



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 11, 2022

Re: JIC Advisory Opinion 2022-05

Dear Judge [REDACTED]:

Your recent request for an advisory opinion was reviewed by the Judicial Investigation Commission. The facts giving rise to your request are as follows: From 1997 through 2008, you served as a Family Law Master/Family Court Judge in [REDACTED] Counties. Since 2009, you have served as a Temporary Family Court Judge and have been assigned to hear cases in Family Courts in 38 different counties over that period. Since 2017, your rate of assignments has declined to perhaps 4 or 5 times per year.

You currently practice law in domestic relations, criminal law, abuse and neglect, estate planning and general areas of law. You also do a significant amount of domestic mediation. You do not practice law in any county where you are serving as a Temporary Family Court Judge.

You are not currently serving as a Temporary Family Court Judge in [REDACTED] County, although you have in the past. Recently, you were asked to serve as an expert witness in a malpractice action filed in [REDACTED] County against an attorney for his/her alleged failure to perform certain acts and/or obtain certain outcomes in a divorce action which occurred in [REDACTED] County. You want to know if you can serve as an expert witness.

To address your question, the Commission has reviewed Application V and Rules 1.2, 1.3, 2.10 and 3.1 of the Code of Judicial Conduct which state:

Application V *Pro Tempore* Part-Time Judge

A *pro tempore* part-time judge who serves or expects to serve once or only sporadically on a part-time basis under a separate appointment for each period of service or for each case heard is not required to comply:

- (A) except while serving as a judge, with Rules 2.4, 3.2, and 4.1(A); or
- (B) at any time with Rules 3.4, 3.8(A), 3.9, 3.10, and 3.11(B).

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 1.3 – Avoiding Abuse of the Prestige of Judicial Office

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.

Rule 2.10 – Judicial Statements on Pending/Impending Cases

- (A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.
- (B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

Rule 3.1 – Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not: . . .

- (A) participate in activities that will interfere with the proper performance of the judge's judicial duties;. . .

- (C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity or impartiality;

Based upon the foregoing, the Commission is of the opinion that you cannot serve as an expert witness in the proceeding. You would not be allowed to use your position as a Temporary Family Court Judge to bolster your opinions. Furthermore, the Commission believes that any testimony elicited from you would constitute comments on a pending matter in violation of Rule 2.10. Therefore, you cannot concurrently serve as a Temporary Family Court Judge and an expert witness. This decision is consistent with our holdings in JIC Advisory Opinion 2002-01 (senior status judge could not serve as an expert witness in attorney fee case) and JIC Advisory Opinion 2002-06 (sitting magistrate could not serve as an expert witness in civil litigation).

We hope that this opinion fully addresses the issue which you have raised. Please do not hesitate to contact the Commission should you have any questions, comments or concerns or desire additional advice.

Sincerely,



Alan D. Moats, Chairperson
Judicial Investigation Commission

ADM/tat