



JUDICIAL INVESTIGATION COMMISSION

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October 5, 2010

Re: JIC Advisory Opinion 2010-12

Dear Judge

On June 29, 2010 you asked this Commission to revisit and either modify or rescind two advisory opinions that were issued on October 31, 2007 and February 19, 2009.

Then, on July 7, 2010 you requested that the Commission revisit an advisory opinion issued to Judge on March 11, 2010 and you also informed the Commission that Judge in your request for a re-evaluation of his request for an advisory opinion.

Because our response to your two requests overlap in part, we are responding in this one reply. We do, however, want you to know that our response in this one letter should not be interpreted to mean that we did not give all of your arguments careful consideration. We appreciate the clarity and thoughtful manner in which you presented your requests to us. We know that the issues are important, not only to you and but to other judges and justices as well.

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I. YOUR JUNE 29, 2010 LETTER CONCERNING OPINIONS BASED ON
INTERPRETATIONS OF THE WEST VIRGINIA CONSTITUTION

HISTORY

The October 31, 2007 advisory opinion you referenced acknowledged that the Commission reviewed Article VIII, Section 7 of the Constitution of West Virginia when it concluded that it was the Commission's opinion that the Judge requesting the advisory opinion might violate the Constitution by being on the West Virginia Archives and History Commission and for that reason the Judge should not accept a nomination to that position.

The March 6, 2009 advisory opinion you also referenced stated that the Commission had reviewed Article VIII, Section 7 of the Constitution of West Virginia. The Commission concluded that the Judge could not accept the appointment to the Governor's Commission on prison overcrowding because it would violate the prohibition set forth in the Constitution against accepting any appointment under the government.

On May 1, 2009 you asked the Commission for an advisory opinion regarding whether a judicial officer is prohibited by the West Virginia Constitution from serving on any commission or only those commissions which the governor appoints the judicial officer to serve. You did not ask for an advisory opinion concerning a violation of the Code of Judicial Conduct. Your specific inquiry was: "Does Article VIII, Section 7 of the West Virginia Constitution prohibit a judge's participation in any and all legislative or executive branch commissions regardless of who makes the appointment?"

The Commission responded to your request by taking the position that it should not issue an advisory opinion because you were asking us to interpret the Constitutional provision. In retrospect, the response of the Commission may have been influenced by the manner in which the opinion was sought - a request for an outright interpretation of a Constitutional provision that was not coupled with an interpretation of the Canons.

YOUR OPINION

This is our interpretation of your June 29, 2010 letter to the Commission:

Based upon our June 3, 2009 response to your request, you took the position in your June 29, 2010 letter to the Commission that "The issuance of an advisory opinion as to whether certain specific actions contemplated by a judge may be appropriate is limited to your interpretation of the Code of Judicial Conduct and not to interpretation of the West Virginia Constitution."

We also believe it is necessary for the Commission to respond to your contention that “the two previously mentioned opinions are having a chilling effect on judicial participation in certain activities.”

THE OPINION OF THE COMMISSION

First we will address the legal significance of “advisory opinions.”

Advisory opinions provide the opinions of the majority of the members of the Judicial Investigation Commission to judges who inquire whether their prospective conduct is prohibited or permitted by the Code of Judicial Conduct. The opinions are not binding on the Supreme Court of Appeals and they have limited value before the West Virginia Judicial Hearing Board. Rule 2.13 of Judicial Disciplinary Procedure provides the authority for a judge to make a written request seeking an advisory opinion as to whether certain specific actions contemplated may constitute a violation of the Code of Judicial Conduct. The Commission may render an advisory opinion as it deems appropriate. The Rule is very clear: “An advisory opinion is not binding on the Judicial Hearing Board or the Court, but shall be admissible in any subsequent disciplinary proceeding involving the requesting judge.”

Thus, that an opinion of the Commission has “a chilling effect on judicial participation in certain activities” must be considered in the context of the advisory opinion. Remember we’re talking about judges, not the general public, who should understand the limited use of an advisory opinion. If the Commission had an opinion that the West Virginia Constitution permitted you or any judge to accept an appointment on a commission, that advisory opinion would be of no value in a proceeding brought to remove you from office for holding another office in violation of the Constitution. On the other hand, when the Commission is asked its opinion whether it is appropriate to accept an appointment on a commission, out of concern that it could be a violation of the Canons of judicial ethics, and the Commission believed it would not violate the Code of Judicial Conduct, but that there was a possibility that it would violate our State Constitution, would you not want us to bring that to the attention of the inquiring judge?

