

**JUDICIAL INVESTIGATION COMMISSION**

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

October 29, 2015

Re: JIC Advisory Opinion 2015-19.

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: the West Virginia Association of Family Case Coordinators and/or the West Virginia Family Court Secretary/Clerk's Association is planning to file a writ against the West Virginia Auditor over the change in pay periods from 24 to 26 a year projected to begin for all state employees in December 2015. The groups have been in contact with an attorney who is willing to represent them in the matter. You want to know whether the attorney's representation of these groups would require disqualification of the Family Court Judges from presiding over any cases in which he/she represents a party in a proceeding before them.

To address the question which you have raised, the Commission has reviewed Canon 3E(1) of the Code of Judicial Conduct. Canon 3E(1) states:

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . .

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*.

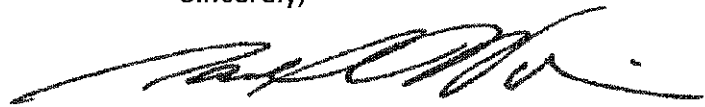
*Tennant* also addressed the rule that a judge has an equally strong duty to sit where there is no valid reason for recusal. In so doing, the Court set forth a balancing test between the two concepts. While giving consideration to the administration of justice and the avoidance of the appearance of unfairness, 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 the Family Court Judges do not have to recuse themselves from presiding over cases involving an attorney who is representing the Associations for their staff in the writ. However, the Family Court Judges must disclose the relationship in every case in which the attorney represents a party to a proceeding before them during the

pendency of the writ. If there is an objection to a Family Court Judge presiding because of the relationship, he/she must then take the appropriate steps pursuant to Rule 58 of the Rules of Practice and Procedure for Family Court and West Virginia Trial Court Rules 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 black ink, appearing to read 'Ronald E. Wilson', with a long horizontal flourish extending to the left.

Ronald E. Wilson, Chairperson  
Judicial Investigation Commission

REW/tat