

JUDICIAL INVESTIGATION COMMISSION

WV Judicial Tower - Suite 700 A
4700 MacCorkle Ave., SE
Charleston, West Virginia 25304
(304) 558-0169

February 3, 2023

Re: JIC Advisory Opinion 2023-05

Dear Judge :

Your request for an advisory opinion to Counsel was recently reviewed by the Judicial Investigation Commission. The facts giving rise to your complaint are as follows: You are one of three circuit judges in a single county circuit. Each judge is responsible for appointing attorneys to their abuse and neglect cases after the circuit clerk assigns the matter to a specific judge. Criminal cases are handled differently. Each judge presides over criminal cases in rotation during one of the three terms of court. In the previous term, the judge assigns lawyers to the criminal cases for the upcoming term. You will do appointments during the May 2023 term and sit on all criminal trials in the September 2023 term.

You have decided to run for re-election in 2024. A local lawyer ("Lawyer 1") has already announced that he/she will be running against you and has filed pre-candidacy papers listing another local lawyer ("Lawyer 2") as his/her campaign treasurer. Lawyer 1 has his/her own firm and employs one other attorney ("Lawyer 3"). Likewise, Lawyer 2 is a solo practitioner in her own firm. You routinely appoint the three lawyers to represent a party in abuse and neglect cases. Because Lawyer 2 is in a different firm he/she is often adverse to Lawyers 1 and 3 in abuse and neglect cases. Lawyer 2 also does court-appointed criminal work. Based upon information and belief, Lawyer 1 is supposed to obtain a new treasurer who would not be adverse to him/her in abuse and neglect proceedings but to your knowledge that has not happened yet.

You want to know whether you are disqualified from presiding over any cases involving any of the lawyers above. You also want to know if you can continue to appoint these lawyers to abuse and neglect and criminal cases. You are particularly concerned about whether the appointment of Lawyer 1 would violate a judge's duty to

not to endorse or oppose other candidates for office. You also want to know if your own campaign would appear to impair the fairness of one of the litigant's cases. Lastly, you want to know if you have an obligation to the abuse and neglect clients of Lawyers 1 and 2 who are on opposite sides of the case that there may be a potential lawyer conflict of interest between the two attorneys.

To address your questions, the Commission has reviewed Rules 2.11, 2.13 and 4.1(A)(3) of the Code of Judicial Conduct which state:

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....
- (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.

Rule 2.13 Administrative Appointments

- (A) In making administrative appointments a judge
 - (1) shall exercise the power of appointment impartially and on the basis of merit; and
 - (2) shall avoid . . . favoritism. . . .

Rule 4.1 Political and Campaign Activities of Judges and Judicial Candidates in General

- (A) Except as permitted by law, or by Rules 4.2, 4.3 and 4.4, a judge or a judicial candidate shall not:
 - (3) publicly endorse or oppose a candidate for any public office;
 - (10) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court. . . .

Comment 2 to Rule 2.11 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.

Comment [1] to Rule 2.13 notes that administrative appointments include “assigned counsel.” It also provides that “[c]onsent by the parties to an appointment . . . does not relieve the judge of the obligation prescribed by paragraph (A). Comment [4] to Rule 4.1 states that the no endorsement rule is in place to prevent judges “from abusing the prestige of judicial office to advance the interests of others.” Comment 10 to the Rule states that Rule 4.1(A)(10) “does not restrict arguments or statements to the court or jury by a lawyer who is a judicial candidate, or rulings, statements, or instructions by a judge that may appropriately affect the outcome of a matter.”

Based upon the foregoing, the Commission is of the opinion that you are not *per se* disqualified from handling cases involving any of the lawyers. However, you should disclose¹ the nature of the relationship in each and every case involving Lawyers 1 and 3 and follow Trial Court Rule 17 where applicable. The same holds true for Lawyer 2 as long as he/she continues to serve as treasurer or on the committee of Lawyer 1 since he/she was originally listed in a material role in the campaign.

Given the nature of how appointments are handled in your circuit, the Commission believes that you should continue to appoint the lawyers to abuse and neglect and/or criminal cases in the manner in which you did prior to Lawyer 1 announcing his/her candidacy. The Commission does not believe that such appointments would constitute a public endorsement of Lawyer 1 as a candidate for office. Indeed, if every lawyer who ran for office or served on a campaign committee for a candidate were disqualified because it was construed as a public endorsement there would be no more lawyers left on the

¹ In JIC Advisory Opinion 2015-11, the Commission said that no disqualification or disclosure was necessary where a judge was running against an assistant prosecutor who regularly appeared before the judge. This opinion is distinguishable because the attorneys in this decision actually represent individual clients while an assistant prosecutor represents only the state.

appointment lists. The Commission also believes that Comment [10] to Rule 4.1 forecloses any argument that a comment would impair fairness.

Lastly, while the potential lawyer conflict between Lawyers 1 and 2 is an issue for the Office of Lawyer Disciplinary Counsel, it would not hurt for you to address it at the same time that you disclose the election issue with the lawyers and litigants. 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,

A handwritten signature in blue ink that reads "Alan D. Moats". The signature is fluid and cursive, with the first name "Alan" and last name "Moats" clearly distinguishable.

Alan D. Moats, Chairperson
Judicial Investigation Commission

ADM/tat