Advisory Committee on the Code of Judicial Conduct

April 3, 2007

Re: Judicial Advisory Opinion No. 07-04

Dear Judge,

You have requested an opinion from the Advisory Committee on the Code of Judicial Conduct as to the circumstances under which [] may preside over criminal matters in your district. [] is a newly appointed judge, and his wife serves as chief deputy district attorney for the district. Your request raises both issues of [] disqualification and the procedure to be followed for remittal of his disqualification. Because this opinion will be made public with identifying information redacted, I will refer to [] as "Judge" and his wife as "Wife."

The provisions of the Code of Judicial Conduct that are relevant to disqualification are Rules 21-200(B) NMRA and 21-400(A), (C) NMRA. Rule 21-200(B) provides, in relevant part, that a judge shall not allow family relationships "to influence the judge's judicial conduct or judgment." Rule 21-400 specifically addresses disqualification. Subsection A provides, in relevant part:

> A. **Recusal.** A judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (5) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> ….
>
> (b) is acting as a lawyer in the proceeding[.]

See also N.M. Const. art. VI, § 18 ("No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause in which either of the parties are related to him by affinity or consanguinity within the degree of first cousin[.]"). In addition, this Committee has issued previous advisory opinions that are also relevant to your request. Advisory Opinion No. 87-06, also addressing a relative of a judge serving in the district attorney's office, is particularly applicable. I have attached copies of it and Advisory Opinion Nos. 87-02, 91-01, and 98-03 for your review.

By virtue of Rule 21-400(A)(5)(b), Judge would be disqualified from presiding in any case in which Wife is acting as an attorney. In Advisory Opinion 87-06, this Committee stated that "an attorney has participated in a case when he has actually worked on the matter in any capacity." We additionally stated that either participation in a case or an entry of appearance as counsel of a relative within the third degree of the judge would require the judge's recusal. We believe the same to be true in the circumstances you describe. Therefore, if Wife has either entered her appearance or participated in the case in any capacity, Rule 21-400 requires Judge's recusal.

However, the more significant issue raised by your request is that presented by Wife's position as chief deputy district attorney. Although you have not described the specific nature of her responsibilities in her position, we anticipate that they include responsibility for administration of the office under the district attorney as well as supervision of attorneys within the office. You have informed the Committee that the office is relatively small in size. We recognized in Advisory Opinion No. 87-02 that even when a governmental attorney who is the spouse of a judge does not appear or participate in a case pending before the judge, the judge may nevertheless be disqualified and required to recuse from a case involving the agency because of an appearance of impropriety. Rule 21-400(A) requires a judge's disqualification when “the judge's impartiality might reasonably be questioned.” We believe that Judge's impartiality might reasonably be questioned because of Wife's position. Thus, under Rule 21-400(A), Judge would be disqualified in all cases involving the office of the district attorney.

In Advisory Opinion No. 87-06, we discussed guidelines concerning the conduct of a spouse of a judge working in the district attorney's office, stating that the spouse could not only appear in a case, but also could not inspect files or discuss cases assigned to the judge-spouse. Although these restrictions make sense for an attorney prosecuting cases in the district attorney's office, we do not believe that they can practically be applied to the chief deputy district attorney. Even if Wife did not review files or discuss cases assigned to Judge, she would still presumably have responsibility for the office and for the supervision of attorneys who appear before Judge. We do not believe that she can take actions that can extricate herself from the appearance of conflict of interest of Judge. *See Smith v. Beckman*, 683 P.2d 1214, 1216 (Colo. Ct. App. 1984) (“A husband and wife generally conduct their personal and financial affairs as a partnership. In addition to living together, a husband and wife are also perceived to share confidences regarding their personal lives and employment situations.”).

We also stated in Advisory Opinion No. 87-06 that a defendant in a criminal case in which the judge's spouse works in the district attorney's office should be apprised of the relationship and be provided the opportunity to challenge the judge. The remittal of disqualification provision of Rule 21- 400(C) more specifically addresses this issue.

Rule 21-400(C) provides:

> **Remittal of disqualification.** A judge disqualified by the terms of Paragraph A of this rule may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

To comply with this rule, you have informed the Committee that you have drafted forms for instructions for criminal defendants, a waiver by the defendant, and a confirmation of the waiver to be executed by Judge and incorporated in the record of the case. I have attached copies of these forms to this opinion.

