



## **JUDICIAL INVESTIGATION COMMISSION**

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May 27, 2005

Re: JIC Advisory Opinion 2005-11

Dear .

In a recent letter you asked for an advisory opinion. You stated that in response to a recently generated administrative problem resulting from a Magistrate taking leave without your ability to cover with an appropriate substitute magistrate for the criminal docket, you asked whether you as the supervising judge could serve as the substitute judicial officer without having to disqualify yourself as the presiding judge if and/or when said cases reach the Circuit Court level.

You stated that you understood the circumstance in a misdemeanor criminal case in which you served as the presiding judicial officer should there be an appeal from a decision adverse to the defendant, you would voluntarily disqualify yourself from hearing the appeal and transfer the case to the other judge for further and proper disposition. You asked, however, in the circumstance of a felony preliminary hearing where the defendant did not waive the preliminary hearing and the court sitting as the judicial officer found "probable cause," should the court voluntarily disqualify itself upon the case being advanced for bound-over processing by the grand jury and subsequent circuit court proceedings of jury trial.

The Commission has reviewed your request and would state you are correct in stating that in those cases in which you serve as a judicial officer in the magistrate court, and an appeal was taken of the magistrate court decision to the circuit court, you would need to voluntarily recuse yourself from hearing the appeal and transfer the case to the other judge for disposition. However, that circumstance does not control the handling of a preliminary hearing in which you serve as the judicial officer at the magistrate court level.

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Serving as the judicial officer in a preliminary hearing in the magistrate court would not require you to recuse yourself from hearing that matter if it were to reach the circuit court for a trial. As a judicial officer at the preliminary hearing you would merely be making a finding of probable cause in the case. You would not be placed in a position of forming a bias or prejudice for or against a defendant, nor would you be learning material facts which could affect the outcome of the case. As a circuit judge you are required to hear and rule on motions in which you hear testimony and review evidence which may be otherwise inadmissible at the trial level. Your exposure to such testimony and/or evidence does not require you to recuse yourself from the subsequent trial of the matter.

It is hoped that this opinion fully addresses the question 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", with a stylized flourish at the end.

Fred L. Fox, II, Chairperson  
Judicial Investigation Commission

FLF, II:nb