



JUDICIAL INVESTIGATION COMMISSION

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

March 24, 2014

Re: JIC Advisory Opinion 2014-10.

Dear

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: From 1990 until February 26, 2014, you served as the elected prosecuting attorney for _____ County. You resigned the position after being appointed to fill the judicial vacancy in your circuit. You want to know if you can continue presiding over the child abuse and neglect cases pending in your predecessor's court. You stated that you "did not personally handle or participate in any way in any hearings regarding the cases." You plan to announce on the record before each initial hearing that while you were the elected prosecutor when the cases were filed that you had no involvement in any of the matters. If one of the parties objects, you intend to recuse yourself from that case. You also stated you intend to review all the files and if you "discovered that I did indeed had some participation in a case, I would disclose that also and see if I needed to recuse myself."

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: . . .
- (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it; . . .

The West Virginia Supreme Court of Appeals has consistently stated that a "prosecuting attorney is a constitutional officer who exercises the sovereign power of the State at the will of the people and he is at all times answerable to them." Syl. pt. 2, *In re Ashton M.*, 228 W. Va. 584, 723 S.E.2d 409 (2012) (citations omitted). The Court also found:

In civil abuse and neglect cases, the legislature has made DHHR the State's representative. In litigations that are conducted under State civil abuse and neglect statutes, DHHR is the client of county prosecutors. The legislature has specifically indicted through W. Ca. Code § 49-6-10 (1996) that prosecutors must *cooperate* with DHHR's efforts to pursue civil abuse and neglect actions. The relationship between DHHR and county prosecutors under the statute is a pure attorney-client relationship. The legislature has not given authority to county prosecutors to litigate civil abuse and neglect actions independent of DHHR. Such authority is granted to prosecutors only under State Criminal abuse and neglect statutes. Therefore, all of the legal and ethical principles that govern the attorney-client relationship in general, are applicable to the relationship that exists between DHHR and county prosecutors in civil abuse and neglect proceedings.

Syl. pt. 3, *Ashton M.*, *supra*.

Meanwhile, in a January 5, 1993 Advisory Opinion, the Commission stated that the language contained in Canon 3E(1)(b) "would prohibit a circuit judge who had previously been employed in the prosecuting attorney's office from hearing criminal cases which were handled by that office while the circuit judge was employed by that office." In a March 16, 1999 Advisory Opinion, the Commission held that a magistrate who had previously been employed in the public defender's office must recuse

himself/herself in all cases in which he/she served as an attorney. The Commission also stated that the magistrate should disclose the prior employment in all other cases involving the public defender's office and afford the parties or their attorneys an opportunity to file any appropriate motion. Lastly, in a June 26, 2007 Advisory Opinion, the Commission stated that a circuit judge would be disqualified from handling only those cases which were pending while he/she served as a prosecuting attorney. However, the judge could preside over any subsequent cases brought after [he/she] left the office, "even if the same individual who had a previous case pending while you were Prosecuting Attorney may be involved in the subsequent case."

When a question of disqualification 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 actual 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 suspicious 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 every civil abuse and neglect proceeding that was pending at the time you became judge since you had no actual involvement in the majority of those matters. However, you should disqualify yourself from any case in which you had any level of participation. You should also disqualify yourself from any abuse and neglect matter in which there is a corresponding criminal case. You should disclose your prior employment in all other abuse and neglect matters pending at the time you became judge; and if there is an objection to your presiding, you should then disqualify yourself.

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', is written over the typed name.

Ronald E. Wilson, Chairperson
Judicial Investigation Commission

REW/tat