



**JUDICIAL INVESTIGATION COMMISSION**

City Center East - Suite 1200 A  
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Charleston, West Virginia 25304  
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September 23, 2022

Re: JIC Advisory Opinion 2022-29

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: The Court is set to hear a case from a lower court which entered an injunction against the Hope Scholarship Act (HSA) which was declared unconstitutional in part because it diverted resources and students away from the public school system.

From approximately August 2021 until July 2022, you were a member of the board at \_\_\_\_\_. \_\_\_\_\_ is a private religious preschool, elementary and middle school, and your child has attended there for approximately four years. The Board ("Board") consists of parents of students (and a few parents of former students), an executive pastor from \_\_\_\_\_ Church, and the principal of \_\_\_\_\_. During your service, the Board did not control the budget for \_\_\_\_\_ or set salaries for teachers. Instead, it functioned essentially as an advisory board – much like a parent/teacher association or group that is common in many public schools. The ultimate authority for hiring/firing staff, budget, etc., for \_\_\_\_\_ rests with a different board and the leadership at \_\_\_\_\_ Church.

The HSA provides parents of eligible children with vouchers to pay for educational expenses incurred for the child's attendance at a private school or for embarking on a homeschooling program. Your child is ineligible for the HSA voucher, and you have absolutely no intention of applying for a voucher. \_\_\_\_\_ is not a party to this underlying litigation. However, \_\_\_\_\_ is a private school, and if the HSA is upheld, parents of eligible children who attend any private school in West Virginia or are home

schooled may use HSA vouchers to pay for tuition and expenses associated with their child's attendance. This includes parents of eligible children at [redacted] if they so choose. Importantly, the scholarship money follows the child.

You want to know whether your past affiliation with the [redacted] Board disqualifies you from presiding over the case involving HSA. 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

ADM/tat