



JUDICIAL INVESTIGATION COMMISSION

WV Judicial Tower - Suite 700 A
4700 MacCorkle Ave., SE
Charleston, West Virginia 25304
(304) 558-0169

April 17, 2023

The Honorable

Re: JIC Advisory Opinion 2023-10

Dear Commissioner :

Your request for reconsideration of JIC Advisory Opinion 2022-31 was recently reviewed by the Judicial Investigation Commission. The factual scenario giving rise to your request is as follows: In JIC Advisory Opinion 2022-31, the Commission stated that a Mental Hygiene Commissioner could not concurrently serve as an assistant prosecutor in another county and cited Article VIII, § 7 of the West Virginia Constitution as the basis of the denial. It has long been the decision of the Judicial Investigation Commission. *See* JIC Advisory Opinions 2009-18 and 2007-21. Additionally, Mental Hygiene Commissioners have long been advised that they would have to resign from office upon announcing a run for the non-judicial office of prosecuting attorney based on Rule 4.5 of the Code of Judicial Conduct. *See* JIC Advisory Opinions 2007-28 and 2007-21.

You are a Mental Hygiene Commissioner in _____ County, your law practice is in _____ County, and you were recently offered a position as an assistant prosecutor in _____ County handling abuse and neglect cases. You believe that the constitutional provision in question does not apply to Mental Hygiene Commissioners and therefore you can concurrently serve as a Mental Hygiene Commissioner in one county and an assistant prosecutor in another county.

In the vast majority, if not all, of the counties in West Virginia, the prosecuting attorney's office is responsible for prosecuting mental hygiene petitions against the petitioner. Therefore, the Commission is of the opinion that provisions of the West Virginia Code of Judicial Conduct also preclude concurrent employment of mental

hygiene commissioners and assistant prosecuting attorney regardless of what counties they work.

Application III governs Mental Hygiene Commissioners and provides:

A judge who serves repeatedly on a part-time basis by election or under a continuing appointment, such as a mental hygiene commissioner:

- (A) is not required to comply
 - (1) except while serving as a judge with Rules 2.10 and 4.1(A) [of the Code of Judicial Conduct]; and
 - (2) at any time with Rules 3.8(A), 3.9, 3.10, 3.11(B), 3.12 and 3.15 [of the Code of Judicial Conduct].

This means a Mental Hygiene Commissioner, like a Circuit Judge, a Family Court Judge or a Magistrate, is required to comply with all other provisions of the Code of Judicial Conduct including Rules 1.1, 1.2, 2.1, 2.2 and 3.1 which state in pertinent part:

Rule 1.1 Compliance With the Law

A judge shall comply with the law, including the West Virginia Code of Judicial Conduct.

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 2.1 Giving Precedence to the Duties of Judicial Office

The duties of judicial office, as prescribed by law, shall take precedence over all a judge's personal and extrajudicial activities.

Rule 2.2 Impartiality and Fairness

A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially.

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

The Preamble to the Code of Judicial Conduct provides:

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to the American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law. . . . Good judgment and adherence to high moral and personal standards are also important.

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.

Comment [1] to Rule 2.1 states that “[t]o ensure that judges are available to fulfill their judicial duties, judges must conduct their personal and extrajudicial activities to minimize the risk of conflicts that would result in frequent disqualification.” Comment [1] to Rule 2.2 notes that “[to] ensure impartiality and fairness to all parties, a judge must be objective and open-minded.”

Based upon the foregoing, the Commission is of the opinion that no Mental Hygiene Commissioner can concurrently serve as an assistant prosecutor in any county in the state. To do so would create in the minds of members of the public, however wrong they may be, that you were biased in favor of the prosecuting attorney in mental hygiene proceedings. The Commission is also concerned about the impact your service as an assistant prosecutor could have on your service as a mental hygiene commissioner when your judicial duties are supposed to take precedence over all your other activities. These considerations would also preclude a circuit judge, family court judge or magistrate from concurrently serving as an assistant prosecutor in another county even if there were no constitutional provision barring the same. Accordingly, the Commission unanimously finds that you cannot concurrently serve as a mental hygiene commissioner and an assistant prosecutor in any county without violating the foregoing provisions of the Code.

The Commission hopes that this opinion fully addresses the issues which you have raised. Please do not hesitate to contact the Commission should you have any questions, comments or concerns.

Sincerely,



Alan D. Moats, Chairperson
Judicial Investigation Commission