The Committee does not believe, however, that the remittal of disqualification rule can remove the appearance issue that results from Wife's position as chief deputy district attorney. We believe that in the view of the public, the chief deputy district attorney, as the second in command to the district attorney, has responsibility for the work of the office, and, consequently, for the success of prosecutions brought for the office. The remittal procedure you have proposed would require attorneys who are supervised by Wife to sign an agreement on behalf of the office of the district attorney that Judge, their chief deputy's husband, may preside in the case. The prosecution of crime concerns the public as a whole, not only the parties to a case. The appearance of propriety is vital to the public's acceptance of the judicial process. The Committee does not believe that the remittal procedure removes the appearance of impartiality caused by Wife's position.

You have also asked that the Committee separately address the forms that you have proposed as a remittal procedure if Wife were to serve as an attorney in the district attorney's office without supervisory responsibility. As the Committee understands the procedure you have set out in the forms, the clerk of the court or the district attorney will provide the waiver and confirmation of waiver forms to a defendant in a criminal case upon the assignment of the case to Judge. The defendant and the defendant's attorney, as well as the prosecuting attorney, having been advised of the disqualifying or potentially disqualifying position of Wife in the district attorney's office, will consider, out of the presence of Judge, whether to waive Judge's disqualification. The parties will execute the waiver if they knowingly, intelligently, and voluntarily waive any claims of disqualification and agree that Judge shall preside in the case. The waiver will be subsequently brought before Judge, who will confirm each aspect of the waiver and accept it if appropriate. He will then incorporate the waiver and confirmation of waiver in the record of the case. The Committee points out the significance that the parties consider the question of remittal independently of Judge, and that Judge "must not solicit, seek or hear comment on possible remittal or waiver of this disqualification" until the lawyers jointly propose it to Judge. Commentary to Rule 21-400(C). When used in this manner, the Committee believes that these forms provide a proper procedure to

document a remittal of disqualification under Rule 21-400(C) if Wife does not serve in a supervisory position.

Very truly yours,

James J. Wechsler
Chair

JJW:ow

Attachments

Cc: Hon. Marie Baca
Hon. Kevin Fitzwater
Paul L. Biderman, Director
Professor Robert L. Schwartz

New Mexico Judicial Advisory Committee
Opinion: 87-2
Canon(s): 2(B), 4(D)
Date: April 20, 1987

The Judicial Advisory Committee is in receipt of your letter of March 26, 1987, inquiring as to the duties and responsibilities of a judge when a case is assigned to his docket and one of the parties to the litigation is represented by a law firm in which the judge's spouse is employed.

Pertinent to your inquiry are the following provisions of the Code of Judicical Conduct:

> 21-200 [avoidance of impropriety and appearance of impropriety] ....
> B. Impartiality. A judge shall not allow his family, social or other relationships to influence his judicial conduct or judgment. He shall not lend the prestige of his office to advance the private interest of others; nor should he convey or permit others subject to his control to convey the impression that they are in a special position to influence him....
>
> 21-400 Disqualification
> A judge is disqualified and shall recuse himself in any proceeding in which:
> …
> D. Family relationship. He or his spouse, or a person within the third degree, by blood, marriage or other relationship to either of them:
> (1) is a party to the proceeding, or an officer, director or trustee of a party;
> (2) is acting as a lawyer in the proceeding;
> (3) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
> (4) is to the judge's knowledge likely to become a material witness in the proceeding.

The commentary to Canon 21-200 specifies in applicable part that, "a judge must avoid all impropriety and appearance of impropriety." The conduct prescribed for judges is more stringent than conduct generally

imposed on other public officials. In re Romero, 100 N.M. 180, 668 P.2d 296 (1983); see generally Annotation, Relationship Attorney as Disqualifying Judge, 50 A.L.R. 2d 143 (1956).

The fact. that a relative or spouse of a judge is employed by a law firm of governmental agency that has litigation pending before a judge is not solely determinative of the judge's ethical obligation to recuse himself from such proceeding. In Smith v. Beckman, 683 P.2d 1214 (Colo. App. 1984), the Colorado Court of Appeals considered the issue of whether a judge could ethically preside over a criminal case where the judge's wife was an assistant district attorney. In that case, the judge's wife had not worked on the case, nor was she assigned to appear before the court in that proceeding. The Court held that the the judge was required to recuse himself in the matter, and:

> Generally, an attorney is said to be "engaged in the case" ... when he has actually worked on the case in any capacity, or is in a position to gain or lose financially from its resolution. See Potashnick v. Port City Construction Co., 609 F.2d 1101 (5th Cir. 1980). A partner in a law firm is said to be "engaged" in every case in which a member of his firm represents a party, primarily because he has a financial interest in the outcome of the case. See SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977); Weinberger v. Equifax, Inc., 557 F.2d 456 (5th Cir. 1977). However, this rationale does not apply to a lawyer in government service, regardless of his powers and duties, because his compensation and clientele are set, and the prestige of the office as a whole is not greatly affected by the outcome of a particular case. For these reasons, a government attorney is only "engaged in the case" when he has worked on it directly. See Laid v. Tatum, 409 U.S. 824, 93 S.Ct 7, 34 L.Ed.2d 50 (1972)....

