

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 93-4

Issued April 16, 1993

[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]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: It is improper under Ohio's Code of Judicial Conduct for a judge to appoint an attorney to represent indigent parties indicted by the grand jury, when the attorney is related to the judge or the judge's spouse within the third degree of consanguinity. The appointment could be viewed as an exercise of nepotism which creates the appearance of impropriety under Canon 2B and the appearance of impartiality under Canon 3B (4). Occasional exceptions to this advice might be proper under extraordinary circumstances in sparsely populated jurisdictions with few attorneys.

Further, it is improper under Ohio Ethics Law, Section 2921.42 of the Ohio Revised Code, for a judge to appoint an attorney to represent indigent parties indicted by the grand jury, when the attorney is a member of the judge's family which includes, but is not limited to: 1) grandparents; 2) parents; 3) spouse; 4) children, whether dependent or not; 5) grandchildren; 6) brothers and sisters; or 7) any person related by blood or marriage and residing in the same household. However, Section 2921.42 (C) provides a safe harbor from the restriction of Section 2921.42 (A) which might be applicable in extraordinary circumstances in sparsely populated jurisdictions with few attorneys if the conditions within Section 2921.42 (C) (1) through (4) are met.

OPINION: This opinion addresses whether it is proper for a judge to appoint an attorney to represent indigent parties indicted by the grand jury, when the attorney is related to the judge within the third degree of consanguinity. Appointments by judges are regulated by both the Code of Judicial Conduct and Ohio Ethics Law. Thus, the question presented requires interpretation under two authorities--the Code of Judicial Conduct and Ohio Ethics Law and related statutes.

Code of Judicial Conduct

Canon 2B, Canon 3B (4), and the commentary to Canon 3B (4) of the Code of Judicial Conduct are set forth below.

Canon 2B A judge should not allow his (her) family, social or other relationships to influence his (her) judicial conduct or judgment. He (she) should not lend the prestige of his (her) office to advance the private interests of others; nor should he (she) convey or permit others to convey the impression that they are in a special position to influence him (her). He (she) should not testify voluntarily as a character witness.

Canon 3B(4) A judge should not make unnecessary appointments. He should exercise his (her) power of appointment only on the basis of merit, eliminating nepotism and favoritism. He (she) should not approve compensation of appointees beyond the fair value of services rendered.

Commentary

Appointees of the judge include officials such as referees, commissioners, special masters, receivers guardians, appraisers and personnel such as clerks secretaries, bailiffs and **all other court employees and appointees**. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection. (emphasis added)

The restrictions in Canons 2B and 3B(4) are necessary to further the broad mandates of Canons 2 and 3. Canon 2 mandates that "A Judge Should Avoid Impropriety and the Appearance of Impropriety in all His [Her] Activities." Canon 3 provides that "A Judge Should Perform the Duties of His [Her] Office Impartially and Diligently." It has been noted that failure of even a few judges to comply with the Canon 3B(4) standard can lower the public's esteem for the entire judicial system. See E. Thode, Reporter's Notes to Code of Judicial Conduct, 60 (1973).

This Board has only once considered in an advisory opinion the issue of nepotism. In Opinion 89-001 the Board advised that it is not improper for a judge to appoint the spouse of another court employee to a court position provided the appointment is based on qualifications. Ohio SupCt Bd of Comm'rs on Grievances and Discipline, Op. 89-001 (1989). That opinion is not analogous here because the appointee was not a relative of the judge.

Nepotism is not defined within the Code of Judicial Conduct. However, it is commonly defined as "[b]estowal of patronage by public officers in appointing others to positions by reason of blood or marital relationship to appointing authority." Black's Law Dictionary 937 (5th ed. 1979). Under this general definition, the Canon 3B(4) reference to nepotism could include the appointment of a lawyer within the third degree of consanguinity. However, there are two possible interpretations of Canon 3B(4). One interpretation is that so long as an appointment is based on merit, not marital or blood relationship, there is no per se violation of Canon 3B(4) for a judge to appoint a relative. The other, more restrictive interpretation is that in order to eliminate nepotism, a degree of relationship test should be applied so as to prohibit the appointment of a relative within a certain degree of relationship. The Board favors the latter interpretation as it is less subjective and provides a more uniform and impartial standard to guide judicial appointments.

The degrees of relationship computed by the rules of civil law are as follows: parents and children are within the first degree; grandparents, grandchildren, brothers, and sisters are within the second degree; uncles, aunts, nephews, nieces and great-grandparents are within the third degree; first cousins, great-uncles, great-aunts, and great-great-grandparents are within the fourth degree; great-great uncles, great-great-aunts, children of a cousin (first cousins once removed), and the children of a great-uncle or a great-aunt are within the fifth degree; second cousins are within the sixth degree. See 23 Am. Jur. 2d Descent & Distribution § 55 (1983).

