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

September 20, 2016

Re: JIC Advisory Opinion 2016-20.

Dear

Your recent request for an advisory opinion was reviewed by the Judicial Investigation Commission. The facts giving rise to your request are as follows: You have been the elected prosecutor of County for the past eight years. You were also an assistant prosecutor from 1999 through 2008. On May 10, 2016, you were elected Judge of the Judicial Circuit, and you take office on January 1, 2017. You want to know if you can serve as the adult drug court judge or if you are precluded from doing so by virtue of your service with the Prosecutor's Office. You also want to know if you can preside over abuse and neglect cases.

While at the prosecutor's office, you served on the planning team for the drug court as it was being developed. Since 2007, you have been a member of the drug court treatment team. With respect to abuse and neglect cases, you stated as follows:

> Since the time of the election I have taken steps to screen myself out of the abuse and neglect cases pending in the Court Division to which I will be assigned. I have two attorneys primarily responsible for abuse and neglect and if a case needs to be covered in Judge Court then either the other abuse and neglect attorney covers the case or another assistant in my office covers the case. If questions arise on these cases they are directed to the Senior Assistant Prosecutor in my office who has over twenty-five years experience and has taught the subject of abuse and neglect to prosecutors statewide as well as C.P.S. workers.

You have personally provided limited coverage over the years in a small number of cases since you have eight assistant prosecutors. Furthermore, you believe you would be able to determine which specific cases that remain on the docket that you have had any level of involvement and plan on disqualifying yourself from those cases.

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

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."

The West Virginia Supreme Court of Appeals has consistently stated that a "prosecuting attorney is a constitutional officer who exercises the sovereign power of the State at the will of the people and he is at all times answerable to them." Syl. pt. 2, *In re Ashton M.*, 228 W. Va. 584, 723 S.E.2d 409 (2012) (citations omitted). The Court also found:

> In civil abuse and neglect cases, the legislature has made DHHR the State's representative. In litigations that are conducted under State civil abuse and neglect statutes, DHHR is the client of county prosecutors. The legislature has specifically indicted through W. Va. Code § 49-6-10 (1996) that prosecutors must *cooperate* with DHHR's efforts to pursue civil abuse and neglect actions. The relationship between DHHR and county prosecutors under the statute is a pure attorney-client relationship. The legislature has not given authority to county prosecutors to litigate civil abuse and neglect actions independent of DHHR. Such authority is granted to prosecutors only under State Criminal abuse and neglect statutes. Therefore, all of the legal and ethical principles that govern the attorney-client relationship in general, are applicable to the relationship that exists between DHHR and county prosecutors in civil abuse and neglect proceedings.

Syl. pt. 3, *Ashton M., supra.*

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.

In a January 5, 1993 Advisory Opinion, the Commission stated that the language contained in former Canon 3E(1)(b) "would prohibit a circuit judge who had previously been employed in the prosecuting attorney's office from hearing criminal cases which were handled by that office while the circuit judge was employed by that office." In a March 16, 1999 Advisory Opinion, the Commission held that a magistrate who had previously been employed in the public defender's office must recuse himself/herself in all cases in which he/she served as an attorney. The Commission also stated that the magistrate should disclose the prior employment in all other cases involving the public defender's office and afford the parties or their attorneys an opportunity to file any appropriate motion. In a June 26, 2007 Advisory Opinion, the Commission stated that a circuit judge would be disqualified from handling only those cases which were pending while he/she served as a prosecuting attorney. However, the judge could preside over any subsequent cases brought after [he/she] left the office, "even if the same individual who had a previous case pending while you were Prosecuting Attorney may be involved in the subsequent case." In JIC Advisory Opinion 2016-14, the Commission stated that

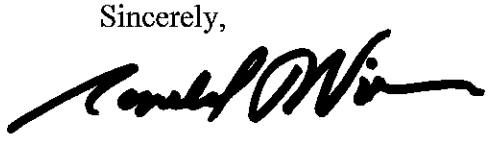
an assistant prosecutor who had won election to judge "could not handle any matter that was in the prosecutor's office pre-election including abuse and neglect cases" but that he could preside over any new cases since winning election as long as he had effectively screened himself from the cases pending in the Court Division to which he would be assigned.

Importantly, in JIC Advisory Opinion 2014-10, the Commission held that a prosecutor who had recently been appointed judge did not have to disqualify himself from presiding over every civil abuse and neglect proceeding that was pending at the time he became judge since he "had no actual involvement in the majority of the matters." The Commission further advised the prosecutor that he should disqualify himself from any abuse and neglect case in which he "had any level of participation" or "there is a corresponding criminal case." Lastly, the Commission held that the judge should disclose his prior employment [as a prosecutor] in all other abuse and neglect matters pending upon his elevation to the bench; and if there is an objection, he should disqualify himself

Based upon the foregoing, the Commission is of the opinion that JIC Advisory Opinion 2014-10 is controlling. You may preside over pending abuse and neglect cases unless you had some participation in the matter or there was a corresponding criminal case. Importantly, you should disclose your prior employment as a prosecutor in all pending abuse and neglect cases that you intend to hear; and if there is any objection, you should disqualify yourself. To the extent that this opinion is inconsistent with JIC Advisory Opinion 2016-14, the latter is overruled. Likewise, you may serve as the drug court judge unless you had some active involvement as a prosecutor in the underlying criminal case. You should disclose your prior employment as a prosecutor in all pending drug court cases; and if there is any objection, you should disqualify yourself.

We hope this opinion fully addresses the issue which you raised. If there is any further question regarding this matter do not hesitate to contact the Commission.

Sincerely,



Ronald E. Wilson, Chairperson
Judicial Investigation Commission

REW/tat