Id. at 1216.

The Court in Smith v. Beckman, however, held that the existence of a marriage relationship "between a judge and a deputy district attorney in the same county is sufficient to establish grounds for disqualification, even though no other facts call into question the judge's impartiality" based upon an appearance of impropriety. Cf. Alaska Bar Assn Op. 82-2,

Law. Man. on Prof. Conduct (ABA/BNA) 801:1201 (1985).

Where a judge is related to an attorney within the third degree of consanguinity or marriage, and that attorney has entered his or her appearance *as* counsel in a case assigned to the judge's docket, the judge is required to recuse himself. A *similar* result is required where a relative of the judge, although not actually having entered an appearance, has worked *on* the case for a law firm or where the relative, by virtue of his position in the law firm would stand to gain or lose financially because of the ultimate ruling in the case. See Ranson v. S & F Food *Center*. Inc. or Florida, 700 F.2d 670 (11th Cir. 1983); Services. Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977); Diversifoods, Inc. v. Diversifoods. Inc., 595 F.Supp. 133 (N.D. Ill. 1984); cf. In re New Mexico Natural Gas Antitrust Litigation, 620 F.2d *794* (10th Cir. 1980).

Similarly in McCuin v. Texas Power & Light Co., 714 F.2d 1255 (5th Cir. 1983), the court held that a judge's recusal was required where a relative of the judge was acting as a lawyer in a proceeding where, although he had not entered an appearance in the case, he had actively participated in discovery proceedings in the case.

Canon 21-200 requires that a judge recuse himself in a proceeding in which an appearance of impropriety may arise. In assessing situations wherein an appearance of a judge's impropriety may occur, we conclude that the standard in State v. Logan, 236 Kan. 79, 689 P.2d 778 (1984) should be applied. The court therein observed:

> Although this Canon has not been construed in Kansas, federal cases offer guidance.... The standard which federal courts use is whether [the] facts ... would create reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself ... but rather in the mind of a reasonable person with knowledge of the circumstances.

Id. at 86, 689 P.2d at 784.

New Mexico courts follow the rule that a judge should recuse himself in cases wherein his impartiality might reasonably be questioned. This means there must be a reasonable factual basis for doubting the judge's impartiality. State ex rel. Bardacke v. Welsh, 102 N.M. 592, 698 P.2d 462

(Ct. App. 1985); Martinez v. Carmona, 95 N.M. 545, 624 P.2d 54 (Ct. App. 1980).

The Virginia State Bar Standing Committee on Legal Ethics considered an inquiry similar to that posed before this committee and held under the proscription of an appearance of impropriety, that a lawyer whose spouse is a judge must not (1) appear before her spouse in his capacity as judge; (2) appear in any case assigned to her spouse; (3) inspect files assigned to her spouse or discuss them with him or (4) discuss files in cases assigned to her spouse, with others in the lawyer's office. Virginia State Bar Standing Committee on Legal Ethics, Op. 624, Law. Man. on Prof. Conduct (ABA/BNA) 801:8833 (1986).

Based upon the foregoing, we conclude that a judge is required to recuse himself in a cause wherein a relative within the third degree has participated in the case or has entered an appearance in the cause. While the members of a law firm are not necessarily precluded from appearing before a judge where an associate of the firm is related to the judge, to avoid an appearance of impropriety, the judge should be informed of the situation whenever a member of the firm appears before him. See Committee on Ethics of the Maryland State Bar Ass'n, Op. 83-30, Law. Man. on Prof. Conduct (ABA/BNA) 801:4326 (1984). Additionally, a judge is required to recuse himself where a relative within the third degree by reason of his or her position in a law firm would stand to profit or lose by virtue of the judge's decision in the cause.

Where a judge's spouse is employed as an associate in a law firm and does not actively participate in the case, the judge is not required to automatically enter a recusal, however, he must evaluate the circumstances on a case-by-case basis in light of a possible appearance of impropriety. See S.J. Groves & Sons. Co. v. International Brotherhood of Teamsters, Chauffers, Warehousemen & Helpers of America, Local 627, 581 F.2d 1241 (7th Cir. 1978). Where the wife or husband of a judge, however, is employed as an attorney by a governmental agency and does not appear or participate in a case pending before the judge, the judge is not required to recuse except where an appearance of impropriety may occur as determined under the "reasonable person standard" set forth in State v. Logan.