Other states have written advisory opinions addressing judicial appointments. These opinions include the following: Alabama Judicial Inquiry Comm'n, Op. 86-250 (1986) (may not appoint niece as county law librarian under Canon 3B(4) and state statute; Alabama Judicial Inquiry Comm'n, Op. 82-138 (1982) and 80-91 (1980) (may not appoint attorney in an indigent criminal case when the relationship is within the fourth degree of the judge or the judge's spouse because impartiality might be questioned--Canon 3C); Alabama Judicial Inquiry Comm'n, Op. 76-13 (1976) (may not employ uncle as bailiff since uncle is related within the restricted fourth degree under Canon 3B(4) and state statute); Florida SupCt Committee on Standards of Conduct Governing Judges, Op. 82-13 (1982) (may not appoint a relative as a guardian ad litem, receiver, or a master under Canon 3B(4)); Georgia Judicial Qualifications Comm'n, Op. 68 (1985) (may not appoint spouse or other immediate family member as a personal secretary under Canon 3B (4) and 2 (A) and (B)); Kansas Judicial Ethics Advisory Panel, Op. JE-11 (1984) (may not appoint attorney/wife with whom he previously practiced law under Canons 3B (4) and 2); Kentucky Judiciary Ethics Committee, Op. JE-26 (1981) (may not appoint close relative as master commissioner under Canons 2 and 3B (4)), even when the relative is the only attorney eligible for the position; Missouri Comm'n on Retirement, Removal & Discipline, Op. 38 (1980) (may not appoint son as guardian ad litem, appraiser, referee, trustee, or attorney for an indigent under Canons 2 and 3B (4)); South Carolina Advisory Comm. on Standards of Judicial Conduct, Op. 1-1980 (1980) (may not employ anyone within the sixth degree to work in his/her office under Canon 2B and 3B (4)--if state statute prohibits any head of any department of government from appointing a person within the sixth degree of relationship a less stringent standard to the judiciary would reflect upon its integrity); State Bar of Texas Committee on Judicial Ethics, Op. 1 (1975) (appointment of grandnephew in the fourth degree to represent indigent not nepotism under Canon 3B(4)).

This Board's view is that the third degree of relationship is an appropriate standard to be applied under Canon 3B (4). This view is compatible with the Code's use of the third degree of relationship as a test to determine judicial disqualification when a relative of either the judge or the judge's spouse is a party to a proceeding or is acting as a lawyer in a proceeding. It is also consistent with another Ohio advisory opinion. See Cleveland Bar Ass'n, Op. 110 (1974) ("[A] judge shall not, in exercising any power of appointment, appoint (i) the judge's spouse; (ii) anyone within the third degree of relationship, according to the civil law system; or (iii) the spouse of such relation.").

In conclusion, it is this Board's opinion that it is improper under Canon 2B and Canon 3B(4) of Ohio's Code of Judicial Conduct for a judge to appoint an attorney to represent indigent parties indicted by the grand jury, when the attorney is related to the judge or the judge's spouse within the third degree of consanguinity. The appointment could be viewed as an exercise of nepotism which creates the appearance of impropriety under Canon 2B and the appearance of impartiality under Canon 3B(4). Occasional exceptions to this advice might be proper under extraordinary circumstances in sparsely populated jurisdictions with few attorneys.

Ohio Ethics Law

Also relevant to this opinion is Division (A) (1) of Section 2921.42 of the Ohio Revised Code (Baldwin Supp. 1992) which is set forth below.

Section 2921.42 (A) No public official shall knowingly do any of the following:

(1) Authorize, or employ the authority or influence of his (her) office to secure authorization of any public contract in which he (she), a member of his (her) family, or any of his (her) business associates has an interest;

A judge is a "public official" subject to the prohibition of R.C. 2921.42. See Ohio Rev. Code Ann. §2921.01(A) (Baldwin1992). Section 2921.42(A) (1) of the Ohio Revised Code prohibits the use of judicial authority to secure a public contract in which a family member has an interest. The restrictions within Section 2921.42 apply when a public official, a member of his or her family, or any of his or her business associates have a prohibited interest in a public contract. Proper application of the law to the facts presented requires the Board to construe the meaning of "public contract," "member of his (her) family," and "interest." In doing so, the Board relies on statutory definitions, past opinions of the Board, and opinions issued by the Ohio Ethics Commission.

