



JUDICIAL INVESTIGATION COMMISSION

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

October 24, 2016

Re: JIC Advisory Opinion 2016-25.

Dear

Your recent request for reconsideration of JIC Advisory Opinion 2016-20 as it relates to your request to participate as the Drug Court Judge for your Circuit was reviewed by the Judicial Investigation Commission at its October 21, 2016 meeting. The facts giving rise to your request are as follows: You have been the elected prosecutor of

County for the past eight years. You were also an assistant prosecutor from 1999 through 2008. On May 10, 2016, you were elected Judge of the Judicial Circuit, and you take office on January 1, 2017.

While at the prosecutor's office, you served on the planning team for the drug court as it was being developed. Since 2007, you have been a member of the drug court treatment team. Prosecutors and drug court judges are the final authority who decide who may participate in drug court, which serves offenders who have been charged with, pleaded guilty to, or been found guilty of misdemeanor or felony drug-related offenses, or offenses in which substance abuse is determined to have been a factor in the commission of the offense. The goals of drug court include but are not limited to enhancing community safety and the quality of life for citizens, reducing recidivism and reducing substance abuse.

Drug offenders who volunteer for drug court may receive a sentence reduction or avoid a jail and prison sentence if they perform satisfactorily in drug court and complete the minimum one year program. Successful completion may also result in the withholding of criminal charges, probation, deferred sentencing or other incentives depending upon the agreement reached when entering drug court. Conversely, a drug

court judge may also impose reasonable sanctions on an offender, including incarceration or expulsion from the program, if he/she violates the terms and conditions of drug court.

You have indicated in your reconsideration request that “under no circumstances would [you] be the Judge to impose sentence on any individual who is discharged from Drug Court on any cases which were prosecuted by the County Prosecutor’s Office during [your] tenure as the elected prosecutor.” You also stated that if a participant is “discharged from Drug Court, the participant has an opportunity to challenge that decision by having an evidentiary hearing before one of the other Circuit Judges.”

To answer your question, the Commission has again reviewed Rule 2.11 of the Code of Judicial Conduct which provides as follows:

Rule 2.11 Disqualification

- (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: . . .
 - (1) The judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of facts that are in dispute in the proceeding. . . .
 - (5) The judge: (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association; (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy. . .
- (C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should

not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

Comment 3 to the Rule notes that the doctrine of necessity may override the rule of disqualification. At the time of your original inquiry, the Commission did not consider the matter in relation to the doctrine of necessity, which should be used only sparingly. *See State ex rel. Brown v. Dietrick*, 191 W. Va. 169, 444 S.E.2d 47 (1994). The doctrine 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.*

The Commission recognizes that Drug Court is a specialty court. We also acknowledge that the Judicial Circuit is a very busy circuit which would face undue hardship should you be unable to serve as the drug court judge. Therefore, the Commission has agreed to extend the doctrine of necessity to allow you to preside over drug court subject to certain limitations: (1) you do not preside over any criminal trial or impose sentence on any individual who is discharged from Drug Court on any cases which were prosecuted by the County Prosecutor's Office while you served as the elected prosecutor; and (2) any such participant who is discharged from Drug Court has an opportunity to challenge that decision by having an evidentiary hearing before another of the other Circuit Judges. To the extent that this opinion is inconsistent with JIC Advisory Opinion 2016-20 as it relates to your participation in Drug Court, the latter is overruled.

We hope this opinion fully addresses the issue which you 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