



**JUDICIAL INVESTIGATION COMMISSION**

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

August 22, 2018



Re: JIC Advisory Opinion 2018-20.

Dear [REDACTED]

Your August 17, 2018 requests for advisory opinions were recently reviewed by the Judicial Investigation Commission. You asked if both of you could keep your legislative positions while you run for the Supreme Court of Appeals of West Virginia.<sup>1</sup>

Most states including West Virginia have laws that cover judges who wish to seek non-judicial office. W. Va. Constitution art. VIII, § 7 states in pertinent part:

No justice, judge or magistrate shall hold any other office, or accept any appointment or public trust, under this or any other government; **nor shall he become a candidate for any elective public office or nomination thereto, except a judicial office;** and the violation of any of these provisions shall vacate his judicial office. . . .

(emphasis added).

Rule 4.5(A) and (B) of the Code of Judicial Conduct govern when a judge must resign to seek election or appointment to a non-judicial office and state:

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<sup>1</sup> Subsequent to Attorney [REDACTED] advisory opinion request, he resigned his positions as Speaker and member of the West Virginia House of Delegates. His resignation was effective on Monday, August 21, 2018.

- (A) Upon becoming a candidate for a nonjudicial elective office, a judge shall resign from judicial office, unless permitted by law to continue to hold judicial office.
- (B) Upon becoming a candidate for appointive office, a judge is not required to resign from judicial office, provided that the judge complies with the other provisions of this Code.

Comment [1] to the Rule notes that in nonjudicial elective campaigns, candidates may make pledges, promises, or commitments related to positions they would take and ways they would act if elected to office. However, “this manner of campaigning is inconsistent with the role of a judge, who must remain fair and impartial to all who come before him or her.” The Comment also states that “[t]he potential for misuse of the judicial office, and the political promises that the judge would be compelled to make in the course of campaigning for nonjudicial elective office, together dictate that a judge who wishes to run for such an office must resign upon becoming a candidate. Comment [2] states that this “resign to run” rule “ensures that a judge cannot use the judicial office to promote his or her candidacy. When a judge is seeking appointive nonjudicial office, however, the dangers are not sufficient to warrant imposing the ‘resign to run’ rule.”

A few states including Arizona, Florida, Georgia, Hawaii and Texas,<sup>2</sup> have resign to run laws that cover additional elected officials such as members of a legislative body who want to run for judge. West Virginia has no such rule. The closest provision, which is a restriction on dual office holding, is contained in W. Const. art. VI, § 13 and states that “[n]o person holding any other lucrative office or employment under this state, the United States, or any foreign government, no member of Congress, and no person who is sheriff constable, or clerk of any court of record, shall be eligible to a seat in the Legislature.” A constitutional challenge was mounted to this specific provision in *Wilson v. Moore*, 346 F. Supp. 635 (N.D. W. Va. 1972). In affirming the provision, the Court stated:

[W]e find the restraints imposed by the amendment to be in consonance with the ancient and well-established common law rule that a public officer cannot hold two incompatible offices at the same time. This common law rule, at the present, has been refined and expanded by the constitutions and statutes of the great majority of the states. Statutory and constitutional prohibitions include not only the holding of incompatible offices, but the holding of more than one public office or employment

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<sup>2</sup> See Ariz. Rev. Stat. Ann. § 38-196; Fla. Stat. § 99.012; Ga. Const. art. II, § 2, para. V; Haw. Const. art. II, § 7; and Tex. Const. art. 16, § 65(b).



whether or not the offices held would be considered incompatible under the old common law rule. We find that the objective to be achieved is germane to enlightened representative state government, and that the classification arising therefrom has a rational basis in the fulfillment of that objective. The amendment provisions under attack, insofar as we can determine, do not offend per se the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution. They, therefore, must be upheld unless shown to be invidiously discriminatory in their operation.

*Id.* at 644 (citations omitted).

While W. Va. Const. art. VI, § 13 addresses dual office holding it does not speak to whether a nonjudicial officeholder must resign his/her position to run for other public office. Since there is no statute, rule or provision of the Code of Judicial Conduct that addresses your question, we decline to answer. It would be improper for the Commission to craft a rule when there is nothing on record that addresses the issue given the complexity of the question as legislators make the laws that judges must interpret.<sup>3</sup>

Thank you for your inquiry. If there is any further question regarding this matter please do not hesitate to contact the Commission.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ronald E. Wilson", is written over a faint, larger version of the same signature.

Ronald E. Wilson, Chairperson  
Judicial Investigation Commission

REW/tat

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<sup>3</sup> The Commission believes this situation is distinguishable from the facts contained in JIC Advisory Opinion 2012-02 where we advised a city councilwoman that she did not have to resign his/her position to run for magistrate but if elected he/she would be have to give up her position.