



JUDICIAL INVESTIGATION COMMISSION

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

December 17, 2012

Re: JIC Advisory Opinion 2012-22.

Dear Magistrate

Your request for an advisory opinion to Counsel was recently reviewed by the Judicial Investigation Commission. The factual scenario giving rise to your request is as follows: In November 2012, you won re-election to the office of Magistrate. Your new term begins on January 1, 2013, and runs through December 31, 2016. Meanwhile, your father won election to the office of Sheriff of _____ County. Likewise, his term of office runs from January 1, 2013 through December 31, 2016. You want to know whether: (1) you are disqualified from presiding over cases that involve your father; (2) you are disqualified from presiding over cases that do not involve your father but are handled by his deputies; and (3) you can arraign and set bond on cases that come in after hours or on the weekends if your father is involved.

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 occurs 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 West Virginia Supreme Court of Appeals considered whether the circuit court was correct in holding that a search warrant issued by a magistrate after hours 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.

The Court also addressed the rule of necessity in *Brown*. The Court noted that the rule is an exception to the general doctrine precluding a disqualified judge from hearing a matter. The Court stated that the rule should be strictly construed and applied only when there is no other person having jurisdiction to handle the matter that can be brought in to hear it. The Court stated that "the rule of necessity should be used only sparingly to circumvent a disqualification. We would not sanction the use of the rule were it to be offered if [the] Chief [of Police] appeared seeking the search warrant." *Id.* at 178, 444 S.E.2d at 56.

In a JIC Advisory Opinion issued on July 19, 2010, the Commission was asked to determine whether a Magistrate had to recuse himself/herself from all cases involving a large municipal police force after the Magistrate's son had become the Chief of Police. The Commission found that the Magistrate must disclose that his/her son is the Chief of Police in all cases involving that agency. If the son has any involvement in the case then the Magistrate must disqualify himself/herself from the matter. Otherwise, the Magistrate must follow the procedures set forth in *Brown, supra*, which would include disclosure, a possible hearing on any involvement the son may have had in the case before him/her and whether the Magistrate may continue as a neutral and detached magistrate able to hear the case in a fair and objective manner.

In applying the foregoing to the questions at hand, you should disclose that your father is the Sheriff of _____ County in all cases involving that agency. If your father has any involvement in the case you must disqualify yourself. You should follow the *Brown* measures when the case is brought by _____ County deputies, and your father has no involvement. Likewise, you should apply the rule of necessity as set forth in *Brown* concerning after hours

and weekend arraignments. Copies of *Brown* and the JIC Advisory Opinion are attached for your information and review.

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", written in a cursive style.

Ronald E. Wilson, Chairperson
Judicial Investigation Commission

REW/tat