



JUDICIAL INVESTIGATION COMMISSION

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

March 27, 2019

Re: JIC Advisory Opinion 2019-08.

Dear

Your recent request for an advisory opinion was reviewed by the Judicial Investigation Commission at its March 22, 2019 meeting. The factual scenario giving rise to your request is as follows:

You have been a magistrate since December 1, 2008, and have served continuously in that capacity since that time. Prior to taking the position, you received a copy of the West Virginia Judicial Personnel System Manual ("Personnel Manual"). Section 11.4 of the Personnel Manual provides in pertinent part:

All judicial branch personnel are prohibited from engaging in any outside employment that might be construed as compromising or interfering with performance in a judicial branch position. . . . Before any judicial branch employee may engage in outside employment for which there is remuneration, he must submit a written request to the Administrative Director for review and approval. . . . The Administrative Director or his designee must determine with guidance from the Supreme Court or Chief Justice as appropriate whether such employment entails a conflict of interest, an impropriety, or the appearance of impropriety. Basic guidelines on outside employment are provided by the Code of Judicial Conduct.

In a document dated November 12, 2008, you certified that you had received and read the Personnel Manual.

On or about January 21, 2011, you started a for profit home health/ambulatory health company called Home Care Services, LLC. By letter dated May 10, 2011, you asked the Administrative Director's permission to engage in outside employment with Home Care. By letter dated June 10, 2011, the Administrative Director granted your request. You were reminded of these events in a JIC Admonishment issued to you on August 24, 2017 in Complaint No. 74-2017.

On January 31, 2019, you sent a letter to the Administrative Director of the Supreme Court of Appeals of West Virginia asking if you could participate in a new business called Your wife and you opened the business in an existing building that you already owned. In your letter to the Administrative Director you indicated that "only after filling out my financial disclosure statement did I realize that I never informed the Magistrate Court Division that I had started the business." You acknowledged that you wife runs the business throughout the day and you are "usually around the shop in the evening hours after work at the magistrate office" and for about four hours on Saturdays.

By letter dated February 7, 2019, the Administrative Director informed you that you could not participate in the venture "due to issues the Court has with potential conflicts and the strong belief that such activity is in contravention of the Code of Judicial Conduct. Specifically, the Administrative Director cited Rule 3.11(B) and (C) of the Code.

By email dated February 15, 2019, you asked the Administrative Director to reconsider his decision and to forward the information to the Judicial Investigation Commission for a formal opinion. By email dated February 20, 2019, the Administrative Director forwarded your request to our counsel. In the request, you stated:

I receive no pay or compensation from this LLC. My involvement is of a management role because of my financial investment. My time involved in this venture is very limited. My time around the shop is after my court day has concluded. I feel since I have money invested in this business I should be able to have involvement on a management level and would like to remain on the LLC in case there was to be an issue where my wife may be injured in an accident or even worse case scenario, she dies. We are the only two members of this LLC.

You also point out that whether you are a member of the LLC or whether your wife solely owns the venture, you would be required to recuse yourself in any magistrate court action involving the business "so as not to have the appearance of impropriety."

To address your question, the Commission has reviewed Rules 1.2 and 3.11(C) of the Code of Judicial Conduct. Rule 1.2 states that "[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.” This standard applies to both the professional and personal conduct of a judge. Comment [2] to the Rule states that “[a] judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens and must accept the restrictions imposed by the Code.” Comment [3] notes that “[c]onduct that compromises or appears to compromise the independence, integrity and impartiality of a judge undermines public confidence in the judiciary.” Comment [5] sets forth the test for appearance of impropriety – “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 3.11(C) states that a judge shall not engage in financial activities if they will:

- (1) interfere with the proper performance of judicial duties;
- (2) lead to frequent disqualification of the judge
- (3) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or
- (4) result in violation of other provisions of this Code.

Comment [1] states that participation in financial activities is subject to the requirements of the Code. “For example, it would be improper for a judge to spend so much time on business activities that it interferes with the performance of judicial duties. . . . Similarly, it would be improper for a judge . . . to conduct his or her business or financial affairs in such a way that disqualification is frequently required.” Comment [2] requires that “[a]s soon as practicable without serious financial detriment, the judge must divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this Rule.”

It is evident that you knew you should have sought an opinion from the Commission or the Administrative Director as to whether you could invest in and open a pawn shop before taking any action. Instead of asking for permission, you clearly thought it better to seek forgiveness. You were wrong. A judicial officer owning a pawn shop creates an appearance of impropriety, can lead to frequent disqualification by the judge in personal property theft cases whenever the items in question were taken to the shop, and/or can involve the judicial officer in frequent transactions or continuing relationships with persons likely to come before County Magistrate or Circuit Courts. Therefore, you should never have opened a pawn shop in your county. The Commission is of the opinion that you must forthwith divest yourself of the pawn shop and provide proof of the same to the Administrative Director. Lastly, the Commission also feels compelled to again remind

you that any future requests for outside employment should occur prior to taking any action and the failure to do so after having been repeatedly warned could result in disciplinary action.

It is hoped that this opinion fully addresses the issues which you have raised. Please do not hesitate to contact the Commission if you have any other questions regarding this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Alan D. Moats", with a long horizontal flourish extending to the right.

The Honorable Alan D. Moats, Chairperson
Judicial Investigation Commission

ADM/tat