An employment relationship is a public contract under Section 2921.42 (A) (1) since the services of an employee are being purchased or acquired. See Ohio Ethics Comm'n, Op. 89-015 (1989). A contract between a court and an attorney to provide legal services is a public contract. See Ohio SupCt Bd of Comm'rs on Grievances and Discipline, Op. 93-2 (1993). In Opinion 93-2 the Board noted that, "(a) court must exercise its power of appointment to acquire services in order to carry out its duties." For example, a court is required to provide counsel when a criminal defendant is unable to obtain counsel. See Crim. R. 44. Hence, this Board concludes that the appointment of an attorney to represent indigent parties indicted by the grand jury, is a "public contract" under Section 2921.42 since the court is acquiring services pursuant to its duties.

The term "a member of his [the judge's] family" has been defined. The Ohio Ethics Commission and the Board have agreed that for purposes of Section 2921.42, "the term 'a member of his family' includes, but is not limited to: 1) grandparents; 2) parents; 3) spouse; 4) children, whether dependent or not; 5) grandchildren; 6) brothers and sisters; or 7) any person related by blood or marriage and residing in the same household." Ohio Ethics Commission 80-001 (1980), Ohio SupCt Bd of Comm'rs on Grievances and Discipline, Op. 93-2 (1993).

The term "interest" has been defined by the Ohio Ethics Commission as a definite, direct interest which may be either pecuniary or fiduciary. See e.g., Ohio Ethics Comm, Op. 81-008 (1981), Op. 81-003 (1981), Op. 78-005 (1978). This Board concluded in Opinion 93-2 that financial compensation for providing legal services is a pecuniary interest. See Ohio SupCt Bd of Comm'rs on Grievances and Discipline, Op. 93-2 (1993). Under the facts presented here, the judge's family member would receive compensation for representing the indigent party. Hence, under Section 2921.42 (A) (1) there is a prohibited interest.

In conclusion as to Ohio Ethics Law, the Board advises that it is improper under Section 2921.42 of the Ohio Revised Code for a judge to appoint an attorney to represent indigent parties indicted by the grand jury when the attorney is a member of the judge's family which includes, but is not limited to: 1)grandparents; 2) parents; 3) spouse; 4) children, whether dependent or not; 5) grandchildren; 6) brothers and sisters; or 7) any person related by blood or marriage and residing in the same household." However, Section 2921.42 (C) provides a safe harbor from the restriction of Section 2921.42(A) which might be applicable in extraordinary circumstances in sparsely populated jurisdictions with few attorneys if the conditions within Section 2921.42(C) (1) through (4) are met. The text of the safe harbor provision, Section 2921.42 (C), is set forth below.

2921.42(C) This section [2921.42] does not apply to a public contract in which a public servant, member of his [her] family, or one of his [her] business associates has an interest, when all of the following apply:

- (1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;
- (2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public servant's becoming associated with the political subdivision or governmental agency or instrumentality involved;
- (3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;
- (4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public servant, member of his family, or business associate, and the public servant takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

Summary of Conclusions under Ohio Code of Judicial Conduct and Ohio Ethics Law

It is improper under Ohio's Code of Judicial Conduct for a judge to appoint an attorney to represent indigent parties indicted by the grand jury, when the attorney is related to the judge or the judge's spouse within the third degree of consanguinity. The appointment could be viewed as an exercise of nepotism which creates the appearance of impropriety under Canon 2B and the appearance of impartiality under Canon 3B(4). Occasional exceptions to this advice might be proper under extraordinary circumstances in sparsely-populated jurisdictions with few attorneys.

Further, it is improper under Ohio Ethics Law, Section 2921.42 of the Ohio Revised Code, for a judge to appoint an attorney to represent indigent parties indicted by the grand jury, when the attorney is a member of the judge's family which includes, but is not limited to: 1) grandparents; 2) parents; 3) spouse; 4) children, whether dependent or not; 5) grandchildren; 6) brothers and sisters; or 7) any person related by blood or

marriage and residing in the same household." However, Section 2921.42 (C) provides a safe harbor from the restriction of Section 2921.42 (A) which might be applicable in extraordinary circumstances in sparsely populated jurisdictions with few attorneys if the conditions within Section 2921.42 (C) (1) through (4) are met.

This opinion addresses the issue of appointments by a single judge and does not consider the issue of appointments by a collective or majority vote of a multi-judge court.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office. Pursuant to Section 102.08 of the Ohio Revised Code, the requester may reasonably rely on the opinion as it applies to Ohio Ethics Law and related statutes.