



**JUDICIAL INVESTIGATION COMMISSION**

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

June 6, 2013

Re: JIC Advisory Opinion 2013-06.

Dear Judge :

Your recent request for an advisory opinion was reviewed by the Judicial Investigation Commission. The factual scenario giving rise to your request is as follows: A local doctor was indicted in the United States District Court for the Northern District of West Virginia on multiple felony charges. You have known this doctor and his family since college; but in recent years, you have only had limited contact with him. In January 2013, the doctor asked you if he could use you as a character witness in his case. You correctly advised him that you could not voluntarily testify as a character witness. Coincidentally, the doctor's criminal defense attorney was indicted by a County Grand Jury on May 17, 2013 on four state charges including conspiracy to commit threats in official and political matters and conspiracy to commit intimidation of a witness. You arraigned the doctor's attorney on May 20, 2013.

On May 24, 2013, the doctor called your office and stated that he wanted to list you as a witness in his federal case. You informed him that his attorney was now under indictment in your Court. You also properly attempted to discourage him from requiring your testimony. On May 30, 2013, you received another call from the doctor about testifying in his case. You again attempted to discourage the doctor from calling you as a witness and informed him that if you were subpoenaed you may have to file a Motion to Quash. Nevertheless, the doctor's attorney recently subpoenaed you to testify at his June 19, 2013 trial. Meanwhile, the attorney has since filed a motion to dismiss his own State charges, which is now pending before you.

You indicate that the scenario "has created a very awkward situation for me because [the doctor's] attorney cannot talk with me to determine what my testimony will be. It has also created a situation where, if any of the federal court jurors were to know

that I am presiding over the attorney's [state] criminal charges, then it may have an effect on the doctor's case." You are also concerned that your "testimony may later be used in an attempt to get me removed from hearing the Motion to Dismiss that is pending in his attorney's criminal case."

You want to know what, if anything, you should do with respect to the subpoena to testify in the doctor's federal criminal trial. You also want to know whether you should disqualify yourself from presiding over matters pertaining to the attorney's state criminal charges.

To address the issue regarding the subpoena to testify, the Commission has reviewed Canon 2B of the Code of Judicial Conduct which provides:

A judge should not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of his office to advance the private interest of the judge or others; nor shall a judge convey or knowingly permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

The Commentary to the Rule states:

A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

The Commission has previously held that it would be improper for a judicial officer to voluntarily submit a letter to the presiding judge regarding the character of a criminal defendant in federal court in JIC Advisory Opinions 11/13/1989 and 11/05/1990. The Commission has also held that it would be inappropriate for a judicial officer to voluntarily submit a letter regarding the character of another judicial officer who was the subject of an ethics proceeding. *See JIC Advisory Opinion 9/04/1997*. Conversely, the Commission stated that if the judicial officer was "properly summoned to testify as a character witness" in the proceeding, he could render an opinion. *Id.* The Commission reaffirmed this position in JIC Advisory Opinion 6/30/2000 when it advised a judicial officer that he could properly submit a letter as substitution for a personal appearance after having been subpoenaed by a lawyer who was the subject of a legal ethics proceeding.

The Commission has not had the opportunity until now to address the parameters of testifying pursuant to a subpoena except to note that Canon 2B "does not afford a judge privilege" against bearing witness. *See JIC Advisory Opinion 11/13/1989*. However, the Indiana Commission on Judicial Qualifications rendered a decision in Advisory Opinion #3-98 which is instructional. The Indiana Commission found that a subpoena does not necessarily establish that a judge's appearance as a character witness is appropriate under Canon 2B. The Indiana Commission stated that "a judge's approach to the question of appearing as a character witness should begin with the presumption that the judge should not do so except where the demands of justice require." The Indiana Commission also stated that a judge should encourage the withdrawal of the subpoena or move the court to quash it unless the circumstances indicate the ends of justice would not be served without his/her testimony:

Whether or not the demands of justice indicate the judge should testify depends on the nature and depth of the judge's actual awareness of the character of the party for whom the judge would testify. It also depends upon the actual necessity that it be the judge, as opposed to another possible witness, who is called to testify. Only if the judge is in a unique position to offer meaningful testimony about the individual should the judge testify. In the case recently considered by the [Indiana] Commission, the judge was a member of a circle of friends and associates of the party, and any number of individuals within the group could have offered similar, if not better-founded, testimony about the person's reputation for truth and veracity; that is it appeared to the [Indiana] Commission that the judge's testimony was requested simply because he was a judge. This constitutes an abuse of the power of the office.

In applying the foregoing to the instant situation, it would appear that the demands of justice do not require your testimony at the doctor's federal criminal trial. You have only had limited contact with the doctor in recent years, so it is unlikely that you are in a unique position to offer any meaningful testimony about him. The doctor has been a member of the community for a long time and undoubtedly has other people who may be better suited to testify about his character.

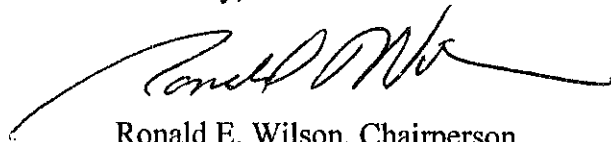
The fact that the doctor's attorney is under a State Indictment in your courtroom on conspiracy and other charges implicates even further issues about the proper use of judicial office. Therefore, it is the Commission's opinion that you should promptly file a Motion to Quash the subpoena.

To address your question regarding recusal by you in the attorney's state criminal case, the Commission also looked at Canon 3E(1) which states that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might

reasonably be questioned.” Because you will be taking a position directly adverse to the doctor’s attorney when you file the Motion to Quash and because you may still be required to testify and be questioned by an attorney presently under indictment in your courtroom, you should disqualify yourself from that attorney’s state criminal case.

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