



JUDICIAL INVESTIGATION COMMISSION

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

October 28, 2015

Re: JIC Advisory Opinion 2015-17.

Dear

Your recent request for an advisory opinion to Counsel was reviewed by the Judicial Investigation Commission at its October 23, 2015 meeting. The factual scenario giving rise to your request is as follows: You are considering running for Magistrate of _____ County in the 2016 election. Your step son-in-law was appointed Prosecuting Attorney of _____ County and was sworn into office on January 2, 2015. You want to know if you would be disqualified from handling any criminal cases if you are elected Magistrate and your step son-in-law is elected Prosecutor.

To address the question which you have raised, the Commission has reviewed Canons 2A and 3E of the Code of Judicial Conduct. Canon 2A states:

Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

- A. A judge shall respect and comply with the law, 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.

The Comment to this Canon notes that a judge "must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." 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:

(d) the judge or the judge's spouse or a person within the third degree of relationship to either of them, or the spouse of such a person: . . . (ii) is acting as a lawyer in the proceeding.

The Code defines the term "third degree of relationship" to include "child." Thus, under the Code, a judge may not preside in a case in which one of the attorneys is the son-in-law of the judge's spouse. Based on the foregoing, you could not handle any cases involving the Prosecuting Attorney. The question then becomes whether you could handle any cases involving the assistant prosecutors who work for your step son-in-law.

In *Tennant v. Marion Health Care Foundation*, 194 W. Va. 97, 459 S.E.2d 374 (1995), the Supreme Court of Appeals of West Virginia held that a judge should disqualify himself/herself from any proceeding in which his/her 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 itself and that the judge should take appropriate action to withdraw from a case in which the judge deems himself/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.

The primary responsibility of the prosecuting attorney is to direct the overall prosecution of criminal cases and ensuring proper supervision of all personnel and resources under his or her authority. Assistant prosecutors¹ work at the will and pleasure of the prosecuting attorney. The prosecuting attorney and his or her assistants generally have one main client and that is the State of West Virginia. Based upon these facts, you would also be precluded from handling any cases involving assistant prosecutors in your step son-in-law's office.

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

¹ By comparison, in Formal Legal Ethics Opinion 92-01, the West Virginia Lawyer Disciplinary Board stated that "when a prosecuting attorney is disqualified for any reason, that disqualification is imputed to the entire office. When an assistant is disqualified for any reason, he/she may be screened from participation in the matter and other assistants or the Prosecuting Attorney may represent the state."