JUDICIAL INVESTIGATION COMMISSION
City Center East - Suite 1200 A
4700 MacCorkle Ave., SE
Charleston, West Virginia 25304
(304) 558-0169 • FAX (304) 558-0831

October 3, 2023

Re: JIC Advisory Opinion 2023-21

Dear Magistrate :

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 intend to run for re-election as Magistrate in the May 2024 election. Meanwhile, your spouse is running for county sheriff. You want to know if you can run for magistrate since your husband is concurrently running for sheriff. You also want to know what guidelines and restrictions apply during your campaigns and what you need to do if you are both elected to office.

To address your questions, the Commission has reviewed Rules 4.1(A)(3) and 2.11 of the Code of Judicial Conduct. Rule 4.1(A)(3) states:

> **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; . . . .

Comment [5] to the Rule states:

> Although members of the families of judges and judicial candidates are free to engage in their own political activity, including running for public office, there is no "family exception" to the prohibition in paragraph (A)(3) against a judge or candidate publicly endorsing candidates for public office. A judge or judicial candidate must not become involved in, or publicly associated with a family member's political activity or campaign for public office. To avoid public misunderstanding, judges and judicial candidates should take, and should urge members of their families to take reasonable steps to avoid any implication that they endorse any family member's candidacy or other political activity.

Therefore, both your spouse and you may run for public office. However, your campaigns must be entirely separate from one another. You must not engage in any activity that would create in the minds of members of the public that you are endorsing your spouse for sheriff.

Should both of you be elected to office, you must adhere to Rule 2.11 which states in part:

> **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.
>
> (2) The judge: knows that the judge, the judge's spouse or domestic partner or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such person is: (a) party to the proceeding, or an officer, director general partner, managing member, or trustee of a party; (b) acing as a lawyer in the proceeding; (c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness 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 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.

The Code specifically states that the third degree of relationship includes child.

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 disqualified from presiding over any matters involving your spouse. In any matters involving other members of the department but not your spouse, you should disclose to all parties that he/she is the county sheriff and follow the *Brown* measures. Likewise, you should apply the rule of necessity as set forth in *Brown* concerning after hours and weekend arraignments. *See also* JIC Advisory Opinion 2012-22,

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