



JUDICIAL INVESTIGATION COMMISSION

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

May 8, 2023

Re: JIC Advisory Opinion 2023-13

Dear :

Your request for a formal advisory opinion was recently reviewed by the Judicial Investigation Commission. The facts giving rise to the request are as follows: A long time magistrate recently retired from office and has been approved to work as a senior status magistrate. He is presently working as a senior status in the county from which he retired. His son, who was the county sheriff, has been appointed to fill the vacancy and will begin his duties later in the month. You want to know if W. Va. Code § 50-1-4 bars the senior status magistrate from serving prior to his son taking office and whether he can concurrently serve with his son at any time after the son actually begins work. You also want to know whether the son will be disqualified from presiding over matters brought by the sheriff's department or matters previously heard by his father.

To address your first question the Commission has reviewed West Virginia Code § 50-1-4 which states that "[n]o magistrate shall be a member of the immediate family of any other magistrate in the county." The Commission is unanimously of the opinion that this provision is not violated as long as the parties are not concurrently working in the county where the father formerly sat and where the son will now be working beginning later in May. In other words, once the son takes office, the father will not be able to work in that county but may serve as a senior status magistrate in the remaining 54 counties.

To address your remaining questions, 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 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 the son cannot preside over any cases in which he actively participated as sheriff of the county. He also

cannot preside over any pending cases that were previously handled by his father. To that end, it may be beneficial for the Chief Circuit Judge to switch the magistrates' caseloads.

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