



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
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November 16, 2017

Re: JIC Advisory Opinion 2017-22.

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:

A 20 year old defendant is charged with sexual offenses in your court. The defense attorney requested a competency/criminal responsibility examination for his client. You did not state whether the prosecuting attorney was present and consented to the evaluation. For purposes of this opinion the Commission assumes that the prosecuting attorney was present and did not object to the evaluation. When the defense attorney did not have a psychologist/psychiatrist ("evaluator") in mind, you granted the request and chose the evaluator. You referred to him/her in your advisory opinion request as the "Court's expert rather than the defense expert" even though the order of appointment does not specify the evaluator as such. Once again, the Commission assumes that the evaluator was a qualified forensic psychiatrist or a qualified forensic psychologist and that the competency evaluation was performed first, and if the evaluator was of the opinion that the defendant was not competent to stand trial, that no criminal responsibility or diminished capacity evaluation was conducted. Further that the information required to be provided to the evaluator, as set forth in West Virginia Code § 27-6A-2, was provided to the evaluator. You have received a message from the evaluator indicating that he/she has major concerns about the defendant and that he would like to discuss the same with you. Although you do not know what the concerns are, you believe they may "go beyond criminal responsibility per the message [you] received" and are concerned that it may involve safety issues. You want to know if you can speak to the evaluator directly, *ex parte* about the concerns.

To address the questions, the Commission has reviewed Rules 2.9 of the Code of Judicial Conduct which states:

Rule 2.9 – Ex Parte Communications

- (A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:
 - (1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
 - (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
 - (b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.
 - (2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.
 - (3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.
 - (4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.
 - (5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.
- (B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall

make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

- (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.
- (D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

Comment [1] to the Rule states that “[t]o the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.” Comment [2] provides that “[w]henver the presence of a party or notice to a party is required by this Rule, it is the party’s lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is given.”

Based upon the foregoing and the specific requirements in West Virginia Code §§ 27–6A–2 and 27–6A–3, the Commission finds that the conversation you envision with the evaluator would not only constitute an improper *ex parte* communication but that it is also necessary for you to hold a hearing concerning the competency of the defendant and at that hearing report to the attorneys that you have not received a written report but that the evaluator you selected has asked to speak to you. You should look to West Virginia Code 27–6A–3 for guidance concerning your responsibility at that hearing. You will then be in a position to know the proper procedure and whether the attorneys want to receive a written report from the evaluator you have selected.

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,



Ronald E. Wilson, Chairperson
Judicial Investigation Commission