JUDICIAL INVESTIGATION COMMISSION
City Center East - Suite 1200 A
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January 4, 2019

Re: JIC Advisory Opinion 2019-01.

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:

In December 2018, Governor Justice appointed you to fill a vacancy in the Judicial Circuit. You took office on January 2, 2019. Prior to being appointed judge, you were an equity member of a large law firm. Under the terms of the firm's contractual operating agreement, as a withdrawing member, you are entitled to: (i) a return of your capital account within 90 days of such withdrawal or in monthly installments of $2,000.00 as determined by the other members; and (ii) receive three (3) monthly payments equal to the *pro rata* equivalent of such withdrawing Member's percentage of firm profits assigned as of the effective date of such withdrawal for the next three (3) months. With respect to (i) you believe that it would take four or five months for the firm to pay you if it elected the $2000.00 a month installment payments. You want to know if you can receive the extra-judicial payments as stated since these contractual rights pre-dated your appointment as a judicial officer.

To address the questions, the Commission has reviewed Rules 3.11(C) and 2.11(A) and (C) of the Code of Judicial Conduct which state:

3.11 Financial, Business, or Remunerative Activities

(C) A judge shall not engage in financial activities permitted under paragraphs (A) and (B) if they will:

1. interfere with the proper performance of judicial duties;

2. lead to frequent disqualification of the judge;

3. involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or

4. result in violation of other provisions of this Code.

Comment [2] states that "[a]s soon as practicable without serious financial detriment, the judge must divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this Rule." The Rule contemplates a natural winding down of a law practice including the remittance of any fees owed and a reasonable time frame within which to complete the action, which may understandably overlap a judgeship.

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:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them or the spouse or domestic partner of such a person is: (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party; (b) acting as a lawyer in the proceeding; (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or (d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or is a party to the proceeding.

(4) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision or opinion, that commits or appears to commit the

> judge to reach a particular result or rule in a particular way in the proceeding or controversy.
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> (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; (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy; (C) was a material witness concerning the matter; or (d) previously presided as a judge over the matter in another court.
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> . . .
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> (C) A judge subject to disqualification under this Rule, **other than for bias or prejudice under paragraph (A)(1)**, may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

(emphasis added).

Thus, pursuant to Rule 2.11(C), the only time a judicial officer should voluntarily disqualify himself or herself is when the judge has an actual or perceived personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. Comment 5 to Rule 1.2 notes:

> 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.

Meanwhile, Comment 2 to Rule 2.11 states that "[a] judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a

motion to disqualify is filed." Comment 5 provides that "[a] judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification."

Tennant v. Marion Health Care Foundation, 194 W. Va. 97, 459 S.E.2d 374 (1995) is instructive to the two issues at hand. In *Tennant*, plaintiff brought a medical malpractice suit against defendant doctors and hospital. In January 1994, the medical malpractice case went to trial. Following the presentation of evidence, the jury found in favor of the defendant. Meanwhile, in March 1993, the law firm representing defendant was retained by the liability carrier for the state to defend the Judge and others in a civil rights claim in federal court. In February 1994, summary judgment was granted in the federal case. When the judge received a copy of the federal order, he realized he had a potential conflict and immediately disclosed the nature of the relationship with defense counsel to the parties in the medical malpractice action. The Chief Justice of the Supreme Court of Appeals of West Virginia permitted the judge to recuse himself in the malpractice action and appointed another judge to hear post-trial motions. Following entry of the judgment order, plaintiff filed a motion to set aside the verdict or grant a new trial on the basis that he was prejudiced by the Judge's relationship with defense counsel in the civil rights case. The new judge in the medical malpractice action granted a new trial based on the appearance of impropriety. The defendant appealed the ruling to the Supreme Court which reversed the decision of the trial court.

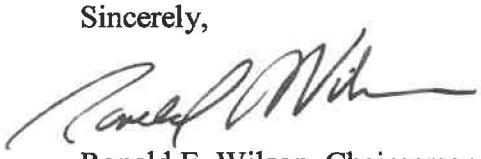
The Court held that a judge should disqualify himself/herself from any proceeding in which his/her impartiality might reasonably be questioned. The Court noted that the avoidance of the appearance of impropriety is as important in developing public confidence in the judicial system as avoiding actual impropriety itself and that the judge should take appropriate action to withdraw from a case in which the judge deems himself/herself biased or prejudiced. *Tennant* cited the commentary to Canon 3E(1) which states that a judge should timely disclose on the record information which he/she believes the parties or their lawyers might consider relevant to the question of disqualification. Litigants and counsel should be able to rely on judges complying with the Code of Judicial Conduct. There is no obligation imposed on counsel to investigate the facts known by the judge which could possibly disqualify the judge. The judge has a duty to disclose any facts even if the judge does not feel that they are grounds for disqualification *sua sponte*.

Tennant also addressed the rule that a judge has an equally strong duty to sit where there is no valid reason for recusal. In so doing, the Court set forth a balancing test between the two concepts. While giving consideration to the administration of justice and the avoidance of the appearance of unfairness, a judge must also consider whether cases may be unfairly prejudiced or delayed or discontent may be created through unfounded charges of prejudice or unfairness made against the judge. The Court noted that the standard for

recusal is an objective one. Facts should be viewed as they appear to the well-informed, thoughtful and objective observer rather than the hypersensitive, cynical and suspicious person.

Based upon the foregoing, the Commission finds that you may receive both payments from your former firm. During the pendency of the payments, you should disclose the same in any case involving your former firm and follow the tenets of Trial Court Rule 17. 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,



Ronald E. Wilson, Chairperson
Judicial Investigation Commission

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