Chairman

New Mexico Judicial Advisory Committee
Opinion: 87-6
Canon(s): 2(B), 4(D)
Date: October 7, 1987

The Judicial Advisory Committee is in receipt of your letter of September 9, 1987, inquiring as to the duties and responsibilities of a judge when a case is assigned to his docket and one of the parties to the litigation is represented by a close relative.

Pertinent to your inquiry is the following provision of the Code of Judicial Conduct:

> 21-400 Disqualificiation (formerly Canon 4)
>
> A judge is disqualified and. shall recuse himself in any proceeding which:
>
> ….
>
> D. Family relationship. He or his spouse, or a person within the third degree by blood, marriage or other relationship to either of them.
>
> ….
>
> (2) is acting as a lawyer in the proceeding...

This disqualification provision is an inseparable part of the Code of Judicial Conduct, and must be read particularly in light of Rule 21-200 (formerly Canon 2):

> B. Impartiality. A judge shall not allow his family, social or other relationships to influence his judicial conduct or judgment. He shall not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others subject to his control to convey the impression that they are in a special position to influence him....

With respect to your specific concern of avoiding the appearance of

impropriety, the commentary to Rule 21-200 specifies in applicable part that, "[a] judge must avoid all impropriety and appearance of impropriety." Unfortunately, this is not a rule which lends itself to hard and fast interpretation. As stated in Advisory Opinion 87-2, issued by this committee, the standard to be used in assessing situations wherein an appearance of impropriety may occur is whether the facts would create reasonable doubt concerning the judge's impartiality in the mind of a reasonable person with knowledge of all the circumstances. Supreme Court Judicial Advisory Opinion 87-2 (April 20, 1987).

The following decisions shed light on the reasonable person standard. In Smith v. Beckman, 683 P.2d 1214 (Colo. App. 1984), the Colorado Court of Appeals considered whether a judge could ethically preside over a criminal case where the judge's wife was an assistant district attorney. While the judge's wife was not assigned to appear before the court in that matter, and, in fact, had not even worked on that specific case, the court held that the judge was required to recuse himself. The court found that the existence of a marriage relationship "between a judge and deputy district attorney in the same county is sufficient to establish grounds for disqualification, even though no other facts call to question the judge's impartiality." Id. at 1216.

Moreover, the Alaska Bar Association found that a lawyer may continue to serve as an assistant district attorney when her husband is appointed to the superior court bench, provided safeguards are observed. The court stated that the assistant district attorney-spouse (1) cannot appear in her spouse's court nor in any respect on cases assigned to him; (2) cannot inspect files assigned to him in her office; (3) cannot discuss cases assigned to the judge-spouse; and (4) in criminal matters being prosecuted by the district attorney's office, the defendant should be apprised of the relationship and given an opportunity to challenge the court for cause. Alaska Bar Assoc., Op. 82-2, Law Man. on Prof. Conduct (ABA/BNA) 801:1201 (1985).

While the above cases concern marital relationships, they are applicable to the father/son situation. A judge will be disqualified from hearing those cases in which his son, as an assistant prosecutor, is involved. The judge is not disqualified nor is the entire prosecutor's office precluded from practicing before the judge because of the son's employment as an assistant prosecutor. See Committee on Professional and Judicial Ethics of the State Bar of Michigan, Op. CI-703, Law. Man on Prof. Conduct (ABA/NBA) 801:4833 (1984).

As stated above, the assistant district attorney relative cannot appear in his or her relative's court nor participate in any respect on cases assigned to that court. Generally, an attorney has participated in a case when he has actually worked on the matter in any capacity, or is in a position to gain or lose financially from its resolution. See Potashnick v. Pot City Construction Co., 609 F.2d 1101 (5th Cir. 1980). Participation begins when the attorney enters his or her appearance as counsel in a case assigned to the judge's docket. In McCuin v. Texas Power & Light Co., 714 F.2d 1255 (5th Cir. 1983), a judge's recusal was required where a relative of the judge was acting as a lawyer in the proceeding, and the court found that although the lawyer-relative had not entered an appearance in the case, he had actively participated in the discovery proceedings in the case.

Based upon the foregoing, we conclude that a judge is required to recuse himself in a cause wherein his son or any relative within the third degree has participated in the case or has entered an appearance as counsel. While the entire prosecutor's office is not precluded from practicing before the judge because of the son's employment, all defendants should be apprised of the relationship and given an opportunity to challenge the court for cause. Generally speaking, the judge should recuse himself in cases wherein his impartiality might reasonably be questioned. Therefore, we approve of your plan to advise every defendant who appears before you of your son's employment, that he does not practice before you, and that if the defendant feels uncomfortable with the situation, you will recuse yourself.

