JUDICIAL INVESTIGATION COMMISSION
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JIC Advisory Opinion 2017-16.

Rule 2.13(c) of the Rules of Judicial Disciplinary Procedure gives the Judicial Investigation Commission the authority to promulgate advisory opinions on ethical issues pertaining to the Code of Judicial Conduct. The Rule states that "[t]he Commission may render in writing such advisory opinion as it may deem appropriate." *Id.* The questions presented are: (1) Is a judicial officer automatically disqualified from presiding over a case when a party to the matter has sued the judge in his official capacity; and (2) Is a judicial officer automatically disqualified from presiding over a case when a party to the matter has filed a judicial ethics complaint against him/her.

To address the questions, 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 . . 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.

(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.

(4) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(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) was a material witness concerning the matter; or (d) previously presided as a judge over the matter in another court.

. . . .

(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.

(emphasis added).

Thus, pursuant to Rule 2.11(C), the **only** time a judicial officer should voluntarily disqualify himself or herself is when the judge has an actual or perceived personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. Comment 5 to Rule 1.2 notes:

> Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

Meanwhile, Comment 2 to Rule 2.11 states 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 provides 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."

Tennant v. Marion Health Care Foundation, 194 W. Va. 97, 459 S.E.2d 374 (1995) is instructive to the two issues at hand. In *Tennant*, plaintiff brought a medical malpractice suit against defendant doctors and hospital. In January 1994, the medical malpractice case went to trial. Following the presentation of evidence, the jury found in favor of the defendant. Meanwhile, in March 1993, the law firm representing defendant was retained by the liability carrier for the state to defend the Judge and others in a civil rights claim in federal court. In February 1994, summary judgment was granted in the federal case. When the judge received a copy of the federal order, he realized he had a potential conflict and immediately disclosed the nature of the relationship with defense counsel to the parties in the medical malpractice action. The Chief Justice of the Supreme Court of Appeals of West Virginia permitted the judge to recuse himself in the malpractice action and appointed another judge to hear post-trial motions. Following entry of the judgment order, plaintiff filed a motion to set aside the verdict or grant a new trial on the basis that he was prejudiced by the Judge's relationship with defense counsel in the civil rights case. The new judge in the medical malpractice action granted a new trial based on the appearance of impropriety. The defendant appealed the ruling to the Supreme Court which reversed the decision of the trial court.

The Court held that a judge should disqualify himself/herself from any proceeding in which his/her 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 itself and that the judge should take appropriate action to withdraw from a case in which the judge deems himself/herself biased or prejudiced. *Tennant* cited the commentary to 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.

The one issue the Court did not speak to in *Tennant* was whether the original trial judge's recusal was necessary. However, in trying to provide circuit judges with some semblance of legal principles against which to measure the issue, the Court stated:

> Modern authorities suggest that no disqualification is necessary where a judge is only being represented in his official capacity. . . .If the disqualification of every judge who is sued in his or her official capacity was required, it would have a substantial impact on available judicial resources. It must be noted that nearly every petition for a writ of prohibition brought to this Court has the unfortunate consequence of naming the judge as a party and the judge is obliged to obtain personal counsel or leave his defense to one of the litigants appearing before him. . . . This is particularly true when a writ of prohibition is sought on an interlocutory ruling. Should the mere fact that one of the litigants arguing on behalf of the judge have the consequence of disqualifying the judge from further participation in the case once the prohibition issue has been resolved? **We think not and, for reasons discussed, infra, we refuse to adopt a per se recusal rule.** Taking this argument one step further, any lawyer who argues in support of a trial judge's rulings on appeal would disqualify the trial judge from participating in any future cases in which the lawyer appears.

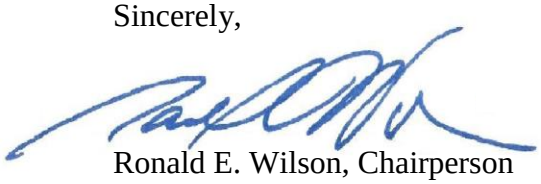
n.10, *Id.* at 106, 459 S.E.2d at 383 (citations omitted) (emphasis added). *See also* n.6, *Williams v. Dingus,* no. 14-0835, 2015 WL 1839163 (memorandum decision) (W. Va. 4/17/2015) (judge was not disqualified from ruling on a habeas corpus petition even

though petitioner recently sued the judge as a member or an alleged conspiracy to keep petitioner incarcerated since the only real claim is that the judge ruled against him in prior proceedings).

Like the Court in *Tennant, supra*, the Commission does not believe that Rule 2.11 requires a *per se* disqualification of a judge from an underlying action simply because a party thereto has filed a judicial ethics complaint against him or her. To do so would create an open door opportunity for parties to remove judges from cases even when there was no reasonable basis for questioning impartiality. Conceivably, such action could also prevent the judge from hearing future cases involving the same party which could result in a snowball effect of clogged courts and delays in the outcome of cases.

Based upon the foregoing, the Commission finds that a *per se* disqualification is not required in cases where a party has sued the judge in his official capacity or has filed a judicial ethics complaint against him/her. Instead, the judge should disclose the matter on the record to all parties and follow Trial Court Rule 17 where applicable.

Sincerely,



Ronald E. Wilson, Chairperson
Judicial Investigation Commission

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