



JUDICIAL INVESTIGATION COMMISSION

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

February 19, 2021

Re: JIC Advisory Opinion 2021-04.

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 want to know if it would be improper for you to submit your name for a U.S. Attorney while you are a sitting judge. You correctly point out that Rule 4.5 of the Code of Judicial Conduct permits you to become a candidate for nonjudicial appointive office provided that you comply with the other provisions of the Code. You also want to know if you receive the appointment would you have to resign as Judge before confirmation.

You state that your seeking the appointment would not be public information, and you absolutely would not answer questions or take positions on issues that would be inconsistent with your role as judge. You don't know much about the selection process but you believe it would involve some interviews. You say that you are confident that you could navigate the process in accordance with the Code and would remove your name if the process conflicted with your role as Judge.

In addition to Rule 4.5, the Commission has reviewed the West Virginia Constitution and Rules 1.2 and 3.4 of the Code of Judicial Conduct to address your question. Importantly, Article VIII, Section 7 of the West Virginia Constitution states:

No justice, judge or magistrate shall hold any other office, or **accept any appointment or public trust, under this or any other government**; nor shall he become a candidate for any elective public office or nomination thereto, except a judicial office; **and the violation of any of these provisions shall vacate his judicial office**. No justice of the supreme court of appeals or judge of an intermediate appellate court or of a circuit court shall practice the profession of law during the term of his office, but magistrates who are licensed to practice this profession may practice law except to the extent prohibited by the Legislature.

(emphasis added) The relevant provisions of the Code of Judicial Conduct state in pertinent part:

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 4.5 Activities of Judges Who Become Candidates for Nonjudicial Office

- B. Upon becoming a candidate for a nonjudicial appointive office, a judge is not required to resign from judicial office, provided that the judge complies with the other provisions of this Code.

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] provides 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 [4] states that “[j]udges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.” Comment [5] provides:


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 this, the Commission finds that you may apply for the position of U.S. Attorney without having to resign your position. However, you will have to immediately resign your judgeship if you are nominated for the position. Nomination indicates acceptance to the position by you if confirmed and the state Constitution is clear that you cannot accept any other non-judicial government position. Furthermore, the U.S. Attorney is the prosecutor for federal crimes. Your nomination to that position while simultaneously serving as a judge could leave the public with the impression however wrong it may be, that you are pro prosecution and therefore biased against defendant in state criminal cases. Therefore, it is the unanimous consensus of the Commission that you must resign your judgeship upon being nominated for the position of U.S. Attorney.

Thank you for your inquiry. If you have any further questions regarding this matter please do not hesitate to contact the Commission.

Sincerely,


Alan D. Moats, Chairperson
Judicial Investigation Commission

ADM/tat