

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 91-13

Issued June 14, 1991

[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]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 disqualify himself from a proceeding when his impartiality might reasonably be questioned and or when he has personal bias or prejudice toward a witness. Judicial disqualification is not automatically required by the Code of Judicial Conduct when a health care professional, who currently provides marital counseling to the judge and his wife, appears before the judge as a significant witness in a trial; nor when a health care professional who in the past performed psychological testing and marital counseling with the judge and his wife, appears before the judge as a significant witness or when his partners or associates appear; nor when a psychiatrist who has never treated the judge but who currently provides counseling and therapy with psychotropic drugs to the judge's wife, appears before the judge as a significant witness. Though, in each of these instances, a reasonable person knowing all the circumstances could conclude that the judge's impartiality might reasonably be questioned; thus, the judge may need to disqualify himself under the Canon 3 C general standard of impartiality and possibly under the Canon 3 C (1) (a) personal bias or prejudice standard. Where a judge is the trier of fact or where competency of the witness is in question, the need for disqualification is more apparent. However, it is the judge who must make the determination of whether he has personal bias or prejudice toward a witness and whether a reasonable person knowing all the circumstances could conclude that impartiality might reasonably be questioned.

OPINION: We have before us a request for an advisory opinion regarding judicial disqualification in instances when a healthcare professional appears as a witness before a judge with whom a professional relationship exists or has existed. The questions raised are as follows:

1. Whether a judge should disqualify himself from a proceeding when a health care professional, who currently provides marital counseling to the judge and his wife, appears before the judge as a significant witness in a trial;

2. Whether a judge should disqualify himself from a proceeding when a health care professional, who in the past performed psychological testing and marital counseling with the judge and his wife, now appears before the judge as a significant witness, or when the health care professional's partners or associates appear;
3. Whether a judge should disqualify himself from a proceeding when a psychiatrist, who has never provided care to the judge but who currently provides counseling and therapy with psychotropic drugs to the judge's wife, appears before the judge?

As to all the above questions the requester inquires whether the obligation to disqualify or disclose would cease at some point in time.

Canon 3 of the Code of Judicial Conduct (Judicial Code) mandates that "[a] judge should perform the duties of his office impartially and diligently." In order to do so, a judge must, at times, disqualify himself from a proceeding. Specific rules governing judicial disqualification are contained within Canon 3 C of the Judicial Code. Canon 3 C (1) sets forth a general standard of disqualification, followed by four specific disqualification standards.

The general standard of disqualification in Canon 3 C (1) is that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned." Under this general standard, "[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. Thode, Reporter's Notes to Code of Judicial Conduct 60 (1973). The reporter explains that impropriety or the appearance of impropriety in violation of Canon 2 "clearly falls within the scope of the general standard [enunciated in Canon 3 C], as does participation by the judge in the proceeding if he thereby creates the appearance of a lack of impartiality." Id. 61.

Under the four specific disqualification standards set forth in Canon 3 C (1) (a,b,c,d), a judge's impartiality might reasonably be questioned in instances when:

- (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

- (b) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
- (c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a substantial financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
- (d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) is a party to the proceeding, or an officer, director, or trustee of a party;
 - (ii) is acting as a lawyer in the proceeding;
 - (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 - (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Code of Judicial Conduct 3 C (1) (a,b,c,d).

Thus, under the general disqualification standard in Canon 3 C of the Judicial Code, a judge should disqualify himself in any instance where his impartiality might reasonably be questioned. Also, a judge should disqualify himself under any of the specific standards identified by Canon 3 C (1) (a,b,c,d).

Although the specific disqualification standards do not directly address the questions raised, they do provide some guidance. Under Canon 3 C (1) (a), a judge should disqualify himself in instances when he has a personal bias or prejudice concerning a party. Although a witness may not technically be considered a party to a proceeding, through his role in the proceeding, a key witness may be closely associated with a party. Thus, bias regarding a witness could result in bias concerning a party.

