



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
4700 MacCorkle Ave., SE
Charleston, West Virginia 25304
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March 7, 2012

Re: JIC Advisory Opinion 2012-14.

Dear Judge :

Your request for an advisory opinion to Counsel was recently reviewed by the Judicial Investigation Commission. The factual scenario giving rise to your request is as follows: There is a vacancy for Mental Hygiene Commissioner in County. You indicated that there has been some difficulty in filling the part-time position in previous years. According to you, the combined number of guardian/conservator and mental hygiene cases filed is usually pretty low and that last year there were only 21 such matters heard by the Mental Hygiene Commissioner. You also indicated that the cases are seldom appealed to Circuit Court. Your law clerk, who is full-time, has expressed interest in serving as the Mental Hygiene Commissioner. You want to know if he can concurrently serve as your law clerk and the Mental Hygiene Commissioner.

W. Va. Code § 27-5-1, *et seq.*, gives the Chief Judge in each judicial circuit of this State the authority to appoint a competent attorney to serve as a Mental Hygiene Commissioner to preside over involuntary hospitalization hearings. By administrative order, the Circuit Court can also delegate evidence taking in guardianship/conservatorship cases to the Mental Hygiene Commissioner. The Circuit Court, by order entered of record, shall allow the Mental Hygiene Commissioner a reasonable fee for services rendered in connection with each case. In mental hygiene proceedings, the Commissioner has independent decision making authority on probable cause matters but must present proposed findings and conclusions to the Circuit Court for entry of an order in final commitment cases. Challenges on probable cause decisions are made by writ of habeas corpus to Circuit Court. The Mental Hygiene

Commissioner must also present proposed findings and conclusions to the Circuit Court in all temporary and final guardianships/conservatorships for entry of an order. The Circuit Court is free to accept or deny the proposed findings and conclusions in final commitment proceedings and guardianships/conservatorships.

A law clerk is a judicial employee. Law clerks are employed by the Supreme Court of Appeals, and they answer to the Judge for whom they serve. Indeed, a law clerk works closely with the judge and is privy to the Court's internal workings, rulings, correspondence, etc. As such, the public may view the law clerk as an extension of the judge because of the nature of the work performed and the need for constant communication between the two. See JIC Advisory Opinion 5/10/2010 (Judge's secretary should not serve as a poll worker in light of the secretary's position and concomitant proximity to judicial officers and judicial activities). Thus, a law clerk should observe the Code of Judicial Conduct.

Canon 3C(2) states that "a judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties." Canon 3C(5) provides that "[a] judge shall not require any personnel subject to the judge's direction to act contrary to any code of ethics applicable to the judge or the personnel. . . ." The concept that a judicial employee must observe the same standards as a judge is also found in *Philyaw v. Gatson*, 195 W. Va. 474, 466 S.E.2d 133 (1995), and JIC Advisory Opinion 3/15/04 (Magistrate Assistant is a judicial employee and must comply with Canon 5A(2) and immediately resign when running for the non-judicial office of Board of Education).

Canon 1 states that "[a]n independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective."

Canon 2(A) provides that "[a] judge shall respect and comply with the law, shall avoid impropriety and the appearance of impropriety in all of the judge's activities, and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Meanwhile, Article VIII, Section 7 of the West Virginia Constitution provides that "[n]o justice, judge or magistrate shall hold any other office, or accept any appointment or public trust, under this or any other government; nor shall he become a candidate for any elective public office or nomination thereto, except a judicial office; and the violation of any of these provisions shall vacate his judicial office." See also JIC Advisory Opinion 12/14/2009 (Mental Hygiene Commissioner, as a judicial officer, may not, at the same time, hold the position of part-time assistant prosecutor); JIC Advisory Opinion 07/03/2007 (Mental Hygiene Commissioner cannot concurrently serve as a Municipal Judge); and JIC Advisory Opinion 6/14/2007 (Mental Hygiene Commissioner cannot concurrently sit as an elected member of city council).

Since you could not concurrently serve as a Circuit Court Judge and a paid Mental Hygiene Commissioner by virtue of Article VIII, Section 7, your law clerk, as your judicial employee, is also precluded from concurrently serving as a law clerk and a Mental Hygiene Commissioner. Moreover, the concurrent appointment of your law clerk is impermissible since it would create an appearance of impropriety between your close working relationship with him and an impartial judiciary. See JIC Advisory Opinion 2/27/2004 (Mental Hygiene Commissioner should not act as an attorney in a guardianship/conservatorship in a county in which he/she serves as a mental hygiene commissioner).

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 horizontal flourish extending to the right.

Ronald E. Wilson, Chairperson
Judicial Investigation Commission

REW/tat