

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 13-919

DISQUALIFICATION: SPOUSE OF JUDGE'S COURT ATTENDANT IS SHERIFF'S INVESTIGATOR

ISSUES

Where the spouse of the inquiring judge's court attendant is a narcotics investigator in the sheriff's office, is the judge disqualified from (1) all narcotics cases investigated by the sheriff's office; (2) those cases in which the court attendant's spouse is the lead investigator of the investigation; and (3) those cases in which the court attendant's spouse is or may be a witness? **Answers:** (1) No. (2) and (3) Yes.

FACTS

The inquiring circuit judge presides in most of the drug and felony-DUI cases, the majority of which the sheriff's office has investigated. More than half of the judge's caseload is criminal.

A court attendant is a confidential employee of the appointing judge, and that judge determines the duties the attendant is to perform. Rule 11, Ala. R. Jud. Admin. The inquiring judge's court attendant has primarily clerical and administrative duties regarding the judge's civil cases, except the assistant is assigned to the courtroom during the judge's criminal trials. The court attendant's spouse is a narcotics investigator in the sheriff's office and, on occasion, is the lead investigator or case agent.

DISCUSSION

It is presumed for purposes of this opinion that the judge does not personally have any disqualifying relationships, interests, knowledge, or biases.

Canon 1 requires a judge to enforce high standards of conduct to preserve the integrity and independence of the judiciary. Canon 2 requires the judge to avoid even the appearance of impropriety, conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and avoid conduct prejudicial to the administration of justice which brings the judicial office into disrepute. Canon 3B(2) provides, "A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him."

Pursuant to Canon 3B(2), the Commission has applied the canons indirectly to a judge's confidential employee such as the judge's bailiff, secretary, judicial assistant, and law clerk. *See* Advisory Opinions 06-867; 97-638; 88-333; 85-231; 83-190. Thus, the same disqualification standards that apply to a judge should apply in situations involving the judge's confidential employee. Advisory Opinion 01-778. *But see* Advisory Opinion 00-764 (not in situations involving the judge's court reporter). If the relationship of the judge's confidential employee would disqualify the employee (were he or she the judge), that relationship disqualifies the judge.

Disqualification questions are governed by Canon 3C. Canon 3C(1) requires a judge to recuse from any case in which the judge's impartiality might be reasonably questioned. Canon 3C(1)(d) applies to relationships of the judge to spouses and relatives within the fourth degree. The pertinent provisions here are, as follows:

(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:

....

(d) He or his spouse, or a person within the fourth degree of relationship to either of them, or the spouse of such a person:

(i) Is named a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iii) Is to the judge's knowledge likely to be a material witness in the proceeding.

These provisions do not require the judge to disqualify from every narcotics case involving the sheriff's office merely because the spouse of the judge's court attendant is an investigator of that office.

The judge is disqualified, however, if his court attendant's spouse has been involved in the case in any way at any point in the investigation or litigation.¹ See Advisory Opinions 97-668; 86-286. If the spouse of the judge's court attendant is the lead investigator or the case agent, the judge is disqualified under the general provision of Canon 3C(1), i.e., because the judge's impartiality might reasonably be questioned. See Advisory Opinions 99-735 (a reasonable question of the judge's impartiality arises where the judge's son is a juvenile police officer who filed the juvenile-court petition, i.e., the complaining police officer)²; 99-730 (where the judge's sister is the director of the work-release program, the judge is disqualified from hearing a motion to set aside a

¹ The Commission assumes the spouse of the judge's court attendant does not have general supervisory authority or a high rank in the sheriff's office. If that were the case, the judge would be disqualified from all cases involving any officer under the spouse's command. See Cynthia Gray, *An Ethics Guide for Judges & Their Families* 51 (Am. Judicature Society 2001). See Advisory Opinion 97-668 (where an appellate judge's staff attorney is the spouse of a chief assistant district attorney who has supervisory authority over all other assistant district attorneys in that district attorney's office, the judge is disqualified in the appeal of all cases prosecuted by that district attorney's office).

² Advisory Opinion 99-735 mistakenly advises disqualification under Canon 3C(1) is remittable.

defendant's suspended sentence where that motion was initiated by a deficiency report prepared by the judge's sister; "a criminal defendant faced with the potential loss of liberty by a recommendation from the judge's sister might reasonably question the judge's impartiality even though the judge was not biased in fact").³ Such disqualification is not remittable under Canon 3D. If the spouse of the judge's court attendant is not the lead investigator or the case agent and does not have general supervisory authority, but has been involved in any other way in the investigation or litigation of the case, the judge is disqualified, but that disqualification is remittable under Canon 3D. *See* Canon 3C(1)(d).

