



JUDICIAL INVESTIGATION COMMISSION

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

May 26, 2003

Re: JIC Advisory Opinion 2003-08

Dear

You have recently requested an advisory opinion from the Judicial Investigation Commission. In your request you stated that a murder occurred in _____ County while you were the Prosecuting Attorney and you had discussions with the police, but no leads developed at that time. After you became a judge, suspects were identified and indictments were returned. Following a trial one defendant was convicted of murder but you had no participation. His appeal was rejected, but he has now filed a civil habeas corpus proceeding alleging constitutional violations in his criminal prosecution. The habeas proceeding was assigned to your docket but upon recognizing that the crime occurred while you were Prosecuting Attorney, you entered an order transferring the matter to the other circuit judge. Immediately counsel for the petitioner asked that the case be returned to you, and his client signed a written request that you preside in the habeas corpus matter, acknowledging that you were the Prosecuting Attorney when the crime occurred. Based upon the petitioner's request and your willingness to preside, the other circuit judge retransferred the matter to you and you are currently presiding.

You stated that a recent review of advisory opinions revealed an opinion issued on January 5, 1993, that stated, "A judge who had previously been employed in the prosecuting attorney's office may not hear criminal cases that were handled by that office while the judge was employed there and that disqualifications may not be waived." You asked whether the advisory opinion was provided under the old or current version of the Code of Judicial Conduct and whether that made a difference. You asked if you should continue to preside in the matter.

In order to address the inquiry which you have made, the Commission has reviewed Canon 3 of the Code of Judicial Conduct which states in relevant part:

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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:

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it; . . .

It is the opinion of the Commission that this language would preclude you from presiding over the matter which you described in your correspondence. Further, the Code of Judicial Conduct does not have a provision which permits parties or their attorneys to waive the ethical mandates set forth in the Canon. While that provision does appear in the Code of Judicial Conduct in some other jurisdictions, it is not present in our Code and so a conflict of interest would preclude a judge from sitting on a case even if the parties or counsel wished the judge to preside.

A complete copy of the advisory opinion which you mentioned in your correspondence is attached hereto. If you have any further question regarding this matter do not hesitate to contact the Commission.

Very truly yours,

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

Donald H. Cookman, Chairperson
Judicial Investigation Commission

DHC:nb

Enclosure



JUDICIAL INVESTIGATION COMMISSION

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

January 5, 1993

Your request that the Judicial Investigation Commission review a memorandum which seeks to provide a mechanism for two new circuit judges who have previously worked in the prosecuting attorney's office to obtain waivers so that they may hear criminal matters was acted on by the Judicial Investigation Commission at its recent meeting. Your inquiry asked whether a knowing intelligent and freely made waiver could be executed by parties who might appear before one of the two new circuit judges waiving the disqualification which would arise because of their prior affiliation with the prosecuting attorney's office.

While a criminal defendant could enter into a knowing voluntary and freely made waiver of such a situation, the language contained in the Code of Judicial Conduct (effective January 1, 1993) in Canon 3E (1) (b) presents an ethical prohibition which as a practical matter may not be waived by the judge. The Canon 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

January 5, 1993

might reasonably be questioned, including but not limited to instances where:

- (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

The language contained in this Canon would prohibit a circuit judge who had previously been employed in the prosecuting attorney's office from hearing criminal cases which were handled by that office while the circuit judge was employed by that office.

There does not appear any way to waive the ethical mandate set forth in the Canon and so as a practical matter there would not be a permissible way to conduct cases within the context of the memorandum.

Also, enclosed is an advisory opinion which was issued previously on a similar question. If you have any further questions concerning this matter, do not hesitate to contact the Commission.

Very truly yours,

Fred L. Fox, II

Fred L. Fox, II, Chairman

CRG/bl
Enclosure