

ADVISORY COMMITTEE
ON STANDARDS OF JUDICIAL CONDUCT

OPINION NO. 11 - 2022

RE: The propriety of a full-time magistrate being married to the Chief Deputy Sheriff in the same county.

FACTS

A full-time magistrate is married to the Chief Deputy Sheriff in the same county. The judge previously requested an opinion on this issue. By way of Opinion 5-2009, we opined that the judge could continue to serve but we also held that if a party sought disqualification due the spouse's employment, the judge should recuse himself/herself. In light of a recent South Carolina Supreme Court ruling, the judge has asked for clarification and whether Opinion 5-2009 is still valid.

A brief review of the facts is warranted. The duties for the position of Chief Deputy include performance of a variety of complex administrative, managerial, supervisory, and law enforcement work in planning, coordinating and supervising the daily activities of the Sheriff's Office; supervision of law enforcement personnel through the chain of command; and performance of related work as required. The Deputy Sheriff plans, organizes, and implements programs within major organizational policies and reports program progress to executive level administration through reports and conferences.

In addition, there are several essential tasks, most of which involve administrative duties such as organizing all programs of the Sheriff's Office, ensuring compliance with all federal and state laws and regulations, investigating complaints against office personnel or policies, administering the annual budget, analyzing office activity and crime trends, etc. This position

also has supervisory duties over officers, including instructing, assigning, reviewing and planning the work of others and ensuring the subordinates' consistent, effective, and professional enforcement of the applicable local, state, and federal laws.

The judge inquires as to whether it is proper to conduct bond hearing, preliminary hearings, and other court proceedings involving the Sheriff's Office, and whether the judge may sign warrants requested by other officers in the Sheriff's Office.

CONCLUSION

A magistrate married to the Chief Deputy Sheriff may continue to preside over cases involving the Sheriff's Office, provided that the judge follows the remittal procedures in Canon 3F.

OPINION

The issue of a judge with a familial or personal relationship with a law enforcement officer has presented this Committee with some of its most-challenging questions. In Opinion 5-2009, we advised the same inquiring judge that presiding over Sheriff's Office cases did not require disqualification, as the judge's spouse would not appear before the court as a material witness. However, we cautioned that if a party sought disqualification based on the spouse's employment, the judge must recuse himself/herself. Since that time, we have issued other opinions involving judges and law enforcement officers¹ and the Supreme Court has recently issued an opinion concerning the same. See, *In re Barker*, Op. No. 28098, filed June 15, 2022 (Howard Adv. Sheet No. 21 at p. 14). Thus, Opinion 5-2009 is amended to reflect the Supreme Court's holding in

¹ In Opinion 2-2018, we reviewed the various opinions issued. Instead of repeating that entire discussion here, that opinion is attached <https://sccourts.org/advisoryOpinions/html/02-2018.pdf>.

Barker.²

A judge must disqualify himself or herself in a proceeding where his/her impartiality might reasonably be questioned. Rule 501, SCACR, Canon 3E(1). Furthermore, the judge must disqualify himself/herself if the judge has a personal bias concerning a party. Rule 501, SCACR, Canon 3E(1)(a). While Canon 3E provides certain situations when disqualification is required -- such as when a judge's spouse or family member is a party, lawyer, or material witness to a proceeding-- the Commentary to the rule also notes that "a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply."

In our most recent opinion involving law enforcement, No. 2-2018, we addressed the propriety of a magistrate dating the county sheriff. We stated: "While it may be unlikely that the sheriff personally appears before the magistrate, the sheriff's employees will regularly appear before the magistrate for bond hearings, warrant requests, and other matters." We concluded that the judge should disqualify himself/herself in handling any matters in which employees of the sheriff, whom the judge is dating, appear as witnesses. *Id.*

Recently, the Supreme Court issued the opinion of *In re Barker*, Op. No. 28098, filed June 15, 2022 (Howard Adv. Sheet No. 21 at p. 14). That disciplinary matter involved a magistrate who was married to an employee of the Sheriff's Office. The judge's spouse was, at one point, promoted to Captain of Sheriff's Office's investigation unit, a role which required the judge's wife to handle "administrative supervision" of certain Sheriff's Office deputies. The judge never presided over any case or hearing in which the judge's wife appeared or was directly involved.

