

JUDICIAL INQUIRY COMMISSION

DATE ISSUED: MARCH 26, 2002

ADVISORY OPINION 02-792

DISQUALIFICATION WHEN THE PROSECUTOR IS THE SPOUSE OF THE JUDGE'S JUDICIAL ASSISTANT

ISSUES

Is a judge disqualified to hear criminal cases prosecuted by the spouse of the judge's judicial assistant? **Answer:** Yes.

FACTS

The inquiring circuit judge's judicial assistant is married to an assistant district attorney who prosecutes criminal cases in the judge's jurisdiction.

DISCUSSION

None of the specific grounds of disqualification stated in the subsections of Canon 3C(1) apply to the question presented. Thus, the issue is whether the presiding judge is disqualified under that canon's general provision requiring disqualification when the judge's "impartiality might reasonably be questioned."

"Recusal 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). See, also, *Wallace [v. Wallace]*, 352 So.2d 1376, 1379, (Ala.Civ.App. 1977)]. Specifically, the Canon 3C(1) 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."

Matter of Sheffield, 465 So.2d 350, 355-356 (Ala. 1984). The issue under Canon 3C(1) is not whether the judge is impartial in fact, but rather whether another person, knowing all of the circumstances, might reasonably question the judge's impartiality. *Ex parte Duncan*, 638 So.2d 1332, 1334 (Ala. 1994).

In Advisory Opinion 88-333, the Commission decided that a judge was disqualified to hear cases in which the State Personnel Board was a party when the judge's secretary was the spouse of the attorney for the personnel board, unless the judge's secretary took no part in the proceeding and did not discuss the matter with the judge. Under the facts presented in Advisory Opinion 88-333, the judge would occasionally hear civil cases in which his secretary's spouse was counsel for a party state agency. The Commission decided that a reasonable question as to the judge's impartiality could be avoided by completely insulating the secretary from participating in or having any contact whatsoever with such cases.

It appears to the Commission that, unlike an occasional civil case, it is not feasible to completely isolate a trial judge's judicial assistant from criminal cases in which the assistant's spouse is the prosecuting attorney. It is hard to imagine a judge handling the ministerial tasks associated with a criminal docket without his judicial assistant. Even if it is possible to do so, the Commission

believes that, due to the nature and volume of cases involved, a perception of partiality would persist. Moreover, isolating the judicial assistant would be disruptive to the orderly administration of cases since a judge's judicial assistant is ordinarily necessarily involved in criminal cases over which the judge presides.

It is the opinion of the Commission that a judge is disqualified to hear criminal cases prosecuted by the spouse of the judge's judicial assistant. This disqualification does not extend to cases prosecuted by other members of the district attorney's office.

The Commission has consistently held that a judge is not automatically disqualified to hear all criminal cases even if the judge's own close relative is an assistant district attorney, but rather is disqualified only from those cases in which the relative participates. Advisory Opinions 80-90, 83-171, 86-277, 87-303, 87-305 and 88-346.

REFERENCES

Advisory Opinions 80-90, 83-171, 86-277, 87-303, 87-305, 88-333, and 88-346.

Alabama Canons of Judicial Ethics, Canon 3C(1).

Ex parte Duncan, 638 So.2d 1332 (Ala. 1994).

Matter of Sheffield, 465 So.2d 350 (Ala. 1984).

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, P. O. Box 303400, Montgomery, Alabama 36130-3400; tel.: (334) 242-4089; fax: (334) 353-4043; E-mail: jic@alalinc.net.