JUDICIAL INVESTIGATION COMMISSION
City Center East - Suite 1200 A
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Charleston, West Virginia 25304
(304) 558-0169 • FAX (304) 558-0831

September 23, 2020

Re: JIC Advisory Opinion 2020-22

Dear Judge :

Your recent request for an advisory opinion was reviewed by the Judicial Investigation Commission. The facts giving rise to your question are as follows:

Your spouse recently became self-employed with a business providing educational services. The business has entered into a contract with the local county board of education to provide "facilitation" services for public school students who are enrolled in the West Virginia Virtual Program. The business will be paid a monthly service fee for providing these facilitation services. Your spouse is not an employee of the county school system and does not provide this service for every county student – only a small sub-set enrolled in the State Virtual Program.

You currently preside over a handful of civil cases involving claims of tort liability where the county board of education is a named defendant. There are also certain representatives of the county school system that often appear as petitioners in truancy cases over which you preside. You also handle abuse and neglect cases and appeals from Family Court where a dispute could, but rarely does, arise calling for your decision on where the child will attend school and, theoretically, which program of learning might be best for that child.

You want to know if you are disqualified from presiding over these types of cases or if disclosure is the proper course of action. To address your question, the Commission has reviewed Rules 1.2 and 2.11 of the Code of Judicial Conduct which state 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.

(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

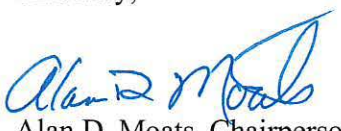
trial based on the appearance of impropriety. The defendant appealed the ruling to the Supreme Court which reversed the decision of the trial court.

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.

Based upon the foregoing, the Commission finds that a *per se* disqualification is not required in cases involving the county board of education, its employees or subject matters pertaining thereto. Instead, you should disclose the matter on the record to all parties and follow Trial Court Rule 17 where applicable. 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,



Alan D. Moats, Chairperson
Judicial Investigation Commission

ADM/bjl