Even where the parties remit disqualification, a judge must isolate the confidential employee from having any involvement whatsoever with any case in which the employee's relative was or is involved. Failure to do so would raise concerns under Canons 1 and 2. *See also* Canon 2C, which states: "A judge should not allow his . . . relationships to influence his judicial conduct or judgment. . . . [N]or should he convey or permit others to convey the impression that they are in a special position to influence him." For example, it would be highly improper for the relative of the judge's confidential employee to testify as a material witness in a trial that the judge's employee is assigned to attend.

In effecting such isolation, a judge should "take every precaution" to "make sure that not even a possibility exists of the judge's employee becoming involved in any way with any matter involving the employee's relative." Advisory Opinion 97-668 (emphasis added). *See also* Advisory Opinion 97-638 (isolation includes prohibiting the employee from discussing any aspect of the case with the judge); New York Advisory Opinion 99-72 (absolute isolation includes insulating the employee from all contact in matters in which his or her spouse is involved, e.g., not opening the mail or answering telephone calls).

Under the circumstances here, however, isolation of the court attendant from all cases in which the employee's spouse is or was involved is too burdensome under the rigid requirements of complete isolation. Isolation is an option where the judge would be disqualified from only an occasional case. Advisory Opinion 02-792. *See also* Advisory Opinion 07-877. Considering the judge presides in a majority of the drug cases and the majority of those cases originates in or involves the sheriff's office, the judge would be disqualified more frequently than an occasional case. More importantly, however, even if isolation were possible, the Commission advises that, due to the nature and volume of cases involved, a perception of partiality would persist, *id.*, and the concerns of Canons 1 and 2 would not be assuaged.

Thus, in every narcotics case involving the sheriff's office, the judge should advise the attorneys of the potentially disqualifying spousal relationship of the judge's employee as soon as practicable after the judge is assigned the case. (The circuit clerk could send notification when the case is assigned.) Then, forthwith, the judge should ascertain

³ Advisory Opinion 99-730 mistakenly advises disqualification under Canon 3C(1) is remittable.

whether the spouse of the judge's court attendant is or was involved in any aspect of the investigation or litigation. In facilitating that determination, the judge may inquire on the record of each case or, in a writing applicable to all narcotics cases, direct the district attorney to provide such information. If the court attendant's spouse is or was involved in any manner, the judge is disqualified, and the case is to be assigned to another judge. Advisory Opinion 07-877. Early determination is imperative for compliance with Canons 1, 2, and 3B(1) (a judge should diligently discharge his or her administrative responsibilities and facilitate the performance of the administrative responsibilities of other judges and court officials).

The judge may also consider directing the district attorney to "flag" those cases in which the court attendant's spouse has had any involvement – before the case is assigned to the inquiring judge. Then, the circuit clerk can assign those cases to another judge, thereby bypassing the inquiring judge.

If the judge continues to accept assignments of narcotics cases in which the spouse of the judge's court attendant is not involved, the judge may direct the sheriff to ensure the spouse avoids even casual conversations with other members of the sheriff's office about cases that will come before the judge. This will further serve to protect the judge from inadvertently presiding over cases in which the spouse of the judge's court attendant has some involvement. In addition, the judge should instruct the court attendant to refrain from discussing court matters with his or her spouse.

REFERENCES

Alabama Canons of Judicial Ethics, Canons 1, 2, 2C, 3B(1), 3B(2), 3C, 3C(1), 3C(1)(d), 3D

Advisory Opinions 07-877; 06-867; 02-792; 01-778; 00-764; 99-735; 99-730; 97-668; 97-638; 88-333; 86-286; 85-231; 83-190

Alabama Rules of Judicial Administration, Rule 11

New York Advisory Opinion 99-72

See Cynthia Gray, *An Ethics Guide for Judges & Their Families* 51 (Am. Judicature Society 2001)

This opinion is advisory only and is based on the specific facts and questions submitted by the judge who requested the opinion pursuant to Rule 18 of the Rules of Procedure of the Judicial Inquiry Commission. For further information, you may contact the Judicial Inquiry Commission, P. O. Box 303400, Montgomery, Alabama 36130-3400; tel.: (334) 242-4089; fax: (334) 353-4043.