



**JUDICIAL INVESTIGATION COMMISSION**

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

June 2, 2016

Re: JIC Advisory Opinion 2016-14.

Dear

Your request for an advisory opinion to Counsel was recently reviewed by the Judicial Investigation Commission. The factual scenario giving rise to your request is as follows: On May 10, 2016, you were elected Judge of the Judicial Circuit, and you will take office on January 1, 2017. In the interim, you plan to continue working as an assistant prosecutor in County, a position that you have held since 1999. During the past eight years, you have handled circuit court felony cases. You will continue to handle the cases that were assigned to you prior to the election. However, the elected prosecutor has agreed not to assign you to any new cases arising from the September 2016 or January 2017 County grand juries. In the past eight years, you have covered Magistrate Court approximately five times and have handled a few misdemeanor cases and preliminary hearings. You also stated that you have not handled any abuse and neglect cases in the past eight years. According to you, the prosecutor's office does not have regular staff meetings and does not hold conferences to discuss cases. Therefore, you, "for the most part, have no knowledge of" the cases being handled by other assistant prosecutors. You want to know if you can preside as judge over: (1) felony cases that other assistant prosecutors have handled and in which you have not participated in any manner; (2) felony cases arising out of the September 2016 and January 2017 grand juries; and (3) any abuse and neglect cases.

To address your question, the Commission has reviewed Rule 2.11 of the Code of Judicial Conduct which provides:

### **Rule 2.11 Disqualification**

- (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: . . .
  - (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. . . .
  - (5) The judge: (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association; (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy. . . .
- (C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

Comment 2 to the Rule notes that "[a] judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed." Comment 5 states that "[a] judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification."

When a question of disqualification arises an analysis must be made of when a current or former relationship causes 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 former 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.

Based upon the foregoing, the Commission is of the opinion that you cannot handle any matter that was in the prosecutor's office pre-election including abuse and neglect cases. However, the Commission believes that you may preside over any new

matter coming into the prosecutor's office post-election or any matters arising out of the September 2016 and January 2017 Grand Juries as long as you have been thoroughly screened from and have had no involvement in the case. To that end, the elected prosecutor and you should develop and reduce to writing the screening process. You should also generate a list of the screened cases. Immediately upon taking judicial office, you should prepare and enter a miscellaneous order setting forth the list of cases that you were screened from, the screening process used by the prosecutor's office, and the reason(s) or reasons why you are not conflicted from presiding over the cases. A copy of the Order should be made available to all defendants on the list and you should consider any disqualification motions and take the appropriate steps pursuant to West Virginia Trial Court Rules 17.01, *et seq.*

The Commission hopes that this opinion fully addresses the issues which you have raised. Please do not hesitate to contact the Commission should you have any questions, comments or concerns.

Sincerely,



Ronald E. Wilson, Chairperson  
Judicial Investigation Commission