JUDICIAL INVESTIGATION COMMISSION
City Center East - Suite 1200 A
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Charleston, West Virginia 25304
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March 27, 2019

Re: JIC Advisory Opinion 2019-09.

Dear

Your recent request for an advisory opinion was reviewed by the Judicial Investigation Commission. The factual scenario giving rise to your request is as follows:

Prior to becoming a Supreme Court Justice, you served as a member of the West Virginia House of Delegates for approximately twenty years. From January 1, 2015, through the majority of 2018, you served as the In your first year as , you oversaw legislation that made West Virginia a right-to-work state. You were not a sponsor of the legislation, but you encouraged other members to vote for the bill. You were also quoted in the media as supportive of the legislation. While you were still a legislator, litigation was initiated challenging the law. In 2017, you also supported a bill that ultimately became law which addressed some of the concerns that had been raised following passage of the initial bill and during the litigation.

In connection with the litigation challenging the right-to-work law, the Circuit Court issued an injunction staying its implementation and the Supreme Court reversed the injunction and allowed the legislation to be implemented pending the circuit court's ruling upon the merits of the litigation. As , you issued a press release supporting the Supreme Court's ruling on the injunction and you believe you may have even made other public statements to that affect. Recently, the Circuit Court declared the right-to-work law unconstitutional, and you believe at least one of the parties will appeal the decision to the State Supreme Court. You want to know if you should voluntarily recuse yourself from presiding over any appeal relating to the right-to-work law.

Rule 1.2 of the Code of Judicial Conduct states that "[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." Comment [3] to the Rule notes that "[c]onduct that compromises or appears to compromise the independence, integrity and impartiality of a judge undermines public confidence in the judiciary." Comment [5] sets forth the test for appearance of impropriety – "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."

Rule 2.11(A)(1) states that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably questioned" including where [t]he judge has a personal bias or prejudice concerning a party or a party's lawyer. . . ." 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 [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."

In *Tennant v. Marion Health Care Foundation,* 194 W. Va. 97, 459 S.E.2d 374 (1995), 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 State Supreme Court 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 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, the Commission is of the opinion that you should voluntarily recuse yourself from presiding over any appeal of the right-to-work law given that your prior comments in support of the legislation may cause a well-informed observer to conclude, however wrong he or she may be, that you are biased in favor of the law's constitutionality.

It is hoped that this opinion fully addresses the issues which you have raised. Please do not hesitate to contact the Commission if you have any other questions regarding this matter.

Sincerely,

The Honorable Alan D. Moats, Chairperson
Judicial Investigation Commission

ADM/tat