



## JUDICIAL INVESTIGATION COMMISSION

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December 17, 2004

JIC Advisory Opinion 2004-25

Dear Ms. :

In a letter to the Judicial Investigation Commission you have asked for an advisory opinion to assist the Administrative Office of the Courts in appropriately handling matters concerning mental hygiene commissioners who are part-time judicial officers. You stated in your correspondence that mental hygiene commissioners as part-time judicial officer make judicial probable cause determinations under the West Virginia Code as to whether respondents are mentally ill and likely to cause serious harm to themselves or others, or are addicted. Findings of probable cause can result in the involuntary hospitalization of individuals in mental health facilities for evaluation and treatment. The mental hygiene commissioners are appointed by and discharge their duties and hold their office at the pleasure of the chief circuit judge of the judicial circuit in which he or she is appointed.

You stated that it had come to the attention of the Administrative Office that conferences with medical staff prior to the probable cause hearing have occurred in some cases. Upon inquiry regarding these conferences with medical staff the mental hygiene commissioner involved explained the procedure. The "conference with medical staff" in each instance was with the nurse assigned to the patient, or rarely, in his/her absence, the physician assigned to the patient to assure that the patient had received no medicines or treatment that would render them otherwise unable to meet with the appointed lawyer and to participate in the hearing, that hospital security was not desired to be in the hearing, whether any conduct occurred after admission that they should be aware of that may place the hearing participants at risk and if committed for treatment whether the deputy making transport could safely transport with the patient being seated alone in a cruiser or whether an ambulance would be preferable.

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The mental hygiene commissioner said that in no instance were questions asked of any potential witness in the case and at no time were the merits of the respondent's case discussed. At the appropriate time during the proceedings, normally at the beginning, for participant security and respondent readiness for hearings and at the conclusion of the case the matters were discussed with the respondent's counsel and other parties.

The commissioner further said that there had not been any complaints received or any concerns raised by any of the parties or the hospital regarding the procedure. It had served to the benefit of the respondent in many cases when being advised of medications initially administered to address medical concerns or behavior that once allowed to reduce in effect prior to initiating the hearing resulted in the respondent's optimum ability to participate in protecting his/her interests. In quite a few other cases information acquired permitted the court to avoid by anticipation spitting on the participants, combative behavior which would have led to injury to one or more of the participants and self inflicting injurious conduct by the respondent during the course of the hearing.

You asked whether this type of communication with the medical staff identified and described in the preceding violate any of the Canons and in particular Canon 3B(7). You further asked whether circuit judges have any duty in regard to supervising responsibility of mental hygiene commissioners in relation to the Canons and if a circuit judge does not do so is he or she in violation of any of the Canons.

To address the questions which you have raised, the Commission has reviewed the relevant parts of Canon 3B(7) and 3D of the Code of Judicial Conduct. These sections of Canon 3 state in relevant part:

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

B. Adjudicative responsibilities.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

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(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond. . . .

\* \* \*

D. Disciplinary responsibilities. - (1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority. . . .

The Commission has discussed your request thoroughly and the procedures which you have laid out in your correspondence. The procedure being followed by the mental hygiene commissioner does not directly fall within the exception to the ex parte communication rule set out above in situations where the judge is scheduling, dealing with administrative matters or handling emergencies. However, the mental hygiene commissioner does have a duty to make sure that the security of the court and the individuals appearing in the court is maintained and that the respondent is provided the best possible hearing under the circumstances. When addressing the security issues by having the "conference with the medical staff," the best practice is for the mental hygiene commissioner to have counsel participate in such conferences wherever possible. In this case, the mental hygiene commissioner does follow the language contained in Canon 3B(7)(a)(i)(ii) in that the commissioner does not feel that any procedural or tactical advantage results from the communication since none of the merits of the case are discussed and the commissioner promptly notifies all parties of the substance of the conference.

The Commission discussed what it considered a more efficient way to deal with the issues raised in the conference. Perhaps a check list could be provided which sets forth the condition or behavior of the respondent and this could be completed by medical personnel and provided to the commissioner with the petition seeking an evaluation of the respondent. Such a check list would obviate the need to have a conference with medical personnel.

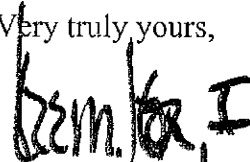
The mental hygiene commissioner is appointed by the chief circuit judge and serves at the will and pleasure of the chief circuit judge. If there were any ethical violations on the part of the mental hygiene commissioner that were known by the chief circuit judge, he or she would have the obligation to comply with the provisions set forth in Canon 3D regarding disciplinary responsibilities. That section of the Canon is set out hereinabove.

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It is hoped that this opinion fully addresses the questions which you have raised. If there is 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 "Fred L. Fox, II". The signature is stylized with a large, prominent "F" and "L".

Fred L. Fox, II, Chairperson  
Judicial Investigation Commission

FLF,II:nb