



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
4700 MacCorkle Ave., SE
Charleston, West Virginia 25304
(304) 558-0169 • FAX (304) 558-0831
January 17, 2013

Re: JIC Advisory Opinion 2013-02.

Dear Justice

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: You were elected in 2012 to a seat on the West Virginia Supreme Court of Appeals. Prior to the election, you were a party in two related matters. Those matters came to a conclusion in mid-September 2012. While the matters were pending, you were represented by three attorneys from the same firm. This is the only time you have ever been represented by these attorneys. The representation was brief, having lasted only two or three months. You do not now nor have you ever had a personal and/or social relationship with any of these attorneys.

Next month, two of the attorneys will be arguing a case before the Court. The upcoming case is wholly unrelated to the attorneys' prior representation of you. Based upon information and belief, the upcoming case does not involve any of the parties, subject matter or legal issues that were present in your prior case as a litigant. With respect to the upcoming case, you indicated that you have no personal bias or prejudice concerning any party or their lawyer(s). You want to know if the attorneys' prior representation of you disqualifies you from presiding over the matter coming before you next month.

To address the question, the Commission has reviewed Canon 3E of the Code of Judicial Conduct and two opinions of the West Virginia Supreme Court of Appeals. 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. . . .

Whenever there is a question of disqualification, an analysis must occur of the underlying relationship and when it 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 case. 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/herself from any proceeding in which his/her 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 actual impropriety itself and that the judge should take appropriate action to withdraw from a case in which the judge deems himself/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 the upcoming case involving the two attorneys who formerly represented you. However, you must disclose the prior relationship to all parties involved and give them an opportunity to raise an objection should they so desire. The Commission notes that this decision is consistent with our prior rulings in the following opinions: JIC Advisory Opinion 2012-21 (judicial officer would have to disclose relationship in all juvenile cases if companion became supervisor of WVDHHR's youth services unit in that county); 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", written in a cursive style.

Ronald E. Wilson, Chairperson
Judicial Investigation Commission

REW/tat