



**JUDICIAL INVESTIGATION COMMISSION**

City Center East - Suite 1200 A  
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May 22, 2017

Re: JIC Advisory Opinion 2017-14

Dear

Your request for an advisory opinion was recently reviewed by the Judicial Investigation Commission. You want to know whether you are recused from all cases involving a lawyer who rents commercial office space from your wife in  
According to you the lawyer frequently represents one party or serves as a Guardian ad Litem in Family Court.

To address your question, the Commission has reviewed Rules 1.2 and 2.11 of the Code of Judicial Conduct which provides in pertinent part:

**Rule 1.2 – Confidence in the Judiciary**

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

**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.

...

- (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 Rule 2.11 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 presiding over cases involving a lawyer who rents commercial office space from your wife. This decision is consistent with JIC Advisory Opinion 9/7/1989 (judicial officer may not rent property to attorneys who practice in his or her court); JIC Advisory Opinion 1/22/1991 (judicial officer who owns rental property and has lawyers who practice before the Court as tenants engages in unethical conduct unless he/she (1) sells the property; (2) refers all tenant lawyers to another judge in the circuit for their hearings; or (3) rents only to non-lawyers. Otherwise the judicial officer's business dealings could suggest partiality, interfere with the performance of judicial duties, and involve him/her in frequent transactions with lawyers likely to come before his or her court); and JIC Advisory Opinion 6/30/1995 (a judicial officer should disqualify himself/herself from cases involving lawyers who are tenants of the judge's spouse).

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