



**JUDICIAL INVESTIGATION COMMISSION**

City Center East - Suite 1200 A  
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Charleston, West Virginia 25304  
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September 10, 2019

Re: JIC Advisory Opinion 2019-20.

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:

The judges in your circuit are interested in implementing an *ad hoc* mediation program since many of the parties in pending suits do not have the resources to privately mediate a dispute which may be ripe for negotiation. The presiding judge would not serve as the mediator over a case pending before him/her but would request that another judge in the same circuit serve in that capacity. The mediating judge would then simply report back to the presiding judge as to whether the mediation was successful. The mediating judge would not receive any compensation for his/her service.

By way of example, another judge in your circuit has a partition suit that is set for trial on December 3, 2019. The presiding judge believes the matter could be successfully resolved through mediation. One of the parties is represented by an attorney but the other party is representing himself/herself *pro se*. You have had no prior involvement in the case and you were appointed mediator by agreement of the parties. The mediation is set for the near future.

You want to know whether serving as a mediating judge in such an *ad hoc* mediation program is within a judge's official duties and therefore permissible pursuant to Rule 3.9 of the Code of Judicial Conduct. You also want to know whether some form of "enabling authorization" must first be obtained and, if so, from whom.

Rule 3.9 provides that "[a] judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge's official duties." Comment [1] notes

that Rule 3.9 “does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of assigned judicial duties. Rendering dispute resolution services apart from those duties whether or not for economic gain is prohibited.” Importantly, the Rule makes clear that a judge who engages in mediation as part of his/her official duties does not violate the Code of Judicial Conduct. However, if a judge engages in mediation or arbitration that is not considered an official duty, he/she has violated Rule 3.9. The key to the Rule then is “official duty.”

A judicial officer on Business Court either serves as a Presiding Judge or a Resolution Judge pursuant to Trial Court Rule 29.07. The latter is specifically “authorized to schedule and conduct mediation of the case or any Alternative Dispute Resolution as agreed to by the parties and the Resolution Judge in an attempt to resolve the case in an expedient and efficient manner.” Since part of the Resolution Judge’s official duties pursuant to Trial Court Rule 29 are to mediate, he/she does not violate Rule 3.9 of the Code of Judicial Conduct by engaging in such activity.

Like Business Court, the judges involved in Mass Litigation follow the same framework of Presiding Judge/Resolution Judge even though Trial Court Rule 26<sup>1</sup> makes absolutely no mention of a “Resolution Judge.” This continuing practice first started several years ago in a multi-million dollar toxic-tort class action lawsuit when the Chief Justice of the Supreme Court of Appeals entered an order assigning two judges to assist as mediators. As a result the Mass Litigation Judges who serve as Resolution Judges do not violate Rule 3.9. It is also possible that a multi-judge circuit may set up a Presiding Judge/Resolution Judge structure similar to those of Business Court and Mass Litigation by administrative order; and if it is, in turn, sanctioned by Order of the Chief Justice, the duties would be considered official and not violative of Rule 3.9. Additionally, any legislative enactment or Supreme Court Rule would also suffice.

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,



Alan D. Moats, Chairperson  
Judicial Investigation Commission

ADM/tat

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<sup>1</sup> This Rule governs Mass Litigation.