



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
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February 27, 2017

Re: JIC Advisory Opinion 2017-09.

Dear

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: You were elected Family Court Judge on May 10, 2016, and took office on January 1, 2017. While an attorney, you served as a mediator in child custody cases. Some of those matters in which you formerly served as a mediator are now coming before your court for modification of parenting plans, child support, etc. You would like to know if you can preside over these matters after having formerly served as a mediator.

The Commission has reviewed Rules 43(d) and 45 of the WV Rules of Practice and Procedure for Family Court, and Rules 1.2, 2.2, 2.9, 2.11 and their respective Comments of the West Virginia Code of Judicial Conduct to address the question which you have raised. The Rules state in pertinent part:

WV Rules of Practice and Procedure for Family Court:

Rule 43 Mediation procedures

(d) Confidentiality. — All mediation proceedings, including premediation screening, are confidential settlement negotiations subject to Rule 25.12 of the Trial Court Rules. All persons involved in premediation screening and mediation shall preserve the confidentiality of negotiations, of all written materials utilized

in the processes, of all information obtained in the processes, and of all agreements; and with the exception of the abbreviated premediation screening report, the Mediation Outcome Report, and any mediated agreement, shall keep such matters confidential from the court.

Rule 45 Prohibition of dual relationships in mediation and parent education

No individual may serve in the same case in more than one of the following roles: parent educator, attorney, guardian ad litem, screener, mediator, custody investigator.

WV Code of Judicial Conduct:

Rule 1.2 Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Comment [5] Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

Rule 2.2 Impartiality and Fairness

A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

Rule 2.9 Ex Parte Communications

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

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

(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 [5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

The Rules of Practice and Procedure for Family Court do not preclude a judge who served as a mediator in the same case from later presiding over a dispute between the same parties. Rule 45 lists all of the positions in which a dual relationship is forbidden and noticeably absent from the roll is judge. Rule 43 states that all information obtained during mediation shall be kept "confidential from the court" except in limited circumstances.

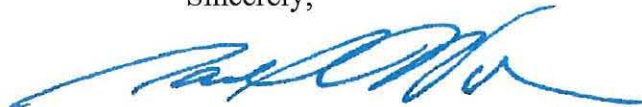
Reading these rules together, the Commission is of the opinion that when these Rules are read *in pari materia* a Family Court Judge who once served as a mediator is not *per se* disqualified from hearing a case involving the same parties as long as the matter involved issue(s) unrelated to the mediation. However, if the new matter involved the same issue(s) as the mediation, the Family Court Judge would be barred from presiding over the case.

The Code of Judicial Conduct places great emphasis on a judges independence, integrity and impartiality. Not only must a judge actually be independent, full of integrity, and impartial, but he or she must also appear to be as well. It is critical to our judicial system, that reasonable people perceive the Court to be neutral and detached when presiding over matters. If a judge has previously served as a mediator to the parties in a

prior dispute, the Judge should strive to make sure each party is not concerned with any appearance of impropriety. Therefore, in cases where the matters involve the same issue(s) the judge should voluntarily disqualify himself or herself. Where the matter involves issue(s) unrelated to the former mediation, the judge should disclose the prior service on the record and give the parties an opportunity to file a motion to recuse and follow the procedures set forth in Rule 58 of the Rules of Practice and Procedure for Family Court and West Virginia Trial Court Rule 17.

We hope this opinion fully addresses the issue which 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

REW/bjl