

# JUDICIAL INQUIRY COMMISSION

DATE ISSUED: OCTOBER 24, 2024

ADVISORY OPINION 24-963

## DISQUALIFICATION: JUDGE'S SPOUSE IS MEMBER OF CITY COUNCIL

## DISCUSSION

Disqualification is governed by Canon 3C. Canon 3C(1) provides:

### ISSUES

Is a judge disqualified from certain criminal proceedings involving police officers of a municipality for which the judge's spouse is a member of the city council?

**Answer:** No, unless the city is a party.

### FACTS

The spouse of a district judge is seeking an appointment to the city council of the municipality in which the judge and the judge's spouse reside. As a district judge, the judge presides over preliminary proceedings in felony cases, including those in which the municipal police department is the arresting agency. In cases where the municipal police department is the arresting agency, a municipal police officer will often appear before the judge as an affiant for a search warrant application or as the movant for an ex parte request for bail in excess of the bail schedule.<sup>1</sup>

A judge should disqualify himself [or herself] in a proceeding in which his [or her] disqualification is required by law or his [or her] impartiality might reasonably be questioned, including but not limited to:

....

(d) [The judge or the judge's] 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

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<sup>1</sup> The Commission assumes that an ex parte request to set bail in excess of the bail schedule takes place simultaneously with the application for and issuance of an arrest warrant, *see* Ala. R. Crim. P. 3.2(a), as ex parte requests after this stage could be considered to be prohibited ex parte communications.

affected by the outcome of the proceeding;

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

Of course, should the judge's spouse be selected as a member of the city council, then the judge would be disqualified from any proceeding, civil or criminal, in which the city is a party. Canon 3C(1)(d)(i); Advisory Opinions 88-342 and 97-634. A judge is not, however, disqualified from a case in which the State is a party, even though the arresting officer is a municipal police officer, unless the judge would otherwise be disqualified from the case.

In Advisory Opinion 99-741, the Commission addressed whether a district judge was disqualified from several different types of matters where the judge's spouse was the mayor of a municipality. In that opinion, the Commission advised that the judge was disqualified from ex parte requests to set bail in excess of the bail schedule made by a city police officer and from ex parte search warrant applications where the affiant is a city police officer. *Id.* The Commission advised that the judge was not disqualified from accepting guilty pleas in Drug Court where the charge was made by a city police officer, preliminary hearings in which a city police officer is a

witness, civil cases where a city employee is a non-party witness, and civil cases in which a separate entity connected to the city government, such as a housing authority, is a party. *Id.* The Commission affirmed this advice in subsequent opinions. Advisory Opinions 04-845 and 12-910.

The Commission reasoned in Advisory Opinion 99-741 that because a city police officer sometimes acts directly as the moving party in ex parte requests to set bail in excess of the bail schedule and in applications for search warrants, that there could be a reasonable question as to the judge's impartiality in those instances. The Commission went on to recognize, however, that "the mere fact that the judge's spouse is the mayor does not constitute a ground to reasonably question the judge's impartiality when a criminal case clearly is a prosecution directed by the district attorney," and, thus, the judge would not be disqualified from these matters where the movant was an assistant district attorney. *Id.*

It is the opinion of the Commission that the advice in Advisory Opinion 99-741 is not controlling in this instance. The relationship between the city council and the city police is fundamentally different than the relationship between the city police and the mayor. *See* Advisory Opinion 12-910 (addressing the relationship between a county manager and the sheriff's office as a distinguishable factor).

The mayor of a municipality is the “chief executive officer” of the municipality and holds “general supervision and control of all other officer and the affairs of the city or town, except as otherwise provided in this title.” Ala. Code § 11-43-81. The city council of a municipality holds “[a]ll legislative powers and other powers granted to cities or towns . . . , except those powers conferred on some officers by law or ordinance.” Ala. Code § 11-43-43. Because the city council does not have the same power as the mayor to exercise control over municipal police officers, it is the opinion of the Commission that there is no reasonable basis to question the judge’s impartiality where municipal police officers of the municipality in which the judge’s spouse serves as a member of the city council appear before the judge in *ex parte* requests for bail in excess of the bail schedule or in applications for search warrants or in any other matters involving the municipal police unless the municipality is named as a party.

Furthermore, the Commission, in reconsidering its advice in Advisory Opinion 99-741, modifies that opinion and advises that a district judge whose spouse is an officer (*e.g.*, mayor, council member, etc.) of a municipality is not disqualified from any proceeding initiated by the municipality’s police officers unless the municipality is a party to that proceeding, including *ex parte* requests to set bail in excess of the bail schedule and applications for

search warrants. The Commission, in Advisory Opinion 99-741, reasoned that “a criminal defendant in [a situation where city police act directly as the movant in seeking a high bail or a search warrant] might reasonably question the impartiality of a judge whose spouse is the mayor, even though the judge is not biased in fact.” The Alabama Supreme Court, in *Matter of Sheffield*, 465 So.2d 350, 356 (Ala. 1984), held that:

[Disqualification] is required under Canon 3C(1) when “facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge.” *Acromag-Viking v. Blalock*, 420 So. 2d 60, 61 (Ala. 1982). . . . Specifically, the Canon 3C(1) [disqualification] test is: “Would a person of ordinary prudence in the judge’s position knowing all of the facts known to the judge find that there is a reasonable basis for questioning the judge’s impartiality?” Thode, *The Code of Judicial Conduct-The First Five Years in the Courts*, 1977 Utah L. Rev. 395, 402.

(Emphasis added.) A district judge whose spouse is an officer of a municipality would know that, even though a municipal police officer appears individually to request bail in excess of the bail schedule or to request a search warrant, the State of Alabama is the prosecuting party and

the prosecution is being directed by the district attorney or his or her representative. It is the opinion of the Commission that there is no reasonable basis for questioning the judge's impartiality under the described circumstances. *See* Advisory Opinions 99-741 and 04-845 (both recognizing that the mere fact that the judge's spouse serves as the mayor of a municipality does not create a reasonable question as to the judge's impartiality in a criminal case where the municipality is not a party and the prosecution is directed by the district attorney unless the mayor is somehow involved or has an interest in the investigation or prosecution of the case). Because there is no reasonable basis for questioning the judge's impartiality in criminal cases brought by a municipality's police officers based solely on the fact that the judge's spouse is an officer of the same municipality, a judge is not disqualified from such proceedings unless the municipality is named as a party to the case or the judge's spouse is involved in or has an interest in the case. Advisory Opinions 99-741 and 04-845 are modified in accordance with this opinion.

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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 Alabama 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; email: [jic@jic.alabama.gov](mailto:jic@jic.alabama.gov).

### **REFERENCES**

Ala. Code §§ 11-43-43 and 11-43-81.

Alabama Canons of Judicial Ethics  
3C(1), 3C(1)(d)(i), 3D.

Alabama JIC Advisory Opinions 88-342, 97-634, 99-741, 04-845, 12-910.