

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 87-038

[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]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: Referees are considered judges for purposes of complying with the Code of Judicial Conduct. Both judges and referees should disqualify themselves from any proceeding where their impartiality might reasonably be questioned. Furthermore, a judge or referee should avoid impropriety and the appearance of impropriety in all of his or her activities.

TO: Judge L. Alan Goldsberry
Athens County Court of Common Pleas

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

DATE: June 22, 1987

We have before us your request for our advisory opinion relating to your desire to appoint a full-time referee to serve as domestic relations referee in your courtroom. The person you refer to as "A," is currently an assistant prosecuting attorney for the Bureau of Support, where she represents the state in actions to enforce and create support orders. In your request letter you properly assumed that if "A" is appointed referee, then her husband "B" would be precluded from practicing before her as domestic relations referee. With this as background, you request an advisory opinion on the following questions:

1. Does the Code of Judicial Conduct permit the common pleas judge to hear either domestic or non-domestic cases in which B or his firm appear as counsel?
2. Under the Code of Judicial Conduct, can A hear cases in which members of B's firm appear as counsel?
3. Under the Code of Judicial Conduct, A obviously cannot hear cases she filed. However, can A hear cases based upon new facts or circumstances involving a parent for whom she appeared, as a prosecuting attorney, representing the state?
4. Under the Code of Judicial Conduct, can A hear any case brought by the prosecutor's office through the Bureau of Support?
5. Under the Code of Professional Responsibility, can B and his firm appear before the common pleas judge?
6. Under the Code of Professional Responsibility, can members of B's firm, other than B, appear before A?
7. Do any other ethical questions arise from the facts as presented?

Your first question addresses the situation where you, as common pleas judge, wish to hear cases in which your prospective referee's husband or members of his law firm appear as counsel. Although there is nothing in the Code of Judicial Conduct (the Code) specifically prohibiting a judge from sitting in such cases, there are several general provisions in the Code which would apply. For instance, under Canon 3C(1) of the Code, a judge should disqualify himself from proceedings where his impartiality might reasonably be questioned. Code of Judicial Conduct Canon 3C(1) (1982). The Reporter's Notes to the Code regarding Canon 3C(1) state, "[a]ny 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). Therefore, if your impartiality might reasonably be questioned in a case because one of the lawyers is affiliated with, or related to, the domestic relations' referee, then you should disqualify yourself from that case.

Canon 2 of the Code also applies to the situation set forth in your first question and should be carefully considered when determining whether you hear cases involving "B" or members of his firm. Canon 2 and its Commentary state:

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

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

COMMENTARY

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Code of Judicial Conduct Canon 2B (1973).

Regarding your second question, because referees are considered judges for purposes of complying with the Code, Code of Judicial Conduct Compliance Sec. (1982), they should disqualify themselves where their spouse is acting as a lawyer in a proceeding. Code of Judicial Conduct Canon 3C(1)(d)(ii) (1982). Therefore, "A" may not hear cases in which her spouse, "B," participates as a lawyer in the proceeding.

However, under the Commentary to Canon 3C(1)(d)(ii), "[t]he fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge." Code of Judicial Conduct Canon 3C(1)(d)(ii) Comment (1982). Again, the fact that the referee's impartiality might reasonably be questioned under Canon 3C(1) would be enough to require her disqualification. Id.

Your third question addresses Canon 3C(1)(b) of the Code which states: "[a] judge should disqualify himself in a proceeding . . . where: . . . he served as a lawyer in the matter in controversy . . ." Code of Judicial Conduct Canon 3C(1)(b) (1982) (emphasis added). It is our opinion that under Canon 3C(1)(b) and, in order to prevent the appearance of impropriety, a referee or judge should not hear cases, based on new facts but, involving parties he or she prosecuted for the state's Bureau of Support. Furthermore, because of the referee's previous contact with a party before her, the general provision of Canon 3C(1) of the Code might require her disqualification from the proceeding since her impartiality might reasonably be questioned. Code of Judicial Conduct Canon 3C(1) (1982).

Your fourth question addresses the second part of Canon 3C(1)(b) of the Code which states: "[a] judge should disqualify himself in a proceeding . . . where . . . a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter." Code of Judicial Conduct Canon 3C(1)(b) (1982). In the Commentary to this section it is stated that, governmental agency lawyers are not necessarily associated with other lawyers employed by that agency. Code of Judicial Conduct Canon 3C(1)(b) Comment (1982). Therefore, the former prosecuting attorney as referee should disqualify herself if her "association with the agency lawyer now before the court . . . leads to the conclusion that, under the general standard of Canon 3C(1), [her] impartiality might reasonably be questioned." E. W. Thode, Reporter's Notes to Code of Judicial Conduct 63 (1973).

Regarding your fifth and sixth questions, the ABA has held, and we agree, that nothing in the Code of Professional Responsibility prevents lawyers from appearing before judges where the judge has not disqualified himself. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1306 (1974).

Finally, we are unable to respond to your seventh and final question, as it is overbroad. We must limit our responses to requests for advisory opinions concerning specific questions relating to the specific facts and circumstances presented in the request.

In conclusion, it is our opinion, and you are so advised, that judges and referees should disqualify themselves from any proceeding where their impartiality might reasonably be questioned. In addition, a judge or referee should avoid impropriety and the appearance of impropriety in all of his or her activities.

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 and Discipline
of the Judiciary