



JUDICIAL INVESTIGATION COMMISSION

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

January 13, 2020

Re: JIC Advisory Opinion 2020-01.

Dear Judge :

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 a special judge on a domestic violence ("DV") case in a county located in another Family Court jurisdiction. You issued a year-long order against the boyfriend in the case and on behalf of the girlfriend. The order is set to expire in February 2020. Meanwhile, in December 2019, you learned that the federal Bureau of Alcohol, Tobacco and Firearms ("ATF") is conducting a criminal investigation into the boyfriend.

ATF originally sent a letter to the Circuit Clerk asking for certain records – the petition, the order and the docketing sheet. The Clerk wouldn't turn anything over to ATF even though the order and the docketing sheet are public record. The Clerk told ATF to contact you so the agency wrote you a letter asking for the documents. You contacted the Administrative Office ("AO") of the Supreme Court of Appeals of West Virginia and the lawyers there told you to send the Order and the docketing sheet to ATF. You, in turn, contacted the Circuit Clerk and told her to send the information.

Now, a hearing has been set before you for early February in the underlying DV matter on a Motion to extend the order. You want to know if the ATF letter constitutes an *ex parte* communication and whether you have any duty to inform the parties of its receipt. You are concerned about revealing the communication since it involves a federal criminal investigation. You also suspect although you do not know for sure that the investigation involves the possible improper possession of firearms by the boyfriend since he is prohibited from having any guns by virtue of the DV.

To address your questions, the Commission has reviewed Rule 2.9 of the Code of Judicial Conduct which states in pertinent part:

- (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* communications 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 consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities . . . 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.

Based upon the foregoing, the Commission finds that the communication is *ex parte* since the ATF sent the letter directly to you and you now know about the criminal investigation which could be viewed, however incorrect the public perception may be, as impacting on your decision on the Motion to Extend. As the federal criminal investigation is confidential and you therefore cannot advise the parties about the communication as required by Rule 2.9, your only remaining option is to recuse yourself from the underlying DV matter.

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,

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

Alan D. Moats, Chairperson
Judicial Investigation Commission

ADM/tat