

ADVISORY COMMITTEE
ON STANDARDS OF JUDICIAL CONDUCT

OPINION NO. 9 - 2018

RE: Propriety of a circuit court judge, whose brother is an assistant public defender, presiding over cases in which another attorney from the public defender's office represents a party.

Propriety of a circuit court judge presiding over a guilty plea where the judge's brother is the public defender if both the public defender and solicitor waive disqualification.

FACTS

A circuit court judge, whose brother is an assistant public defender, inquires into the propriety of serving over criminal cases in which the public defender's office appears. The judge understands that the judge cannot preside over any case in which the judge's brother appears. However, the judge inquires into the propriety of presiding over criminal matters in which other members of the public defender's office appear as counsel.

The judge also inquires as to the possible scenario in which the judge is the only one available and one of the brother's clients is in jail, but wants to plead guilty to a time served offer. The judge inquires as to whether, if the Solicitor and Public Defender waive any conflict, the judge could preside over such a plea.

CONCLUSION

A circuit court judge may preside in criminal matters where the judge's brother is employed by the public defender's office, provided that the judge's brother is not involved in any way in the case being heard or in a companion case that could be affected by the judge's rulings.

A circuit court judge may preside over a guilty plea for time served for a client of judge's brother only if both sides waive disqualification or if essential under the rule of necessity.

OPINION

Canon 3E.(1)(d) states that a judge should disqualify himself or herself where the judge's impartiality might reasonably be questioned, including where "the judge's spouse or person within the third degree of relationship to either of them, or the spouse of that person" is an attorney in a proceeding. In Opinion. 2-1991, this Committee addressed the issue of whether a circuit judge could hear cases involving the public defender's office where the judge's son was an attorney in that office. The Committee determined that the judge could hear cases involving the public defender, provided that his son was not involved in any way in the case being heard or in a companion case that could be affected by the judge's rulings.

Furthermore, the commentary to Canon 3E also notes that a judge should disqualify himself or herself if the judge's impartiality might be questioned and that a "judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification."

The Committee believes that the ruling in Opinion 2-1991 applies and that the judge can hear cases involving other attorneys from the public defender's office, provided that the judge's brother is not involved in any way in the case being heard or a companion case that could be affected by the judge's rulings. However, we take this opportunity to clarify one issue. In Opinion 8-2011,¹ the Committee referenced 2-1991 and claimed it held that "in any cases in which the public defendant's office appeared, the judge was required to make a disclosure on the record and recuse himself or herself if anyone objected." The quoted language did not appear in Opinion 2-1991 itself. Opinion 2-1991 merely stated that if the judge's impartiality might be

¹ Other than its reference to 2-1991, Opinion 8-2011 does not provide any guidance here.

questioned or the judge's ruling would have an effect on a companion case handled by his son, the judge should disqualify himself.

In conclusion, the judge may preside over cases in which the public defender's office appears, provided that the judge's brother is not involved in any way in the case being heard or in a companion case that could be affected by the judge's rulings. In addition, the judge "should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." Commentary, Canon 3E.

As to the second question presented by the judge, under Canon 3F, the parties can waive disqualification of the judge by considering the issue out of the presence of the judge. Moreover,

...the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for any possible disqualification and use reasonable effort to transfer the matter to another judge as soon as practicable.

Commentary, Canon 3E. If the judge is the only judge available and a client of the judge's brother wants to plead guilty to time served, the judge may either obtain a waiver of disqualification after disclosure on the record (following the procedure in Canon 3F) or preside over the matter under the rule of necessity.

S/ LETITIA H. VERDIN
LETITIA H. VERDIN, CHAIR

S/ USHA JEFFERIES BRIDGES
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S/ KEITH M. BABCOCK
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May 21, 2018.