



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
4700 MacCorkle Ave., SE
Charleston, West Virginia 25304
(304) 558-0169 • FAX (304) 558-0831

March 17, 2021

Re: JIC Advisory Opinion 2021-05.

Dear _____ :

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

During the majority of your 20-year legal career, you have served as an assistant prosecutor in _____ County. During most of your time, you served as the adult felony prosecutor in front of the Honorable _____ Judicial Circuit. From 2006 to 2007, you served as the adult felony attorney before the Honorable _____, Judge of the _____ Judicial Circuit. Between 2014 and 2015, you were assigned briefly to another circuit judge as the adult felony assistant prosecutor. From November 2009 through April 2012, you held a supervisory position in the prosecutor's office. This is the only time you supervised other assistant prosecutors.

In your request for a formal opinion, you state the following:

Due to the structure of the office, there is a natural screening process between the assistants assigned to individual judges. Further, there is another layer of screening between the assistants assigned to each judge for abuse and neglect and juvenile proceedings and their counterparts assigned to [felony] criminal cases. Although not always the case, the practice of Judge _____ was to schedule only abuse and neglect proceedings together on specific days of the week. On those days, the practice was not to set adult criminal cases or civil cases, so as to avoid other

attorney's being present on those days. . . . I can't think of a single abuse and neglect or juvenile case with which I have had contact in the 5 years I have been recently assigned to Judge

Following Judge [redacted] untimely passing earlier this year, you were appointed by Governor [redacted] to fill his seat. You begin your duties on or about [redacted]. Subsequent to your appointment, you ceased work on all cases on [redacted], except to transfer the matters to another attorney and notify victims of the change. In the meantime, Judge [redacted] announced his retirement effective [redacted], and a new judge has not yet been appointed to replace [redacted].

You want to know if you will be conflicted off all criminal cases upon taking office as judge. The judges in your Circuit have discussed you switching the adult criminal dockets with the new jurist who will replace Judge [redacted]. You also want to know if this poses any ethical dilemma since a 2011 Order requires the judge to keep all defendants assigned to him/her for any future criminal cases.

To address your questions, the Commission has reviewed Rule 2.11 of the Code of Judicial Conduct which provides:

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. . . .
 - (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) 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 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 *Tenant 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. *Tenant* 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 cannot handle any criminal cases in which you had any involvement in the matter. As to any cases involving matters handled by other assistant prosecutors while you were employed by the office, you should disclose the nature of the relationship and follow Trial Court Rule 17.01 *et seq.* whenever applicable. The Commission believes that you may preside over any new matter coming into the prosecutor's office on or after March 3, 2021. Additionally, the idea to switch the adult criminal dockets of Judge _____ and Judge _____ poses no known ethical concerns pertaining to the Code of Judicial Conduct. The actual decision is an administrative one which is left to the judges of your Circuit.

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