



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
4700 MacCorkle Ave., SE
Charleston, West Virginia 25304
(304) 558-0169 • FAX (304) 558-0831

December 22, 2011

Re: JIC Advisory Opinion 2011-21

Dear Judge

Your recent request for an advisory opinion addressed to Counsel was reviewed by the Judicial Investigation Commission. In your letter, you allege that an attorney who regularly appears in front of both Judges in the Judicial Circuit may have inappropriately misused trust funds for personal use and may have billed the public defender system for services not actually rendered. Based on this set of facts, you seek advice as to the following: (1) Whether both judges who have knowledge of suspicious activity with respect to the alleged improper billing to the public defender system should sign and approve future vouchers submitted by him/her?; (2) If there is no conflict in signing the vouchers whether the judges have a duty to scrutinize these vouchers more closely and allow specific charges or services?; (3) Whether both judges should be recused from presiding over any criminal or civil matters where the attorney is appointed or retained to represent a client based upon the fact they are aware of alleged criminal and ethical violations; (4) Whether the judge who reports the alleged criminal or ethical violations to the appropriate authorities would be recused from presiding over any criminal or civil matters where that attorney was appointed or retained to represent a client in that particular case?

In order to address your request, the Commission has reviewed Canon 3 of the Code of Judicial Conduct, which provides in pertinent part:

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

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

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; . . . [or] (d) the judge . . . (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Generally, judicial recusal and disqualification are matters of discretion for the presiding judge and the Chief Justice of the Supreme Court of Appeals. However, that discretion is clearly tempered by the provisions of Canon 3E which sets forth specific times when a judge must recuse himself or herself. Thus, it is evident that a judge has an ethical duty to hear a matter assigned unless there is some specific reason set forth in Canon 3E such as the likelihood that he or she will be a material witness in the proceeding or if the judge has developed a bias or prejudice either for or against a party in a proceeding and therefore, must recuse himself or herself from the matter.

In applying the foregoing to your factual scenario, if you have reason to doubt the validity of the tendered vouchers then you should not sign or approve them. Furthermore, it is incumbent upon any judge to scrutinize attorney vouchers more closely and approve only those charges, costs and/or expenses that are valid. If it is likely that you are going to be a material witness in a proceeding arising out of either the trust fund or voucher matters then you should recuse yourself from handling those cases. As to whether Judge _____ or you should be recused from presiding over any criminal or civil matter involving the attorney in question, each of you should recuse yourself if you believe your impartiality is in question as a result of the information before you.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald E. Wilson", with a long, sweeping horizontal line extending to the right.

Ronald E. Wilson, Chairperson
Judicial Investigation Commission

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cc: