



**JUDICIAL INVESTIGATION COMMISSION**

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September 20, 2022

Re: JIC Advisory Opinion 2022-28

Dear Judges:

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 presently have before you two cases involving businesses that may or may not be owned, in whole or in part, by the Governor of West Virginia in his personal capacity. Although the Governor is not listed as an officer or manager of either company on the Secretary of State's website, based upon information and belief you think he may own some interest in either or both of the companies. You also anticipate receiving future cases where the Governor may be named as a party in his official capacity.

Each of you applied for the vacancies on the newly created Intermediate Court of Appeals. You were interviewed by the Judicial Vacancy Advisory Commission and were one of three names submitted by JVAC to the Governor for appointment to each of the three seats. The Governor then chose you from each of the three names to serve in your respective seat. One of you must run for the seat in 2024, the second must run in 2026, and the third must run in 2028. Now that you have been appointed and taken the oath of office, you automatically retain the seat at least through the election. According to each of you, the only nexus between the Governor and you is the appointment to judicial office.

You want to know if you are disqualified from presiding over cases involving the Governor either in his personal or official capacity since he appointed each of you to the

bench. 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** *per se* disqualified from presiding over cases involving the Governor in his official capacity or his personal capacity. You should disclose the nature of the relationship to the Governor in each case involving him and absent any additional facts raised by the party moving to disqualify, you may remain on the case. Any additional facts should be

weighed accordingly by you as to whether you should disqualify yourself or stay on the case. You should disclose in each and every case involving the Governor for a period of one year from the date you took 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