The Commission respectfully-and we do mean that because we have the highest respect for your judicial abilities and your reputation as one of our finest judges-disagrees with your position that we should do our job without rendering any opinion on the meaning of the West Virginia Constitution.

We believe that we have a duty to render opinions which adhere to binding State and United States Constitutional precedents. More and more issues are presented to the Commission that concern First Amendment rights. Judges have constitutional rights that may conflict with the State and Federal Constitutions.

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You are, of course, very familiar the case of Republican Party of Minnesota v. White. That case involved a First Amendment challenge to a Canon similar to our Canon 5A(3)(d)(ii) (the “announce clause”) that prohibits judges or candidates for a judicial office from announcing their views on cases, controversies or issues that are likely to come before the court. That case began when a candidate for associate justice expressed his opinions criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion. A complaint was filed against the candidate with the Office of Lawyers Professional Responsibility, the agency which, under the direction of the Minnesota Lawyers Professional Responsibility Board, investigates and prosecutes ethical violations of lawyer candidates for judicial office. The Lawyers Board had to consider the United States Constitution when it dismissed the complaint with regard to charges that the candidate had expressed opinions that violated the announce clause. The Board did that because it doubted that the clause could constitutionally be enforced.

This is just one example where both the judicial ethics code and the Constitution had to be consulted in rendering an advisory opinion. In West Virginia the Commission has had a number of inquiries that required the Commission to consider our Canons and the impact of Republican Party of Minnesota v. White in our response to requests for advisory opinions.

The Commission believes that in properly fulfilling our duties we must consider all constitutional precedents as we interpret our Code of Judicial Conduct.

II. YOUR JULY 7, 2010 LETTER CONCERNING THE ADVISORY OPINION TO

HISTORY

On March 11, 2010 the Commission issued an advisory opinion to _____ concerning his role as a judge in a proposed “Judge-Led Stakeholder Meetings” program drafted by the West Virginia Court Improvement Program Oversight Board that is chaired by _____. The Commission considered his request in light of the standards set forth in Canon 4 that addresses a judge’s extra-judicial activities. The Commission referenced Canon 4C(3)(a) and concluded that a judge led meeting with “stakeholders in abuse and neglect cases” who regularly appear before the judge in contested hearings could, to those who are the respondents in those proceedings, “cast reasonable doubt on the judge’s capacity to act impartially as a judge.” Canon 4A(1).

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YOUR OPINION

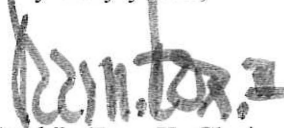
It is your opinion that we should revisit _____ request and focus on Canon 4C(1) and that our reliance on Canon 4C(3) is mistaken because Canon 4C(3) is not applicable to a Judge's participation in a governmental group concerned with improving the legal system.

THE OPINION OF THE COMMISSION

Again, the Commission wants emphasizes to you and _____ the limited purpose of an advisory opinion. _____ requested our opinion- the opinion of a Commission that is composed of members of various backgrounds. Canon 4C(3)(a) was not the only Canon cited in the advisory opinion. The Commission was--and is-- concerned with the appearance of a judge meeting with law enforcement representatives, prosecutors, DHHR personal, and others to discuss abuse and neglect cases. We do not consider that to be a proper governmental activity for a West Virginia trial judge. We do not think that it is possible to have meetings, of the type described in _____ letter, that will always be limited to systemic problems and procedures. The appearance of those "shoulder to shoulder" meetings, and the friendships that would necessarily follow with prospective witnesses in future cases, would not be consistent with our legal system-one based upon "the principle that an independent, fair, and competent judiciary will interpret and apply the laws that govern us." Preamble, Code of Judicial Conduct.

We will not be issuing an opinion that approves the proposed Protocol for Judge-Led Stakeholder Meetings. We do acknowledge the outstanding work that _____ is doing in the abuse and neglect field and we regret that we cannot endorse this program of the Court Improvement Program Oversight Board.

Very truly yours,



Fred L. Fox, II, Chairperson
Judicial Investigation Commission

REW:FLF:nb