



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
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November 15, 2013

Re: JIC Advisory Opinion 2013-16.

Dear Mr.

Your request for an advisory opinion was reviewed by the Judicial Investigation Commission at its November 7, 2013 meeting. You want to know if it is permissible for a mental hygiene commissioner to act as counsel or guardian ad litem in a Guardianship/Conservator proceeding when the order of judicial appointment limits his or her authority to only "preside over involuntary hospitalization hearings held pursuant to W. Va. Code § 27-5-1, *et seq.*?"

We want to thank you for your request because it has caused the Commission to revisit our prior consideration of the issue your question presents as it applies to our situation in West Virginia. It would appear that an exact reading of Canon 6 and our February 27, 2004 advisory opinion would mandate a "no" answer to your question. However, for the reasons stated in this opinion, our advisory opinion now is that mental hygiene commissioners may act as attorneys or guardians ad litem in Guardianship/Conservator cases subject to the limitations set forth in this Advisory Opinion.

We recognize that **Canon 6** does state that a Mental Hygiene Commissioner is a judge within the meaning of the Code and that all judges shall comply with this Code.

However, **Canon 6C(2)** has a special exception for a continuing part-time judge. A mental hygiene commissioner who serves repeatedly on a part-time basis under a

continuing appointment is a part-time judge who is permitted under the Canon to practice law in the court on which he or she serves or in any court subject to the appellate jurisdiction of the court on which the mental hygiene commissioner serves. Nevertheless, the mental hygiene commissioner cannot act as a lawyer in a proceeding in which the mental hygiene commissioner has served as commissioner in any other proceeding related thereto, or in any matter involving the same subject-matter jurisdiction.

Additionally, the **Comment to the Canon** 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.

The Commission addressed Canon 6C(2) in a February 27, 2004 advisory opinion. The Commission informed a mental hygiene commissioner that he could not act as an attorney in Guardianship/Conservator matters even though he had never served as a finder of fact in any such proceedings. The Commission noted that "such conduct . . . would violate the prohibition set forth in Canon 6C(2) and create, at least, the appearance of a conflict of interest."

In a December 22, 2011, the Commission again addressed the issue in an advisory opinion. A mental hygiene commissioner asked if **his law partners** would be able to do Guardianship/Conservator cases in the two-county area **where he served as a fact finder**. It was important to the Commission that only eight attorneys would accept court appointed criminal and mental hygiene cases and three of them were the mental hygiene commissioner's law partners. Because of the predicament the attorney shortage created for the judicial system in these two counties, the Commission applied the **rule of necessity** to ensure much-needed representation and permitted the mental hygiene commissioner's law partners to do Guardianship/Conservator cases in the mental hygiene commissioner's two-county area.

It is important to note that in that opinion the Commission placed restrictions on the rule extension: The Circuit Judge must preside over cases involving the law partners, and the mental hygiene commissioner must never have served as a fact finder in any prior proceeding involving the alleged protected person.

The **rule of necessity** is an exception to judicial disqualification and is to be used sparingly. 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. See *State ex rel. Brown v. Dietrick*, 191 W. Va. 169, 444 S.E.2d 47 (1994).

The members of the Judicial Investigation Commission now recognize that the literal wording of the Canon and the problems presented in obtaining attorneys to represent people in Guardianship/Conservator and mental hygiene proceedings in West Virginia are in conflict. The Commission believes that in West Virginia, even in counties with a large number of attorneys, there are problems attracting attorneys to handle court-appointed Guardianship/Conservator cases. The compensation for these court-appointed cases remains at the 1990 rate of \$45/\$65 an hour for out-of-court/in-court work-fees and is no longer compatible with the normal hourly rates charged by lawyers today.

Therefore, the Commission concludes that it must extend the rule of necessity to the entire state of West Virginia and that its advisory opinion is now that mental hygiene commissioners may act as attorneys or guardians ad litem in Guardianship/Conservator cases subject to these limitations:

- (1) The mental hygiene commissioner must not have acted as a fact-finder in any Guardianship/Conservator matter;
- (2) The order of appointment as a mental hygiene commissioner must limit his or her authority to preside only over involuntary hospitalization hearings; and
- (3) The mental hygiene commissioner must disqualify himself or herself whenever a conflict develops.

To the extent that this opinion is inconsistent with the February 27, 2004 opinion, this opinion will have priority.

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

Sincerely,



Ronald E. Wilson, Chairperson
Judicial Investigation Commission