



**JUDICIAL INVESTIGATION COMMISSION**

City Center East - Suite 1200 A  
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Charleston, West Virginia 25304  
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July 17, 2020

Re: JIC Advisory Opinion 2020-17

Dear Judge :

Your recent request for an advisory opinion was reviewed by the Judicial Investigation Commission. The facts giving rise to your question are as follows:

A vacancy has occurred in the position of Magistrate. A special election is set for November 2020 to fill the vacancy. You believe the newly elected magistrate would take office on January 1, 2021. As Chief Judge of the Circuit you are responsible for filling the vacancy in the interim. You are contemplating appointing your law clerk to the interim Magistrate position, which you expect to conclude at the end of the current year. You want to know if your law clerk can take an unpaid leave of absence from his current position to temporarily fill the Magistrate vacancy. Alternatively, you want to know if your employee has to resign whether he/she can resume his law clerk position on January 1, 2021 if it is still available. Lastly, you want to know if you should exclude yourself from the temporary Magistrate selection process and leave the decision to the remaining circuit judges.

In JIC Advisory Opinion 2012-14, the Commission informed a circuit judge that he/she could not appoint his/her law clerk as a mental hygiene commissioner if the two positions would be held contemporaneously since the law clerk would lack independence as a mental hygiene commissioner. Specifically, the Commission noted that "[a] law clerk is a judicial employee. Law clerks are employed by the Supreme Court of Appeals, and they answer to the judge for whom they serve. Indeed, a law clerk works closely with the judge and is privy to the Court's internal workings, rulings, correspondence, etc. As such, the public may view the law clerk as an extension of the judge because of the nature of the

work performed and the need for constant communication between the two.” Therefore, a law clerk who is still employed by the judge but who has taken an unpaid leave of absence cannot be appointed to fill the temporary vacancy of Magistrate. A magistrate must truly be independent from a circuit judge. If the purpose of the law clerk’s temporary resignation or the chief judge’s abrogation of his responsibility to fill the temporary appointment is to achieve indirectly what cannot happen directly then the judge cannot appoint the law clerk to said position.

It is hoped that this opinion fully addresses the issue raised by you. 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