



**JUDICIAL INVESTIGATION COMMISSION**

City Center East - Suite 1200 A  
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February 23, 2017

Re: JIC Advisory Opinion 2017-06

Dear

Your request for an advisory opinion was recently reviewed by the Judicial Investigation Commission. The factual scenario giving rise to your request is as follows: Your daughter was recently hired by the \_\_\_\_\_ County Prosecutor's Office to serve as an assistant prosecutor. She does not reside in the same household with your wife and you but resides in her own home. You understand that you are disqualified from presiding over any juvenile, criminal, or habeas matters or any magistrate appeals, etc. in which your daughter had any involvement whatsoever. You also want to know if you are disqualified from hearing any cases involving the elected prosecutor or other assistant prosecutors.

To address your question, the Commission has reviewed Rules 2.11(A) and (C) of the West Virginia Code of Judicial Conduct which provides in pertinent part:

- (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.

- (2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is (a) a party to the proceeding or an officer, director, general partner, managing member, or trustee of a party, (b) acting as a lawyer in the proceeding; (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or (d) likely to be a material witness in the proceeding.
  - (3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or is a party to the proceeding. . . .
- (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, it is the decision of the Commission that you are disqualified from handling cases in which your daughter has any involvement as an assistant prosecutor. However, you are not disqualified from cases involving the elected prosecutor or his assistants as long as your daughter has not done any work on the matter. The Commission is of the opinion that you should fully disclose the nature of the relationship in each and every case involving the remaining Logan County prosecutors and follow the tenets of West Virginia Trial Court Rule 17 where applicable and when you are unable to secure a waiver on the record. This opinion is consistent with previous JIC Advisory Opinions. See JIC Advisory Opinion 2013-03 (circuit judge was disqualified from hearing cases involving his daughter and her fiancé but only had to disclose the relationship in cases involving other members of the daughter's and fiancé's

law firms); JIC Advisory Opinion 10/28/2011 (magistrate must disclose granddaughter's employment relationship with an attorney any time the lawyer appears in her court); JIC Advisory Opinion 7/19/2010 (magistrate must disclose that her son is Chief of Police in all cases involving that agency, and if he has any involvement in the case she must disqualify herself); and JIC Advisory Opinion 5/11/2009 (law firm's employment of judge's daughter does not result in *per se* disqualification but requires at a minimum disclosure of the relationship).

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