



JUDICIAL INVESTIGATION COMMISSION

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

November 19, 2024

Re: JIC Advisory Opinion 2024-22

Dear Attorney :

Your request for an advisory opinion was recently reviewed by the Commission. You have asked three questions in your submission.

Question 1 – Disclosure/Disqualification:

You were in a four-person, now three-person, law firm. All members were partners but for the most part you did not share fees. Each member of the firm practices family law. Your practice includes some family law mediation. Both Partner B and you ran for family court judge and won. You both take office as Family Court Judge in a two-judge jurisdiction on January 1, 2025. You plan on dissolving the practice just before you take office. Attorney C left the practice in June 2024. In addition to being a partner in the firm, Attorney D is also the Godparent to Attorney B's child.

You want to know if Attorney B and you are disqualified from handling any cases/mediations that were in your firm prior to becoming judge and whether you are disqualified from handling any new cases involving Partners C and D. To address your question the Commission has reviewed Rule 2.11 of the Code of Judicial Conduct which states in pertinent part.

- (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 neither Attorney B nor you can handle any cases/mediations which were in your firm prior to its dissolution and prior to Attorney C striking out on his/her own. As to any new cases obtained by Attorney C after he/she left the firm and as to those acquired by Attorney D after the dissolution of the firm, Attorney B and you should disclose the nature of your prior relationship with them and follow Trial Court Rule 17.01 *et seq.* and/or the Family Court Rules whenever applicable. Additionally, Attorney B will have to disclose that Attorney D is his/her child's Godparent in each and every case. Attorney B and you should disclose the business relationship for a period of one year from when you take office or one year from when Attorney C quit the law firm. As to the Godparent relationship, Attorney B must disclose indefinitely.

Question 2 – Membership on the Board of the Senior Monongalians:

You currently serve on the Board for the Senior Monongalians which is a local 501(c)(3) non-profit organization. It provides a variety of services to seniors including meals, in-home care, social services, transportation, counseling, and access to resources, etc. Your work on the Board is voluntary. You want to know if you may continue serving on the Board.

Rule 3.7(A)(2) of the Code of Judicial Conduct which states:

- (A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system or the administration of justice and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conduct for profit, including but not limited to the following activities:
- (2) soliciting contributions for such an organization or entity, but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority.

The Commission believes that you may continue to serve on the Board. However, you may not solicit money or appear to solicit donations on behalf of the organization.

Question 3 – Service on the WV Board of Examiners in Counseling:

Lastly, you want to know if you can continue to serve on the West Virginia Board of Examiners in Counseling. It is a state board which serves as a quasi-judicial entity addressing complaints against licensed professional counselors as well as general oversight. You were appointed to the Board by the Governor in 2022 for a term of five years.

Article VIII, § 7 of the West Virginia Constitution states:

No justice, judge or magistrate shall hold any other officer, or accept any appointment or public trust under this or any other government; nor shall he become a candidate for any elective public office or nomination thereto, except a judicial office; and

the violation of any of these provisions shall vacate his judicial office.

Therefore, you must resign your position with the Board prior to taking the oath of office as judge.

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