



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
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July 31, 2013

Re: JIC Advisory Opinion 2013-08.

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: In an action before you, the respondent wife recently hired a lawyer as co-counsel. You became aware of the hiring on July 15, 2013. From 2004 through March 2008, the lawyer and you served as co-counsel in two divorce actions although the two of you never worked in the same firm. During your campaign for judicial office in 2008, the lawyer made a financial contribution to your campaign. He also appeared in two television ads endorsing your candidacy. The advertisements were approved by you and paid for by your campaign committee. Following your election, the lawyer and his wife treated your husband and you to a dinner at a restaurant on one occasion. You want to know whether you would be disqualified from handling any matters involving the lawyer or whether you must disclose the relationship.

To address the question which you have raised, the Commission has reviewed Canon 3E of the Code of Judicial Conduct which 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:
- (a) the judge has a personal bias or prejudice concerning a party or the party's lawyer ; [or]
 - (b) a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter

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 not precluded from presiding over any cases involving the lawyer unless the matter is one in which you both served as co-counsel nor must you disclose your prior relationship. You have never had an ongoing business or social relationship with the lawyer or the lawyer's spouse. Indeed, your business relationship was limited to two divorce cases where you served as co-counsel and those matters ended in March 2008. Your social relationship was even more constrained, consisting of some 2008 campaign activity by the lawyer on your behalf, a donation made to that campaign by the lawyer and one dinner party occurring shortly after you were elected. Thus, because of the limited nature and extent of your interaction with the lawyer, you do not need to disqualify yourself nor do you need to disclose the relationship. See JIC Advisory Opinion 3/29/2004 (Family Court Judge may continue to serve in cases without disclosure of a close personal friendship with BCSE attorney and her spouse even though they have vacationed together, shopped together and are members of the same social clubs. Yet, in the event the Judge did feel a bias or prejudice for or against a party or lawyer because of the friendship, the Judge had a duty to disclose and/or seek disqualification); and JIC Advisory Opinion 4/1/2003 (Family Court Judge need not disqualify himself or herself with respect to the attorney campaign chairperson or treasurer appearances in family court matters. However, the judge should for a period of six (6) months from the closure of the campaign and committee, disclose the prior affiliation to the parties in litigation).

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