

JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 99-741

DISQUALIFICATION IN CASES INVOLVING CITY POLICE WHEN A RELATIVE OF THE JUDGE IS THE MAYOR

ISSUE

Is a district judge whose spouse is Mayor disqualified from hearing any of the following matters?

1. Ex parte requests to set bail in excess of the bail schedule, made by a city police officer or an assistant district attorney either during office hours or by telephone to the judge's home on weekends or at night.
2. Search warrant applications when the affiant is a city police officer.
3. Guilty pleas in Drug Court when the charge was made by a city police officer.
4. Preliminary hearings when a city police officer is a witness, either as the case agent or the arresting officer.
5. Civil cases where a city employee is a non-party witness (*e.g.*, a police officer in a traffic accident case).
6. Civil cases in which a separate entity connected to city government is a party (*e.g.*, the Housing Authority).

Answer: Absent an emergency, the judge may not hear either of the first two above types of matters when a police officer is acting as a party in initiating the proceeding. In other proceedings, the judge is disqualified only if a ground of disqualification listed in a

subsection of Canon 3C(1) exists or additional circumstances otherwise create a reasonable question as to the judge's impartiality.

FACTS

A district judge's spouse was recently elected the mayor of the city where the judge sits. The judge does not hear any criminal proceedings in which the city is a party. However, district judges often approve requests to set bail in excess of the bail schedule in cases involving city police. Districts judges also issue search warrants within the county where they sit upon requests by law enforcement officers or the district attorney. Drug Court is a year long diversion program which begins with the defendant pleading guilty on a drug related charge, which may have been brought by city police. City police also frequently are witnesses both in preliminary hearings on felony charges and in civil cases.

DISCUSSION

As the inquiring judge recognizes, a judge is disqualified in any case in which the city of which the judge's spouse is Mayor is a party. Canon 3C(1)(d)(i) expressly provides that a judge is disqualified in a proceeding in which the judge's spouse "[i]s named a party to the proceeding, or an officer, director, or trustee of a party." Under this canon, the Commission has previously concluded that a judge with a close relative on a city council is disqualified from sitting in any proceeding, civil or criminal, in which the city is a party. Advisory Opinions 88-342 and 97-634. Similarly, in Advisory Opinion 83-186, the Commission advised a judge who was closely

related to a member of the county commission that he was disqualified to hear any case in which the county commissioners, the county commission, or the county was a party.

The city of which the judge's spouse is Mayor is not a party to any of the proceedings concerning which inquiry is now made. However, in the first two types of cases presented, city police sometimes act directly as the moving party in seeking a high bail or the issuance of a search warrant. It is the opinion of the Commission that a criminal defendant in such a situation might reasonably question the impartiality of a judge whose spouse is the mayor, even though the judge is not biased in fact. Thus, the judge is disqualified to hear *ex parte* requests made by a city police officer to set bail in excess of the bail schedule and applications for a search warrant by a city police officer. Canon 3C(1).

However, the Commission also is of the opinion that the judge may hear bail requests and search warrant applications made by city police in situations where immediate action is required to protect life or property and no other judge is available. As discussed in Advisory Opinion 95-542, the Rule of Necessity governs as an exception in such a situation.

The Commission does not find a reasonable basis for questioning the judge's impartiality in those cases where a bail request or a search warrant application is presented by an assistant district attorney. 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.

The judge is, of course, disqualified in any proceeding in which she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts, as a result of her spouse's position as Mayor. Canon 3C(1)(a). Likewise, she is disqualified in any case in which her husband has a financial interest or any other interest that could be substantially affected by the outcome of the proceeding (Canon 3C(1)(c) and 3(c)(1)(d)(ii)) or in which he is likely to be a material witness (Canon 3C(1)(d)(iii)). Disqualification arising under Canon 3C(1)(a) is not subject to remittal. Disqualification arising under Canons 3C(1)(c) or 3C(1)(d) may be remitted under the procedure in Canon 3D.

If none of the foregoing grounds of disqualification exist, the judge is only disqualified in any of the proceedings in question if her impartiality is otherwise reasonably questionable by virtue of her relationship to the Mayor.

In Advisory Opinion 89-353, the circuit judge's spouse was a city attorney, responsible for the management of the city attorney's office and several assistant city attorneys. The Commission decided that the judge was not automatically disqualified from sitting in cases in which an assistant city attorney was counsel, but was disqualified if the city attorney participated in the proceeding, either directly as counsel or indirectly by actively directing the actions of the city attorney's office in the proceeding. The Commission advised the judge to make the necessary determination as to her spouse's participation at the outset of each proceeding.

The Commission also has addressed other cases in which a close relative of a judge was employed by a government agency that was involved in litigation other than as a party. In these cases, the Commission has concluded that, absent a ground of disqualification specifically listed in a subsection of Canon 3C(1), a judge's impartiality is not reasonably questionable unless the relative has some personal or direct involvement or interest in the case. Advisory Opinions 86-286, 88-345, and 97-632.

In Advisory Opinion 93-504, a judge whose cousin was a member of the city council had asked whether he was disqualified to hear appeals from decisions of the municipal board of zoning adjustment. The members of the board were appointed by the city council and were reimbursed for expenses, but the board was otherwise autonomous from the council. The Commission held the judge was not disqualified to hear such appeals unless his cousin had an interest that could be substantially affected by the outcome of the appeal.

It is the opinion of the Commission that the mere fact that the judge's spouse is Mayor does not create a reasonable question as to the

judge's impartiality in proceedings of the type described in numbers 3 through 6 in the statement of the issue presented, *supra*. However, if the judge's spouse has a particular interest or direct involvement in a particular case, then the judge is disqualified to hear the case.

REFERENCES

Alabama Advisory Opinions 83-186, 86-286, 88-342, 88-345, 89-353, 93-504, 95-542, 97-632, and 97-634.

Alabama Canons of Judicial Ethics, Canons 3C(1), 3C(1)(a), 3C(1)(c), 3C(1)(d), and 3D.

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 17 of the Rules of Procedure of the Judicial Inquiry Commission. For further information, you may contact the Judicial Inquiry Commission, 800 South McDonough Street, Suite 201, Montgomery, Alabama 36104; tel.: (334) 242-4089; fax: (334) 240-3327; e-mail: jic@alalinc.net.