

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 87-024

[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]

[Not Current- subsequent rule amendments to Canons 1 through 6, Ohio Code of Judicial Conduct, eff. May 1, 1997]

SYLLABUS: A judge should recuse himself from proceedings where his impartiality might reasonably be questioned. This includes instances where the judge's spouse is a party to or lawyer in the proceeding. A prosecuting attorney may not practice law in his or her spouse's courtroom. However, disqualification of one prosecuting attorney does not per se disqualify all other lawyers serving that office unless disqualification is reasonably necessary to insure the fairness of a trial, the proper administration of justice or public confidence in the legal system. A lawyer whose spouse is a common pleas judge may practice before any other judge in the county where his or her spouse presides, but may not engage in conduct which suggests an ability to improperly influence a tribunal.

TO: Judge William Walker

FROM: Board of Commissioners on Grievances and Discipline of the Judiciary

DATE: June 22, 1987

We have before us your request for our informal advisory opinion regarding your situation as common pleas judge in the county where your spouse is a member of the prosecuting attorney's staff. Specifically, you seek our opinion with regard to the following:

1. your spouse's appearance before other judges of the general jurisdiction, the division of domestic relations, probate and juvenile court.

2. the necessity of you recusing yourself in any case involving any member of the prosecuting attorney's staff.

We agree with your assumption that your spouse may not appear as counsel in your courtroom. Code of Judicial Conduct, Canon 3C(1)(d)(ii) (1982). However, under Canon 3D of the Code of Judicial Conduct (the "Judicial Code"), disqualification under Canon 3C(1)(d) may be waived by all the parties and lawyers by agreeing in writing that the judge's relationship is immaterial. Code of Judicial Conduct, Canon 3D (1982).

Regarding your first question, it is our opinion that your spouse may ethically appear before other judges in your county. However, both lawyers and judges must scrupulously avoid any appearance of impropriety. Code of Judicial Conduct Canon 2 (1973), Model Code of Professional Responsibility DR 9-101 (1985). Also, under the Model Code, a lawyer shall not engage in conduct which suggests the ability to improperly influence any tribunal. Model Code of Professional Responsibility DR 9-101(C) (1985). Furthermore, a lawyer shall not communicate, or cause another to communicate with a judge relating to the merits of a case. Model Code of Professional Responsibility DR 7-110 (B) (1970).

Regarding your second question, it is our opinion that you may preside as judge in cases involving other members of the prosecuting attorney's staff. The fact that a judge's spouse is disqualified from prosecuting cases in his or her spouse's courtroom is not imputed to fellow prosecuting attorneys. However, we recommend that you disclose to all the parties and lawyers in cases brought by the prosecutor's office that your spouse is a staff member of that office.

Under such circumstances, disqualification might be necessary to insure the proper administration of justice and/or public confidence in the legal system. If your impartiality might reasonably be questioned in a proceeding then you should disqualify yourself. Code of Judicial Conduct Canon 3C(1) (1982). "Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification." E. W. Thode, Reporter's Notes to Code of Judicial Conduct 60 (1973).

Based on the foregoing, it is our opinion, and you are so advised that, where a judge and his or her spouse, as a prosecuting attorney, practice in the same county, they are precluded from participating in the same cases. The judge may however, hear cases brought by other prosecuting attorneys in the county. Conversely, the prosecuting attorney may appear

before other judges in the county. However, both spouses should keep in mind the potential for disqualification based on the aforementioned provisions in the Code of Professional Responsibility and Code of Judicial Conduct.

This opinion is advisory in nature, is based upon the facts as presented and is limited to questions arising under the Code of Judicial Conduct.

James W. Mason, Esq.
Secretary
Board of Commissioners
on Grievances & Discipline
of the Judiciary