² To the extent that 2-2018 or any opinion referenced therein did not include the disqualification/remittal procedure outlined in *Barker*, they too are amended.

The judge did preside over bond hearings, traffic citations, preliminary hearings, and other matters in which Sheriff's Office deputies who were supervised by the judge's wife appeared before him.

In cases involving the Sheriff's Office, the judge in *In re Barker*, stated on the record his wife's position in that office, that she was not involved in the case, and advised the parties, "I would be happy to disqualify myself and have another judge hear your case." *Barker*, Howard Adv. Sheet No. 21 at p. 15. After making this disclosure, the judge would then ask if the defendant objected and if there were no objections, the judge would then preside. *Id.*

The Supreme Court found that the judge's disclosure, while well-intentioned, did not meet the requirements of the disqualification procedure. Under Canon 3E, a judge is required to communicate all information that parties might consider relevant to the issue of disqualification. The judge may preside if all parties agree to waive disqualification, following the remittal procedure in Canon 3F, which the court explained fully:

Specifically, Canon 3F provides that a judge may disclose on the record the basis for the disqualification and ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If, following disclosure, the parties and lawyers, without participation of the judge, all agree that the judge should not be disqualified, then the judge may participate in the proceeding. This agreement shall be incorporated in the record of the proceeding. The commentary to Canon 3F makes clear that the parties' consideration of whether to waive the judge's qualification must be made independently of the judge and that judge "must not solicit, seek[,], or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule."

Id. at p. 16 (internal citation omitted).

Because the judge's spouse in this matter has supervisory duty over other officers, the inquiring judge may continue to preside in matters involving officers in the Sheriff's Office (other than the judge's spouse) but must follow the same process as set forth by the Supreme Court in *Barker*.

We now turn to the question of warrants, which are issued based on a finding of probable cause pursuant to requests from law enforcement officers, without any appearance by a defendant (and thus no chance for a defendant to object or waive disqualification). In *Shadwick v. City of Tampa*, 407 U.S. 345, (1972), the United States Supreme Court noted that “[t]his Court long has insisted that inferences of probable cause be drawn by a ‘neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.’” *Id.* at ___. In 2007, an opinion of the Tennessee Attorney General noted that: “We have found no case stating that the existence of such a [familial] relationship, by itself, prevents an individual from being a “neutral and detached” magistrate as required by law.” Tenn. Op. Att’y Gen. No. 07-123 (Aug. 16, 2007). However, that opinion cautioned that “circumstances including a familial relationship may require the [judge] to recuse himself or herself rather than issue the warrant.” The opinion concluded that “if possible, a judicial commissioner should recuse himself or herself when presented with a request for a search warrant by the commissioner's close relative, or in connection with an investigation in which the commissioner's relative is an investigating officer.” We adopt that reasoning here.

The commentary to Canon 3E of our Code of Judicial Conduct states:

By decision law, 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 possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

Id. (emphasis added). Thus, while circumstances may require the judge to take immediate action on warrant request by officers the Sheriff’s Office (but not if the judge’s spouse is directly involved), the judge should, if possible, refer such requests to other judges.

If the requests for disqualification or unavailability of other judges to issue warrants creates an administrative burden such that the judge is unable to properly perform judicial duties, then the judge must re-evaluate continued service on the court.

s/ Usha Jeffries Bridges
USHA JEFFRIES BRIDGES, CHAIR

s/ William H. Seals, Jr.
WILLIAM H. SEALS, JR.

s/ Keith M. Babcock
KEITH M. BABCOCK

July 18, 2022