



JUDICIAL INVESTIGATION COMMISSION

212 Dickinson Street
Post Office Box 1629
Charleston, West Virginia 25326-1629
(304) 558-0169 FAX (304) 558-0831

February 7, 1997

Re: JIC Advisory Opinion 1997-05

Dear

In a recent letter to Counsel to the Judicial Investigation Commission you sought an advisory opinion regarding the Code of Judicial Conduct requirements or restrictions as to disclosure and/or disqualification in criminal cases for a magistrate whose assistant is the spouse of a law enforcement officer or of a prosecutor or assistant prosecutor. You asked whether there was any distinction depending on the kind of law enforcement officer - sheriff or deputy sheriff, municipal police chief or "ordinary" police officer, state police detachment supervisor or "ordinary" state trooper.

Canon 3E(1) of the Code of Judicial Conduct states generally the requirements relating to disqualification. That section of the Code of Judicial Conduct states:

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 . . .

The commentary to this section of the Code states that "a judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification."

February 7, 1997

Also Canon 2 addresses the area of concern which you have raised in your letter. Canon 2 states in pertinent part:

Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

A. A judge shall respect and comply with the law, shall avoid impropriety and the appearance of impropriety in all of the judge's activities, and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment . . .

Recently the Court handed down two decisions which addressed in some detail the question of judicial disqualification. 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., 194 W. Va. 97, 459 S.E. 2d 374 (1995) the Court discussed judicial disqualification in matters arising under language similar to that contained in Canon 3E of the Code of Judicial Conduct. In these decisions the Court considered the relationship the judicial officer had with other individuals. In your request the relationship would exist between the magistrate assistant and the individual. Notwithstanding the fact that that relationship in question is one step removed from the judicial officer the Court's analysis in Brown and Tennant are helpful in addressing your request.

In Brown the Court considered whether 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. 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 was otherwise neutral and detached from issuing a warrant sought by another member of the police force. The Court rejected the per se application of Canon 3 regarding disqualification based on the participation of an officer of a police department which the magistrate's husband commanded. To determine whether disqualification was appropriate more information would need to be ascertained regarding the relationship in question.

In Tennant the Court set forth proceedings to be followed when reviewing such questions and articulated the standard by

February 7, 1997

which a factual basis to determine disqualification should be reviewed. 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.

This decision cites the commentary to Canon E(1) stating 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. It 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 states 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 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 the 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.

Applying these holdings to the question of when disclosure and/or disqualification in criminal cases is warranted because a magistrate's assistant is the spouse of a law enforcement officer or of a prosecutor or assistant prosecutor requires that an analysis be done on a case-by-case basis. When such relationships exist the degree and kind of involvement in the case by the spouse will inevitably vary. For example one spouse may be a police officer who is directly involved in the case and will appear as a material

February 7, 1997

witness before the magistrate. Another may be a police officer who is not involved in a case in any fashion and who is working in an area outside the jurisdiction of the magistrate. One spouse may be an assistant prosecuting attorney who is handling the case before the magistrate. Another may be not involved in the case and unfamiliar with it.

Clearly based on the Court's decision in Dietrick, there would be no per se disqualification in those cases involving magistrate assistants unless the facts fell within Canon 3E(1)(a), (b), (c), (d) which set forth specific situations requiring disqualification. A case-by-case analysis would need to be done and the extent of the involvement on the part of the spouse would be an issue to be determined at the time based on the particular facts presented. At a minimum the magistrate would need to disclose the existence of any such relationship by the magistrate assistant in any case.

If there is any further question concerning this matter, do not hesitate to contact the Commission.

Very truly yours,


Fred L. Fox, II, Chairman

FLF,II/bl