



JUDICIAL INVESTIGATION COMMISSION

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

February 25, 2025

Re: JIC Advisory Opinion 2025-06

Dear :

Your request for an advisory opinion was recently reviewed by the Commission. You are looking to hire a new law clerk. You are considering approaching a lawyer who works in the public defender's office in your circuit to see if he/she would be interested in the position. According to you, the attorney appears in front of you periodically with either his/her assigned clients or as stand-in counsel for another lawyer in the office. The attorney has a criminal case set before you in the near future. You want to know if you must disclose the relationship during the interview/negotiation stage and/or during the period before the lawyer begins working for you should you retain him/her for the position.

To address your questions, 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. . . .
- (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.”

Rule 2.12(A) states that “[a] judge shall require court staff, court officials and others subject to the judge’s direction and control to act in a manner consistent with the judge’s obligations under this Code.” Comment 1 to the Rule notes:

A judge is responsible for his or her own conduct and for the conduct of others, such as staff, when those persons are acting at the judge’s direction or control. A judge may not direct court personnel to engage in conduct on the judge’s behalf or as the judge’s representative when such conduct would violate the Code of Judicial Conduct if undertaken by the judge.

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 should disclose the nature of the relationship during the interview/negotiation stage involving the public defender in question and during the period between his/her hiring and actual start date. If anyone objects you should disqualify yourself from presiding over the matter involving the lawyer. As to any of his/her colleagues, you should disclose the matter but unless the potential hire has had some involvement in the case you do not have to disqualify yourself absent some other issue. If you decide to hire the individual as your law clerk, you should wall him/her off from working on any case he/she handled before you while a public defender and inform his/her former clients of the same. Absent any other fact, that in and of itself would not require disqualification. Likewise, the public defender under consideration should seek an opinion from the Office of Lawyer Disciplinary Counsel as to his/her responsibilities to his/her clients during the potential hiring process. If you decide to hire the individual as your law clerk, you should wall him/her off from working on any case he/she handled before you while a public defender and inform his/her former clients of the same. Absent any other fact, that in and of itself would not require disqualification.

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