



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
4700 MacCorkle Ave., SE
Charleston, West Virginia 25304
(304) 558-0169 • FAX (304) 558-0831
October 25, 2012

Re: JIC Advisory Opinion 2012-21.

Dear Judge :

Your recent request for an advisory opinion to Counsel was reviewed by the Judicial Investigation Commission. The factual scenario giving rise to your request is as follows: You are presently dating a woman who is employed by the West Virginia Department of Health and Human Resources. She is currently in the child protective services unit and handles abuse and neglect cases in _____ County. You presently do not preside over abuse and neglect matters. However, she is applying for a supervisor's position in youth services, which deals with juveniles charged with delinquency or status offenses. As a supervisor, she would normally not be involved in direct care to the juvenile involved; but she would supervise the Department worker who would be providing direct care to the juvenile and who would appear on behalf of the Department in Court. She would be the only supervisor in youth services in Wood County. You indicated in your letter that you understand that the relationship must be disclosed on the record. You want to know if the relationship would automatically disqualify you from presiding over any case in which she has a supervisory role.

To address the question which you have raised, the Commission has reviewed Canon 3E of the Code of Judicial Conduct and two opinions of the Supreme Court of Appeals of West Virginia. Canon 3E provides 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 the proceeding in which the judge's impartiality might reasonably be questioned. . . .

When a question of disqualification based on a relationship arises an analysis must be made of when that relationship rises to a level causing a reasonable questioning of a judge's impartiality. In *State ex rel. Brown v. Dietrick*, 191 W. Va. 169, 444 S.E.2d 47 (1994), 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 held that in any criminal matter where the magistrate's spouse was involved the magistrate would be disqualified from hearing that matter. The Court declined to extend a *per se rule* to other members of the police force. The fact that the magistrate's spouse was the chief of police of a small agency 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.

In *Tennant v. Marion Health Care Foundation*, 194 W. Va. 97, 459 S.E.2d 374 (1995), the Court held that a judge should disqualify himself or herself from any proceeding in which his 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 impropriety and that the judge should take appropriate action to withdraw from a case in which the judge deems himself or 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 scrupulous person.

In applying the foregoing to your factual scenario, the Commission is of the opinion that you do not have to disqualify yourself from presiding over every case in which the young lady in question has merely a supervisory role. Conversely, you must disclose the relationship between the two of you in every juvenile case involving members of her unit; and if there is an objection to your presiding because of the relationship, you must then take the appropriate steps pursuant to West Virginia Trial Court Rules 17.01, *et seq.* The Commission notes that this decision is consistent with our prior rulings in JIC Advisory Opinion 10/28/2011 (Magistrate must disclose granddaughter's employment relationship with an attorney any time the lawyer appears in her court); JIC Advisory Opinion 7/19/2010 (Magistrate must disclose that her son is Chief of Police in all cases involving that agency, and if he has any involvement in the case she must disqualify herself); and JIC Advisory Opinion 5/ 11/2009 (law firm's employment of judge's daughter does not result in *per se* disqualification but requires at a minimum disclosure of the relationship).

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,

A handwritten signature in black ink, appearing to read 'Ronald E. Wilson', with a stylized, flowing script.

Ronald E. Wilson, Chairperson
Judicial Investigation Commission

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