JUDICIAL INVESTIGATION COMMISSION
City Center East - Suite 1200 A
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April 16, 2015

Re: JIC Advisory Opinion 2015-06.

Dear

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: You are presiding over two separate juvenile cases. Before you became judge, you handled abuse and neglect cases as part of your practice. Each of the juveniles in the matters now before you was at one time the subject of separate abuse and neglect proceedings. As a lawyer, you represented the non-offending interested father in one matter and the respondent mother in the other proceeding.

You have already disclosed the prior representations in each of the juvenile matters. According to you, all parties have waived any potential conflict in each case. Nonetheless, you want to know if you should voluntarily disqualify yourself from each case even though all parties have provided waivers.

To address the question which you have raised, the Commission has reviewed Canons 2A and 3E(1) of the Code of Judicial Conduct. Canon 2A provides that "[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3E(1) states:

> A judge shall disqualify himself or herself in a 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 or personal knowledge of disputed evidentiary facts concerning the proceeding;
> (b) the judge serve as a lawyer in the matter in controversy. . . .

When a question of disqualification arises an analysis must be made of when the 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 a waiver is not sufficient to overcome your disqualification from presiding over the juvenile matters in question. The parents of juveniles charged with crimes/status offenses are served with a copy of the juvenile petition and very often required to come to court for the proceedings. While they are not a named party, parents do have a vested interest in the outcome of a juvenile matter. Additionally, a child's home life may play a part in deciding certain outcomes with regard to such matters as bond, the trial and sentencing. Therefore, the Commission believes that because of your prior representation of the parents in the abuse and neglect proceedings, you are now disqualified from presiding over the juvenile matters.

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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