JUDICIAL INVESTIGATION COMMISSION
City Center East - Suite 1200 A
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Charleston, West Virginia 25304
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July 26, 2022

Re: JIC Advisory Opinion 2022-20

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 anticipate that the Court will hear a case from a lower court who entered an injunction staying enforcement of the criminal abortion law contained in W. Va. Code § 61-2-8. The Attorney General ("AG") has filed a motion to stay this injunction as well as an appeal of the circuit court decision. The issue as you see it is whether you uphold a lower court order which generally held: (1) subsequent statutes "impliedly" repealed the old criminal statute and are inconsistent with the old criminal statute; (2) the old statute is invalid due to desuetude; and (3) the old statute is unenforceable due to due process concerns.

You are a former member of the West Virginia Legislature and for a time served as Speaker of the House. According to you, the motion for a stay makes the argument that the Legislature had not impliedly repealed the old statute by passing new statutes during the time *Roe v. Wade* was in effect. In the AG's appellate brief, they repeat this argument and also make a brief reference, primarily on Page 15, to the historical opportunities the Legislature had to repeal the old criminal statute but didn't do so. These references include mention of a 2018 bill that was introduced but the Legislature did not run it and it was never voted on. As speaker, you did not approve the request to place House Bill 4264 on the Health Committee agenda primarily because the enforcement was already barred by *Roe v. Wade*. Even though it was not placed on the agenda, any member could have moved to place that bill on the committee agenda or discharge it from committee to the

House floor but they did not. In your review of the injunction, you do not see any reference to House Bill 4264. In fact, the injunction seems to say that the fact that the Legislature never expressly repealed the statute is different than the conclusion that it was "impliedly" repealed by subsequent legislation. According to the injunction, the old criminal statute was impliedly repealed when the Legislature enacted subsequent legislation related to abortion during the period *Roe v. Wade* was in effect.

The AG's brief also makes reference to several pieces of legislation during the 50-year time period *Roe v. Wade* was in effect, including the Pain Capable bill that passed in 2015 which was the subject of a news clipping in which You are quoted with regard to the Legislature's override of the Governor's veto of that bill. Your comments do not relate to W. Va. Code § 61-2-8. In 2014, when you were minority leader, you moved to discharge a similar pain capable bill from committee and take it up in the House and that motion was defeated. The bill that passed and became law was taken up in 2015 and you were not a sponsor of that bill at that time. You voted on other pieces of legislation that addressed the abortion issue during your 20 years in the Legislature, but you state there was no vote to your recollection that would have altered the language of the statute at issue in the present case,

The Office of Counsel received a letter from a citizen who is not a party or counsel in the matter, expressing that you should not hear the matter. The general basis of his/her argument is that you attended and spoke at rallies for West Virginians for Life at times when you were in the Legislature and the Attorney General also attended one or more such rallies. They include a photograph that includes both the attorney general and you at such a rally. You do not recall the statute at issue in this case ever being discussed at any such rally. They also make a reference to specific legislation which I believe is the Pain Capable bill discussed above.

Finally, the individual raises the fact that your daughter previously worked in the AG's office. This was for a brief period during the year 2015. She is not an attorney and worked in the communications office. By 2015, your daughter was an adult living on her own. She no longer works for the AG.

You want to know if any of this disqualifies you from presiding over the stay/appeal. To address your question, the Commission has reviewed Rule 2.11 of the Code of Judicial Conduct which states:

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. . . .
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> (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. . .
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> (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 are not disqualified from presiding over the stay/appeal nor do you have to make a disclosure to the parties in question. 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