



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
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June 28, 2020

Re: JIC Advisory Opinion 2021-15

Dear Magistrate :

Your recent request for an advisory opinion was reviewed by the Judicial Investigation Commission at its August 25, 2021 meeting. 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 appointment to a vacant unexpired term as Circuit Clerk while you are a sitting magistrate. You correctly point out that the Circuit Clerk position is at best a quasi-judicial office subject to election every four years. You also want to know when you would be required to resign your position as magistrate during the process.

To address your questions, the Commission has reviewed Article VIII, § 7 of the West Virginia Constitution and Rules 1.2 and 4.5 of the Code of Judicial Conduct. 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 provide 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 unexpired term of Circuit Clerk without having to resign your position. However, you will have to immediately resign your judicial position once it becomes public that you have applied for the Circuit Clerk vacancy or, if applicable, upon acceptance of the new job, whichever is sooner. You should note that this position is consistent with the one we have espoused in JIC Advisory Opinion 2021-04 (judge could apply for the position of U.S. Attorney without

having to resign but would have to do so at the point it became public when his/her name was submitted to the Senate for approval).

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