



JUDICIAL INVESTIGATION COMMISSION

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

July 29, 2020

Re: JIC Advisory Opinion 2020-18

Dear Mr. :

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

You are currently a private practice attorney and a Mental Hygiene Commissioner in the Judicial Circuit. You recently accepted a position as an assistant public defender in the same circuit. You want to know if you can concurrently serve as an assistant public defender and a Mental Hygiene Commissioner.

In your circuit, private practice attorneys generally represent respondents in mental hygiene proceedings but the public defender's office serves as back up counsel. You acknowledge that as late as last week, a public defender appeared on behalf of a respondent at a mental hygiene hearing. The private practice attorneys who represent respondents are paid by the public defender's office for their work.

To address your question, the Commission has reviewed Rules 1.2 and 2.11(A)(5) of the Code of Judicial Conduct which state:

Rule 1.2 – Confidence in the Judiciary

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.

Rule 2.11 – Disqualification

- (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
- (5) The judge: (a) served as a lawyer in the matter in controversy or was associated with a lawyer who participated substantially as a lawyer in the matter during such association.

The Comments to the Rules are instructive. Comment [1] to Rule 1.2 states that “[p]ublic confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge. Comment [2] notes 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] provides that “[c]onduct that compromises or appears to compromise the independence, integrity or impartiality of a judge undermines public confidence in the judiciary.” Comment [5] states:

Actual improprieties include violations of law, court rules or provisions of this code. The test for appearance of impropriety is 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.

Based upon the foregoing, the Commission is of the opinion that it is impermissible for you to concurrently serve as a mental hygiene commissioner and an assistant public defender. 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