



## JUDICIAL INVESTIGATION COMMISSION

212 Dickinson Street  
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August 15, 1995

Re: JIC Advisory Opinion 1995-18

Dear

In a letter to Counsel dated May 17, 1995, you asked for an advisory opinion. In your correspondence you indicated that your daughter just completed her first year at the West Virginia University College of Law and is employed as a summer law clerk at a law firm. You stated that the firm has several cases pending in your court. Based upon those facts you asked for a statement as to the relationship that is now to exist between you as a judge and the law firm which is employing your daughter. The Judicial Investigation Commission considered your request previously but has chosen to revisit its considerations in view of two recent opinions of the Supreme Court of Appeals of West Virginia.

The Court in State ex rel. Brown v. Dietrick, 191 W.Va. 169, 444 S.E.2d 47 (1994) and Tennant v. Marion Health Care Foundation, Inc., et al, (No. 22643, Supreme Court of Appeals of West Virginia filed, June 15, 1995) discussed judicial disqualification in matters arising under language similar to that contained in Canon 3E of the Code of Judicial Conduct. That Canon states in pertinent part:

### CANON 3

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL  
OFFICE IMPARTIALLY AND DILIGENTLY

#### E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . .

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The ultimate issue to be resolved in cases involving disqualification of a judge based on some family relationship requires an analysis of when that relationship rises to a level causing a reasonable questioning of a judge's impartiality.

In Brown the Court considered whether the Circuit Court of Jefferson County was correct in holding that a search warrant issued by a magistrate was void because the magistrate was married to the chief of police, and one of his officers had procured the warrant. Justice Miller, writing for the Court, stated that any criminal matters in which the magistrate's husband was involved could not be brought before the magistrate because of the spousal relationship. The decision, however, declined to extend a per se rule with regard to other members of the police force. The Court stated that the fact that the magistrate's spouse was the chief of police of a small police force did not automatically disqualify the magistrate who is otherwise neutral and detached from issuing a warrant sought by another member of the police force. The decision did state that the magistrate's involvement with warrants from the police force should be severely curtailed.

The Court rejected the per se application of Canon 3 regarding disqualification based on the participation of an officer of the police department which the magistrate's husband commanded. By analogy this decision stands for the proposition that the employment of your daughter by a Morgantown law firm would not per se require your disqualification in all cases involving that law firm. More information would need to be ascertained to make a determination of when disqualification would be appropriate because "your impartiality might reasonably be questioned." The proceedings to be followed in such cases and the standard by which a factual basis should be reviewed were discussed in Tennant.

In this decision the Court stated that to protect against the appearance of impropriety, courts in this country consistently hold that a judge should disqualify himself or herself from any proceeding in which his or her impartiality might reasonably be questioned. The decision makes clear that avoiding the appearance of impropriety is as important in developing public confidence in the judicial system as avoiding impropriety itself. It states that a judge should take appropriate action to withdraw from a case where he or she deems himself or herself biased or prejudiced.

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The decision cites in footnote 7 the commentary to Canon 3E(1) which provides that a judge should timely disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification. The footnote makes clear that litigants and counsel should be able to rely on judges complying with the Code of Judicial Conduct. It reiterates that there is no obligation imposed on counsel to investigate the facts known by the judge that could possibly disqualify him. The judge is duty bound to disclose them sua sponte.

The opinion also addressed the rule that a judge has an equally strong duty to sit where there is no valid reason for recusal. It says that "while due consideration should be given to the notion that the administration of justice should be beyond the appearance of unfairness, a trial judge in deciding whether to recuse himself should also consider whether cases may be unfairly prejudiced or unduly delayed, or discontent may be created through unfounded charges of prejudice or unfairness made against the judge in the trial of a cause."

The standard for recusal is an objective standard which is essential when the question involves appearance. Factual scenarios are viewed as they appear to the well-informed, thoughtful, and objective observer, rather than the hypersensitive, cynical, and scrupulous person. The objective standard requires a factual basis for questioning a judge's impartiality.

Based upon the information received in your letter that your daughter is working as a summer clerk for a law firm in after completing her first year of law school and that she is living out of your household, the Commission feels that a per se disqualification by you in all cases involving the law firm would not be required.

Based on the language contained in Tennant there are certain disclosures which would need to be made and inquiries which would need to be conducted in those cases in which the law firm appears. Information about the length of time the person has worked with the firm and the capacity in which the person works for the firm would need to be addressed. Information about whether the person worked on the case and any other relevant information which would enable the parties or their attorneys to make a decision on a recusal motion would need to be disclosed and addressed in those cases.

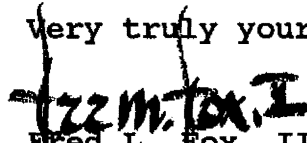
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After such issues have been disclosed and addressed, the parties or their counsel may decide on filing a motion for recusal or not. You as trial judge could then make your determination of the propriety of sitting on a given case having fully disclosed these matters.

If there are any further questions concerning this situation, do not hesitate to contact the Commission.

Very truly yours,

A handwritten signature in black ink, appearing to read "Fred L. Fox, II", written over the typed name.

Fred L. Fox, II, Chairman

FLF,II/bl