



JUDICIAL INVESTIGATION COMMISSION

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May 11, 2009

Re: JIC Advisory Opinion 2009-12

Dear Judge

In a recent letter to the Judicial Investigation Commission you asked for an advisory opinion. You stated that your daughter recently accepted a position as a first year summer clerk with a law firm in their office. The Chief Justice advised that you should seek an advisory opinion as to whether you should recuse yourself from any cases involving that firm, and if so, would the recusal last only for the period of her summer clerkship which lasts approximately ten weeks. You asked whether it would be sufficient to disclose to the parties your daughter's employment at the firm and if a party objected you recuse yourself, if no objection you could continue to preside.

To address the questions which you have raised, the Commission has reviewed two opinions of the Supreme Court of Appeals of West Virginia and Canon 3E of the Code of Judicial Conduct. 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 194 W.Va. 97, 459 S.E.2d 374 (1995), discussed judicial disqualification arising under language similar to that contained in Canon 3E of the Code of Judicial Conduct. Canon 3E states in relevant 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 the proceeding in which the judge's impartiality might reasonably be questioned . . .

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When a question of disqualification of a judge based on a family relationship arises an analysis must be made of when that relationship rises to a level causing a reasonable questioning of a judge's impartiality. This issue was discussed in an advisory opinion issued by the Commission on August 15, 1995, and the Commission reiterates its position in this opinion. A copy of the opinion issued on August 15, 1995 is attached hereto for your information.

In Brown, the Court considered whether the circuit court 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 obtained the warrant. The Court stated that in any criminal matters in which the magistrate's spouse was involved the magistrate would be disqualified from hearing that matter. However, the Court did not extend a per se rule in regard to other members of the police force. The fact that the magistrate's spouse was the chief of police of a small police force did not automatically disqualify the magistrate who could be otherwise neutral and detached from issuing a warrant sought by another member of the police force. The magistrate's involvement with warrants from the police force should be severely curtailed.

In this decision the Court rejected a per se application of Canon 3 regarding disqualification based upon the participation of an officer of the police department which the magistrate's husband commanded. By analogy it is the belief of the Commission that this decision stands for the principle that the employment of your daughter by a law firm would not per se require your disqualification in all cases involving the law firm. More information should be obtained in order to determine when your disqualification would be appropriate because "your impartiality might reasonably be questioned."

In the Tennant decision the Court stated that to protect against the appearance of impropriety, courts have held that a judge should disqualify himself or herself from any proceeding in which his or her impartiality might reasonably be questioned. The avoidance of the appearance of impropriety is as important in developing public confidence in the judicial system as avoiding impropriety. A judge should take appropriate action to withdraw from a case in which the judge deems himself or herself biased or prejudiced.

The decision cites the commentary to Canon 3E(1) which provides that the judge should timely disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of the 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 the duty to disclose any facts even if the judge does not feel that they are grounds for disqualification sua sponte.

This decision also addressed the rule that a judge has an equally strong duty to sit where there is no valid reason for recusal. While giving consideration to the administration of justice and the avoidance of the appearance of unfairness, a judge when deciding to recuse himself or

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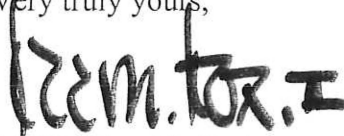
herself, must also consider whether cases may be unfairly prejudiced or delayed or discontent may be created through unfounded charges of prejudice or unfairness made against the judge.

The 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, an 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 given in your letter the Commission feels that a per se disqualification by you in all cases involving the law firm would not be required.

The Court's language contained in Tennant would require certain disclosures and inquiries in those cases in which the law firm appears before you. Information about the 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 concerning 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. After these issues were disclosed and discussed the parties or their counsel could decide on filing a motion for disqualification or not. As judge, you could then make your determination of the propriety of sitting on a given case having fully disclosed these matters.

It is hoped that this opinion fully addresses the questions which you have raised. If you have any further questions concerning this matter do not hesitate to contact the Commission.

Very truly yours,

A handwritten signature in black ink that reads "Fred L. Fox, II". The signature is stylized, with the first letters of the first and last names being large and prominent.

Fred L. Fox, II, Chairperson
Judicial Investigation Commission

FLF:nb

Enclosure