JIC Advisory Opinion 2002-15

Dear

Your recent request for an advisory opinion addressed to Commission Counsel was reviewed by the Judicial Investigation Commission. In your letter you seek an advisory opinion as to whether you may ethically preside over cases in which a party is represented by or by any attorney who practices at the law firm of

The inquiry arises from the fact that , an attorney with that firm represents in a civil action relating to a dispute over an administrative order that was signed by all of the Judges of the Circuit. The effect of the administrative order was to cause , to "be relieved forthwith as the Supervisor of the Home Incarceration Program" in

You stated that subsequently instituted a Civil Action 02-C-411 by filing a "petition for writ of mandamus and complaint for damages" in the Circuit Court of County. Among others, each of the Judges of the Judicial Circuit including you, were named as a Respondent/Defendant in this action.

was also named as a Respondent/Defendant in the action. In his capacity as Counsel for , Mr. filed "Respondent response to petition for writ of mandamus and complaint for damages and cross claim." The cross claim portion of the complaint alleges that "the Judges of the Judicial Circuit, individually and in their official capacities as judges, acted contrary to well-established law and without any semblance of due process . . . in the entry and implication of the . . . October 12, 2001 Administrative Order."

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In his prayer for relief, _____ requests among other things an order “requiring the Judges of the _____ Judicial Circuit to indemnify the Sheriff all costs and expenses, including attorneys’ fees, incurred in the defense of this civil action” and an order “declaring that Judges of the _____ Judicial Circuit must indemnify the Sheriff for any judgment rendered against the Sheriff in favor of the Plaintiff/Petitioner in this civil action.” Further, _____ asks for an order “requiring the Judges of the _____ Judicial Circuit to reimburse the Sheriff his costs and expenses, including attorneys fees, incurred in having the Administrative Order ruled invalid” and an order “declaring that the actions of the Judges of the _____ Judicial Circuit were not judicial in nature. . . .”

You asked whether Sheriff _____ efforts to pursue the judges as individuals and to obtain indemnification from them personalized this action to the extent that an individual judge would be foreclosed from sitting on other actions in which Counsel for Sheriff _____ appeared on behalf of the party. You asked if any such disability which might exist extends to other attorneys practicing in the same firm as Counsel for Sheriff _____

The Code of Judicial Conduct Canon 3E(1)(a) states:

Canon 3. A judge shall perform the duties of judicial office impartially and diligently.

E. Disqualification. - (1) A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .

The disqualification provisions of Canon 3E are balanced by the language contained in Canon 3B(1) of the Code of Judicial Conduct which states:

B. Adjudicative responsibilities. - (1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

The Commission has written a lengthy advisory opinion about disqualification by a judge when the judge is a named defendant in litigation in his or her official capacity. See JIC Advisory Opinion 4/8/87 a copy of which is attached hereto for your review.

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That advisory opinion discusses West Virginia cases and cases from other jurisdictions relative to the question of disqualification by a judge when the judge is a named defendant. Based on the Commission's analysis of the case law and the Canon it concluded that judges would not be disqualified from hearing a proceeding merely because a litigant sued or threatened to sue the judge.

Since that advisory opinion, the Supreme Court of Appeals of West Virginia decided Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 459 S.E.2d 374 (1995). In that case a circuit judge presided over a medical malpractice jury trial which resulted in a defense verdict. The judge did not know at the time one of the defense attorneys also represented him in a federal law suit filed by a pro se litigant. When the judge received the dismissal order, he realized that he had been represented by one of the defense lawyers and voluntarily recused himself from the medical malpractice case. Another circuit judge was appointed to the case and granted the plaintiffs a new trial based on the appearance of impropriety.

The Supreme Court reversed that judge's order that granted a new trial. In the ruling the Court refused to adopt a per se rule that a new trial should be granted when there is an appearance of impropriety and there is no additional supporting evidence that the judge was actually prejudiced or biased. In a footnote the Court noted that the original judge had voluntarily recused himself. The Court stated that the question of whether recusal was necessary was reserved. The Court stated that "if the disqualification of every judge who is sued in his or her official capacity was required it would have a substantial impact on available judicial resources." In that case the judge was sued in his official capacity. There could be no cases found in this jurisdiction discussing the necessity for disqualification when a judge is sued in his individual capacity.

However, the rationale followed by our Court and others in determining that disqualification is not required per se when a judge is sued in his official capacity is sound as applied to the facts presented where a judge has been sued in his official and individual capacity. The question which each judge must then determine is whether given all the facts and issues present in the case, the judge has a personal bias or prejudice which would require the judge to recuse himself. Absent supporting evidence of actual bias or prejudice disqualification would not be required. See Tennant, supra.

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It is hoped that this opinion fully addresses the question which you raised. If there is any further question regarding this matter do not hesitate to contact the Commission.

Very truly yours,

A handwritten signature in black ink, appearing to read "Donald H. Cookman", followed by a horizontal line.

Donald H. Cookman, Chairperson
Judicial Investigation Commission

DHC:nb