JUDICIAL INVESTIGATION COMMISSION
City Center East - Suite 1200 A
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Charleston, West Virginia 25304
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April 12, 2021

Re: JIC Advisory Opinion 2021-09.

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:

You are currently a candidate for appointment to a seat on the Judicial Circuit. From 1997 through 2014, you were an Assistant and then a Deputy Public Defender. Beginning in January 2015, you worked as an Assistant Prosecuting Attorney. While working there, you had a list of former public defender clients that you represented and did not participate in the prosecution of any of them. Since October 2019, you have served as the Deputy Chief Public Defender. At the start of your current position, the entire Public Defender Office withdrew from any case in which you substantially participated. You were also screened from any case that arose or was active during your tenure at the prosecutor's office and any matter or person in which you participated in the prosecution.

In your role as Deputy Chief Public Defender you: (a) supervise lawyers including participating in disciplinary decisions and actions; (b) assign and conflict check all felony cases and double check the staff's conflict checks for misdemeanors; (c) mentored a new attorney and served as co-counsel for his/her cases for approximately six months; (d) represent a small group of defendants at any given time; and (e) advise other attorneys who may have questions about cases or procedures. For four months, there was a "serious felony" division which met weekly or bi-weekly to discuss cases. You

participated in the meetings but were screened from any of the cases that arose while you worked in the prosecutor's office.

You want to know whether you will be disqualified from handling any case coming from the Public Defender Office should you become judge. 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 *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 cannot handle any cases in which you had any involvement in the matter as a public defender or a prosecutor. As to any cases involving matters handled by other public defenders or assistant prosecutors while you were employed there, 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 public defender's office after you are appointed as long as you screen yourself from those cases during the time period between your appointment and your taking of the oath of office.

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