



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
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(304) 558-0169 • FAX (304) 558-0831

October 26, 2015

Re: JIC Advisory Opinion 2015-14.

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: Before becoming judge, you represented a juvenile in a matter. After becoming judge, you were disqualified from his pending delinquency case. The juvenile is now a participant in the County Juvenile Drug Court program. As judge, you sit as a member of the treatment team for the Drug Court in your county. You want to know if you should abstain from involvement in the treatment team meetings regarding the juvenile and whether you should request the involvement of another judge in this proceeding.

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 served 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 you should recuse yourself from sitting as a member of the treatment team in the juvenile's case because of your prior representation of the minor and your disqualification as judge from the underlying detention matter. If you are in charge of the Drug Court then you should request the appointment of another judge to preside over the matter. However, if you are simply a non-critical member of the treatment team then you do not need to seek the appointment of another judge.

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", with a stylized flourish at the end.

Ronald E. Wilson, Chairperson
Judicial Investigation Commission

REW/tat