Under Canon 3 C (1) (d) (iv), a judge should disqualify himself in instances when he, his spouse, or a person within the third degree of relationship to either of them is to the judge's knowledge likely to be a material witness in the proceeding. See Ohio SupCt, Op. 89-19 (1989), Ohio State Bar Ass'n, Op.85-2 (1985). This provision, although not squarely on point to the issue being addressed in this opinion, suggests that bias toward a witness is a potential reason for disqualification.

The general standard of impartiality under Canon 3 C (1) also applies to the questions raised. Since marital discord and therapy create a highly emotional situation, no matter how earnest the judge, there is an obvious danger that his impartiality might reasonably be questioned by a reasonable person knowing all the circumstances when a marital therapist is a significant witness.

Of further note is the language in the Judicial Code that a judge "should" disqualify rather than "shall" disqualify suggesting that it is difficult to define instances requiring automatic disqualification because so many subjective factors are involved. Also of note is the fact that the Board could find no other ethics opinions directly addressing the questions raised by this request.

The Board's opinion is that when a judge has personal bias or prejudice toward a significant witness the judge should disqualify himself from a proceeding. Beyond that broad statement, it is difficult to state a precise rule regarding when a judge should disqualify himself from a proceeding. However, when a social worker or other professional who currently provides marital counseling to the judge and his wife, appears before the judge as a significant witness in a trial, the Board is of the opinion that a reasonable person knowing all the circumstances could conclude that the judge's impartiality might reasonably be questioned; thus, the judge may need to disqualify himself under the Canon 3 C general standard of impartiality and possibly under the Canon 3 C 1 (a) personal bias or prejudice standard. Where a judge is the trier of fact or where competency of the witness is in question, the need for disqualification is more apparent. Where the judge is not the trier of fact or where competency of the witness is not at question, it would appear less clear. However, it is the judge who must make the determination of whether he has personal bias or prejudice toward a witness and whether a reasonable person knowing all the circumstances could conclude that impartiality might reasonably be questioned.

When a psychologist or other professional who in the past performed psychological testing and marital counseling with the judge and his wife now appears before the judge as a significant witness, judicial disqualification is also not automatically required but depends on factors such as whether there is personal bias or prejudice as a result of the past therapy or whether a reasonable person knowing all the circumstances would question the judge's impartiality. Similarly, judicial disqualification would not automatically be required for partners or associates of a psychologist or other therapist who in the past performed psychological testing or marital counseling with the judge and his wife. Nor is automatic disqualification required when a psychiatrist, psychologist or other professional who has never treated the judge but who currently provides therapy to or psychological testing on the judge's wife, appears before the judge as a significant witness.

It is also the Board's opinion that mere disclosure to counsel of the current or past relationship does not alleviate the ethical conflict for the judge. Remittal of disqualification is authorized by Canon 3 D of the Judicial Code but requires disclosure on the record and written agreement by the parties and lawyers, independent of the judge's participation and applies only to a judge disqualified by the terms of Canon 3 C (1) (c) (economic interest) or 3 C (1) (d) (family relationship). See E. Thode, Reporter's Notes to Code of Judicial Conduct 71 (1973).

The final question as to whether the obligation to disqualify or disclose would cease at some point in time is difficult to answer definitively. The ABA Committee on Ethics and Professional Responsibility addressed this question in the context of a judge's disqualification where a former associate appears as counsel. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 87-1524 (1987). The ABA committee stated that specifying a time interval after which a judge's impartiality may not reasonably be questioned depends on many factors including the closeness of the professional relationship and the extent of any continuing personal or social relationship in the interval since the professional relationship ceased. Id. Thus, the Board is unable to answer at what point in time the obligation to disqualify would cease other than to say that it would occur when the judge's impartiality would not be questioned by a reasonable man knowing the circumstances and when there were no other reasons requiring disqualification.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, non-binding 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.