JUDICIAL INVESTIGATION COMMISSION
City Center East - Suite 1200 A
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November 26, 2019

Re: JIC Advisory Opinion 2019-26

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:

Your husband has a sister who is married to a lawyer. Your brother-in-law is in a partnership with another lawyer. They do some guardian *ad litem* ("GAL") work and are appointed by some of the other judges in County. You have been told by the other judges that the two lawyers are good GALs. You want to know if you can add your brother-in-law and/or his law partner to your rotation list of GALs and appoint him to abuse and neglect matters and/or summary proceedings whenever their turn occurs. You also want to know if your brother-in-law or his partner may appear in front of you if they are appointed by another judge to a case that ends up in your court.

To address your first question the Commission has reviewed Rule 2.13(A)(2) of the Code of Judicial Conduct which states that "in making administrative appointments, a judge shall avoid nepotism, favoritism and unnecessary appointments" Nepotism means "the appointment or hiring of any relative within the third degree of relationship of either the judge or the judge's spouse or domestic partner, or spouse or domestic partner of such relative." Third degree of relationship includes "brother" and "sister." Based upon Rule 2.13(A)(2), you are not able to appoint your brother-in-law or his partner to any cases in your courtroom even if they were on a rotation list because such action, no matter how painstakingly fair you are in the process, may still create in the public's mind the appearance that the selections occurred because of nepotism.

With respect to your second question concerning disclosure/disqualification of GAL cases involving your brother-in-law and or his law partner, the Commission has reviewed Rule 2.11(A)(2) of the Code which states:

> (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:
>
> (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 person is: . . . (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. . .

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, the Commission is of the opinion that you are *per se* disqualified from any matter involving your brother-in-law. However, the Commission believes that you must disclose the nature of your relationship with the brother-in-law's law partner on the record whenever he appears before you pursuant to Rule 2.11(C) of the Code and follow Trial Court Rule 17.01, *et seq*. wherever appropriate. Particular attention should be paid to any matters where your brother-in-law may have more than a *de minimis* interest in the outcome of the matter by virtue of the partnership, which would by necessity involve infant summary proceedings or other non-court appointed work.

The Commission hopes that this opinion fully addresses the issues which you have raised. Please do not hesitate to contact the Commission should you have any questions, comments or concerns.

Sincerely,

Alan D. Moats, Chairperson
Judicial Investigation Commission

ADM/tat