



## **JUDICIAL INVESTIGATION COMMISSION**

City Center East - Suite 1200 A  
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Charleston, West Virginia 25304  
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January 28, 2013

Re: JIC Advisory Opinion 2013-03.

Dear Judge

Your recent request for an advisory opinion was reviewed by the Judicial Investigation Commission. The factual scenario giving rise to your request is as follows: Your daughter is an associate attorney with a local law firm. She primarily works on estate and business matters, which do not require her to appear in court very often. Her fiancé anticipates employment in another local law firm. Your daughter and her fiancé do not live with you but reside separately in their own home(s). You want to know whether you would be disqualified from handling any matters involving the two firms or whether disclosure of the relationships would suffice.

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 including but not limited to instances where: . . .

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: . . .

(ii) is acting as a lawyer in the proceeding. . . .

The Commentary to the provision notes 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.” Canon 6 defines “third degree of relationship” to include the children of a judicial officer.

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 are precluded from presiding over any cases directly involving your daughter or her fiancé. However, you do not have to disqualify yourself from presiding over cases in which other members of the firms are representing the parties. However, you must disclose your relationship to your daughter and her fiancé in every case involving the firms in question. If there is an objection to your presiding because of the relationship(s), 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,



Ronald E. Wilson, Chairperson  
Judicial Investigation Commission

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