



**JUDICIAL INVESTIGATION COMMISSION**

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

March 2, 2017

Re: JIC Advisory Opinion 2017-10.

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: You were elected in May 2016 as a Family Court Judge and took office on January 1, 2017. Before that you were involved in some litigation and were represented by a lawyer who now appears before you in Family Court. The matter settled out of court prior to your taking office. You want to know if you are disqualified from hearing any cases involving the attorney who formerly represented you. You also want to know if you are disqualified from presiding over any matters involving other lawyers in his firm who may also appear before you.

Further, you want to know if you can appoint the attorney and other lawyers from his firm as Guardians Ad Litem ("GALs") for children, incarcerated and incompetent persons. In an effort to attempt to avoid disproportionately appointing attorneys as GALs you have prepared a list of attorneys who can serve in that capacity and intend to rotate from the list on an even basis.

To address the questions, the Commission has reviewed Rule 2.11 of the Code of Judicial Conduct and two opinions of the West Virginia Supreme Court of Appeals. Rule 2.11 provides in pertinent part:

### **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 ....

(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 [5]** 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

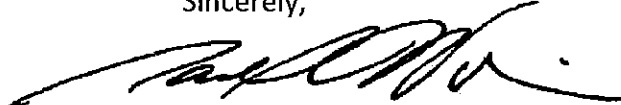
judge should take appropriate action to withdraw from a case in which the judge deems himself or herself biased or prejudiced. *Tennant* cited the commentary to former Canon 3E(1) which states that a judge should timely disclose on the record information which he/she believes the parties or their lawyers 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.

In applying the foregoing to your factual scenario, the Commission is of the opinion that you do not have to disqualify yourself from presiding over any cases involving your former attorney or members of his firm and you may appoint the attorney and members as GALs on a proportionate basis. Importantly, you must disclose the prior relationship to all parties involved and give them an opportunity to raise an objection should they so desire. The Commission notes that this decision is consistent with our prior rulings in the following opinions: JIC Advisory Opinion 2014-22 (Judge must disclose recent prior representation by two lawyers who appear in his court for two years and give the opposing parties an opportunity to raise an objection should they so desire); JIC Advisory Opinion 2012-21 (judicial officer would have to disclose relationship in all juvenile cases if companion became supervisor of WVDHHR's youth services unit in that county); 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).

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