Chairman

Advisory Committee on the Code of Judicial Conduct

Hon. Frank H. Allen, Jr., Chairman
Hon. Theresa M. Baca
Hon. Thomas A. Donnelly

May 6, 1991

Re: 91-1

Dear Judge,

In your letter of April 26, 1991, you have pointed out that your husband has recently accepted employment as an attorney in the felony division of the public defender's office in the Judicial District. You have requested an advisory opinion regarding what you must do to preserve your impartiality and to avoid the appearance of impropriety in serving as a Judge of the metropolitan Court in criminal cases assigned for hearing in your division.

Two canons of the Code of Judicial Ethics are directly applicable to your inquiry. Canon 24-200 provides, in part:

> B. Impartiality. A judge shall not allow his family, social or other relationships to influence his judicial conduct or judgment. He shall not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others subject to his control to convey the impression that they are in a special position to influence him.
>
> ….

Additionally, Canon 21-400 provides, in part:

> A judge is disqualified and shall recuse himself in any proceeding in which:
>
> ….
>
> D. Family relationship. He or his spouse, or a person within the third degree by blood, marriage or other relationship to either of them:

> (1) is a party to the proceeding, or an officer, director or trustee of a party;
>
> (2) is acting as a lawyer in the proceeding;
>
> (3) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
>
> (4) is to the judge's knowledge likely to be a material witness in the proceeding.
>
> (5)

In New Mexico Judicial Advisory Committee Opinion 87-6 (October 7, 1987), this committee previously addressed the question of the responsibility of a judge whose son served as a prosecutor in the same judicial district. We have attached a copy of that opinion hereto. we believe that similar restrictions apply to your situation. we have also attached a copy of New Mexico Judicial Advisory Committee Opinion 87-2 (April 20, 1987), which we think also is instructive.

In particular, we call your attention to our conclusion in Opinion 87-6, in which we stated: "[A] judge is required to recuse himself in a cause wherein his son or any relative within the third degree has participated in the case or has entered an appearance of counsel." See also Op. 87-2. We conclude that in your case the same requirement applies The judge has no discretion in this matter; if the circumstances described in Canon 21-400 apply, the judge has a duty to recuse herself from the proceeding. See New Mexico Judicial Advisory Committee, Op. 87-7 (October 14, 1987).

Employees of the public defender office are not disqualified from practicing before a judge whose spouse is also an employee in the public defender's office. See Op. 87-6 (citing Committee on Professional and Judicial Ethics of the State Bar of Michigan, Op. CI-703, Lawyers' Manual on Professional Conduct (ABA/NBA) 801:4833 (1984)). We conclude that even when your husband is not acting as an attorney of record in a criminal proceeding pending before you as a Metropolitan Court Judge, you should, however, inform prosecutors who appear before you of the relationship and allow them the opportunity to submit a challenge for cause. See id. (citing Alaska Bar Ass'n, Op. 82-2, Lawyers' Manual on Professional Conduct (ABA/BNA) 801:1201 (1985)).

Although Canon 21-400 does not require recusal where the spouse-attorney has not entered an appearance or participated in the case and has no interest in its outcome, Canon 21-200 requires that a judge recuse herself in any proceeding wherein an appearance of impropriety may arise. New Mexico courts follow the rule that a judge

should recuse herself in cases in which her impartiality might be questioned by a reasonable person with knowledge of the circumstances. Op. 87-2 (citing State v. Logan, 236 Kan. 79, 689 P.2d 778 (1984)). In Opinion 87-2 we noted:

> Where the wife or husband of a judge, however, is employed as an attorney by a governmental agency and does not appear or participate in a case pending before the judge, the judge is not required to recuse except where an appearance of impropriety may occur as determined under the "reasonable person standard" set forth in State v. Logan.

In sum, we conclude that it is ethically proper for you to hear cases in which the public defenders appear as counsel of record, provided that you recuse yourself in any case in which your husband appears as an attorney of record or as a witness. In each' case where your husband does not appear as an attorney of record, however, you should inform all prosecutors who appear before you of your relationship. Further, you should recuse yourself in any case in which your relationship would raise a question of impropriety in a reasonable mind.

Yours very truly,

Frank H. Allen, Jr.
Chairman, Judicial
Advisory Committee

Encls.
Advisory Ops. 87-2
and 87-6