



JUDICIAL INVESTIGATION COMMISSION

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

May 27, 2014

Re: JIC Advisory Opinion 2014-13

Dear

Your request for an advisory opinion was reviewed by the Judicial Investigation Commission on May 16, 2014. In October 2013, you initiated Truancy Court in an effort to improve student attendance in the County school system. Currently, cases involving parents who are charged with permitting truancy and cases involving students who are 18 years of age or older who are being charged with truancy are being initiated by the filing of a complaint in magistrate court. Juvenile status cases involving students under 18 years of age are filed in a similar manner. Once probable cause has been found, the matter is then transferred to Circuit Court.

You would like to make a change to the way adult truancy cases are initiated. Specifically, you would like the prosecutor's office to file a misdemeanor information in circuit court against an adult defendant instead of a filing a criminal complaint in magistrate court.

You state that by utilizing this procedure, the school board employees would be relieved of having to "go through the burdensome process of preparing magistrate court complaints, propose warrants and other documentation required at that level." You also assert that by initiating a case by way of information also ensures that the case is kept in the circuit court. As you note, "West Virginia Code § 50-5-7 provides that an individual charged by magistrate warrant may demand to be tried in magistrate court thereby removing the case from the Truancy Court jurisdiction." You also stress that "[i]n addition to streamlining the process, filing misdemeanor information's against the adults would enable all filing to be made with the Clerk of the Circuit Court and would resolve any confusion among the parties as to where certain documentation should be filed as well as

allowing this judge the ability to more accurately and efficiently manage the caseload, the documentation and the scheduling of truancy cases.”

In your letter, you indicated that the prosecutor is concerned about the proposal and has sought a formal advisory opinion from the Lawyer Disciplinary Board about the “ethics of filing [an] information at the request of the judiciary.” You indicated that that prosecutor does not typically file an information against a defendant unless a plea agreement has been reached. You stated that the prosecutor wants to retain discretion over how cases are initiated, and it is for this reason that she has resisted instituting any such policy change. The county prosecutor also has a concern regarding “the ethics of filing information’s at the request of the judiciary.”

You want to know “[w]hat, if any, ethical issues arise if the prosecutor’s charging method results from the request-but not the order-of the presiding judge?”

To address your question, the Commission has reviewed Canon 2 of the Code of Judicial Conduct, which provides that “[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.” Canon 2A elaborates on this duty by stressing that a judge must ensure the judge’s behavior is perceived as impartial: “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.”

When a judge assumes functions belonging to another, such as a police officer or prosecutor, the judge undermines the public’s confidence in the judiciary’s integrity and impartiality. In *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W. Va. 233, 271 S.E.2d 427 (1980), the Court disciplined a circuit court judge in part for participating in the arrests of three individuals and later improperly entering an order relieving the prosecutor from acting in those cases. The Court found this conduct violated Canon 2A:

A Judge is not expected to and should not summarily step from his judicial function and become an investigator, prosecutor, arresting officer, or instigator of legal actions, for when he does, he lessens the public confidence in the impartiality of his office. It is important that the Judge not only actually maintain integrity and impartiality, but that he must also give the appearance of such. No Judge should take unto himself activities or functions which are delegated to other branches of the government. When the Judge shed his robe of judicial impartiality and donned the garb of a participant in an arrest, he could not promote public confidence in the impartiality of the judiciary.

Id. at 237, 271 S.E.2d at 429-30.

Unfortunately, a judge’s suggestion may sometimes be viewed by others as a command. By requesting that the prosecutor always file an information against adults in

truancy matters, you may be viewed as having stepped out of your judicial robe and into the mantle of prosecutor. Therefore, the Commission advises against suggesting such changes to the prosecutor.

The Commission recognizes the value of streamlining the process but based upon the holding of *Dostert* cannot agree to your spearheading the change. The better course of action is to seek either a statutory or rule change. To that end, the Commission has decided to forward a copy of this Advisory Opinion to the Administrative Director for further consideration.

Please be advised that in light of our holding, we decline to answer the remaining questions posed by you. If you have any further questions regarding this matter, please 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

cc:

REW/tat