



**JUDICIAL INVESTIGATION COMMISSION**

City Center East - Suite 1200 A  
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Charleston, West Virginia 25304  
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August 10, 2022

Re: JIC Advisory Opinion 2022-24

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 against the Hope Scholarship program which was declared unconstitutional in part because it diverted resources and students away from the public school system.

Your spouse is employed by a private school as a preschool/day care teacher. Your spouse's title is transitional kindergarten teacher. The class provides children who may not yet be ready for traditional kindergarten a year to prepare for the same. While the scholarship may have an overall benefit on the school as a whole, it is believed that participation in the scholarship program would have no effect on your spouse's position whatsoever since he/she does not teach a traditional kindergarten, elementary or secondary school class. He/she is not an owner, director or supervisor over the school, preschool or day care but is simply a preschool/day care teacher. His/Her certification is through West Virginia Stars as an early childhood professional.

You also have nieces and nephews and other relatives who do not live with you who attend private schools or are home-schooled. According to you, none of this relatives have applied for or utilize the Hope Scholarship program.

You also served for a period of time in the West Virginia Legislature. While there, you co-sponsored legislation from 1999-2002 with other members that if adopted would have provided an annual income tax credit for homeschool or private school

children of up to \$1,000 for private school and \$500 for homeschool. You also sponsored a bill in 2001-2002 that would have given an income tax credit of half of amounts expended for educational purposes up to \$1,000 for students in both public and private schools. It included credit for private school tuition but also provided credit for such things as computers, uniforms and textbooks to be used by public or private school children. None of these bills were ever placed on a committee agenda or voted on.

These bills differ from the Hope Scholarship, which was passed in 2021, in that they were limited tax credits for amounts already expended by parents. The Hope Scholarship legislation that is the subject of the injunction sets up a scholarship fund that provides annual payments of approximately \$4,200 for tuition and/or educational expenses for private or homeschool students.

You want to know if any of this disqualifies you from presiding over the case. 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. . . .
  - (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 JIC 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.”

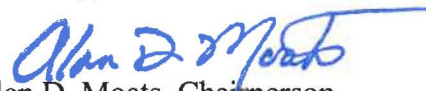
When a question of disqualification arises an analysis must be made of when a current or former relationship causes a reasonable questioning of a judge's impartiality. In *State ex rel. Brown v. Dietrick*, 191 W. Va. 169, 444 S.E.2d 47 (1994), the Court considered whether the circuit court was correct 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 matter 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