



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
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July 27, 2015

Re: JIC Advisory Opinion 2015-08

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 a newly-appointed Circuit Judge who will be severing all ties with your current law firm when you take office. Your firm employs a part-time associate attorney who does some civil work, such as drafting deeds and wills. The associate receives a small salary from the firm. He is also employed as a full-time Assistant Prosecutor in County -- where he represents the State in abuse and neglect proceedings, juvenile cases and some felonies before the Circuit Court. The associate keeps all of his salary from the prosecutor's office. He also performs all work on criminal cases at the prosecutor's office, his criminal files are kept there and his State Bar dues is paid by that office.

The associate has worked on approximately 25 to 30 active abuse and neglect cases that were assigned to your predecessor. You also anticipate that Judge O'Briant will be transferring some juvenile cases to you that involved the associate as a prosecutor. You want to know if you are disqualified from handling any pending abuse and neglect, juvenile or felony cases involving the associate. You also want to know if you are disqualified from handling any new such cases that may be filed after you are sworn into office.

To address the questions 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. . . .

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*.

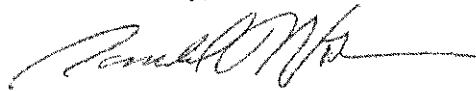
Tennant also addressed the rule that a judge has an equally strong duty to sit where there is no valid reason for recusal. In so doing, the Court set forth a balancing test between the two concepts. While giving consideration to the administration of justice.

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 do not have to disqualify yourself from presiding over every case in which the associate/assistant prosecutor appears before you. However, you must disclose the prior work relationship between the two of you in each pending or, for a time, in each new case where the associate/assistant prosecutor represents the State. If there is an objection to your presiding because of the relationship, you must then take the appropriate steps pursuant to West Virginia Trial Court Rule 17.01, *et seq.*

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 dark ink, appearing to read "Ronald E. Wilson", with a long horizontal flourish extending to the right.

Ronald E. Wilson, Chairperson
Judicial Investigation Commission

REW/bjl