



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
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August 30, 2013

Re: JIC Advisory Opinion 2013-12.

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: At one time, your wife worked for the West Virginia Department of Health and Human Resources (hereinafter "WVDHHR") as Deputy Secretary for Legal Services. She is now a plaintiff in litigation involving WVDHHR and several present and former officials of that agency. The litigation relates to her former employment. The law firm of _____ represents several defendants in the litigation.

You preside over a substantial number of cases in which WVDHHR is a party. These include, but are not limited to, child abuse and neglect matters and adult protective services cases. You want to know if you should disqualify yourself from these cases. Additionally, you are presiding over several civil cases where parties are represented by _____. Although the law firm has not filed formal motions to disqualify, it has asked you to voluntarily recuse yourself from client cases in a letter dated July 19, 2013. You want to know if you should also recuse yourself from all _____ matters.

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:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer. . . .

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 should timely disclose the necessary information pertaining to your wife's lawsuit in every WVDHHR case before you. If there is an objection to your presiding over the WVDHHR case because of the information, you must then take the appropriate steps pursuant to West Virginia Trial Court Rules 17.01, *et seq.* With respect to the _____ matters, you could either treat the July 19, 2013 letter as a Rule 17 motion to disqualify even though it is not in proper form and transmit the same to the State Supreme Court for consideration or you can inform the firm that it should file an appropriate motion for consideration.

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

REW/tat