



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 2011-22

Dear Commissioner

Your recent request for an advisory opinion was reviewed by the Judicial Investigation Commission. In your letter you explain that in addition to serving as a Mental Hygiene Commissioner, you are also a member of the law firm of [redacted]. The firm has a total of four lawyers who along with four other lawyers comprise the entire defense bar in [redacted] Counties. You want to know if either you or a member of your firm can represent a Petitioner in a Guardianship or Conservatorship proceeding in those counties if the Circuit Judge were to serve as the fact finder.

In order to address your request, the Commission has reviewed Canon 6 of the Code of Judicial Conduct, which provides in pertinent part:

Canon 6. Application of the Code of Judicial Conduct.

A. Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including but not limited to Justices of the Supreme Court of Appeals, Circuit Judges, Family Law Masters, Magistrates, Mental Hygiene Commissioners, Juvenile Referees, Special Commissioners and Special Masters, is a judge within the meaning of the Code. All judges shall comply with this Code except as provided below. . . .

C. Continuing part-time judge. A continuing part-time judge :

(1) is not required to comply

(a) except while serving as a judge, with Section 3B(9); and

(b) at any time with Sections 4D(3), 4E(1), 4F, 4G, 4H, 5A(1), 5B(2), and 5D.

(2) may practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, but shall not act as a lawyer in a proceeding in which the judge has served as a judge in any other proceeding related thereto, or in any matter involving the same subject-matter jurisdiction.

Pursuant to the Code of Judicial Conduct "a continuing part-time judge" means a judge who serves repeatedly on a part-time basis by election or under a continuing appointment, a part-time family law master, a juvenile referee, and a mental hygiene commissioner. The Comment to the Canon specifically states that a Mental Hygiene Commissioner [shall not] accept any mental hygiene matters or serve as an attorney in any proceeding related to a case in which he or she has served as a Mental Hygiene Commissioner. Thus, it is clear that you are precluded from representing any party in a Guardianship/Conservatorship proceeding as long as you continue to serve as a Mental Hygiene Commissioner.

Ordinarily, your law partners would also be precluded from handling Guardianship/Conservatorship proceedings in those two counties. However, the rule of necessity comes in to play because of the limited number of attorneys practicing in both counties. The rule of necessity is an exception to judicial disqualification and should be used only sparingly. See *State ex rel. Brown v. Dietrick*, 191 W. Va. 169, 444 S.E.2d 47 (1994). Usually, the rule allows a judge who is otherwise disqualified from handling a case to preside if there is no provision that allows another judge to hear the matter. *Id.* We are extending the rule to encompass situations where limited resources dictate the use of a continuing part-time judge's law partners to ensure representation in Guardianship/Conservatorship proceedings provided that a Circuit Judge acts as fact finder and you have not previously served as Mental Hygiene Commissioner in a prior proceeding involving the alleged protected person.

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", written in a cursive style.

Ronald E. Wilson, Chairperson
Judicial Investigation Commission