

ADVISORY COMMITTEE
ON STANDARDS OF JUDICIAL CONDUCT

OPINION NO. 13 - 2021

RE: Propriety of an Associate Municipal Judge presiding over cases that arise from the Department of Public Safety for a local university where the judge's spouse is a lieutenant with that department.

FACTS

An Associate Municipal judge is married to a lieutenant in the Department of Public Safety (DPS) for a local university. The City has concurrent jurisdiction with the County over the university property. The judge's spouse is a Watch Commander for the night shift and the Field Training Manager of the university's DPS. The judge inquires as to the propriety of adjudicating cases that arise from the university's DPS.

CONCLUSION

In presiding over cases arising from the university DPS, the judge, who is married to a university DPS lieutenant, should not preside if the judge's spouse appears as a material witness in a proceeding. In other DPS proceedings, the judge must, on the record, disclose the spouse's position and allow the parties to determine whether or not to seek recusal.

OPINION

A judge must disqualify himself or herself in a proceeding where his/her impartiality might reasonably be questioned. Rule 501, SCACR, Canon 3E(1).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). The commentary to Canon 3E(1) states that "A judge should disclose on the record

¹ 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 in 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."

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.”

However, parties can waive any disqualification under Canon 3F:

A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

This Committee has struggled with the issue of relationships between judges and persons in law enforcement, and as a result, previous opinions are inconsistent. Opinion 2-2018 considered some (but not all) of these previous opinions. Some of the previous opinions allowed judges to preside despite a relationship to law enforcement officer. See, Opinions 1-1989 (finding no ethical violation where municipal judge is married to SLED officer because there was no overlap in jurisdiction); 1-1991(magistrate can preside over cases prosecuted by sheriff’s department even though judge’s son is sheriff);² 9-1994 (no violation where magistrate is married to a sheriff’s deputy provided the judge discloses the relationship and recuses himself/herself upon request);³ 25-

²We have previously noted that Opinion 1-1991 based its decision on the fact that the sheriff was not actually a “party” so as to trigger the Canon that prohibits a judge from presiding over a case where a family member a party. That opinion was written according to a prior version of the Canons which may or may not have had the provision under current Canon 3E(1)(d)(iv) which requires disqualification where a judge’s spouse or person within third degree of relationship is likely to be a material witness in a proceeding. See Op. 2-2018, Footnote 3. However, because of the language of current Canon 3E, we stated the Committee would likely rule a different way if presented with the question today, and thus we determined that Opinion 1-1991 should be considered overruled. *Id.*

³ The majority in Opinion 9-1994 found that there was no impropriety as long as the magistrate disclosed the relationship in every case where a member of the Sheriff’s department appeared before the court and recused himself/herself upon request. There was a dissent in Opinion 9-1994, noting disclosure and recusal would result with few or no criminal defendants willing to go to trial

1995 (no violation where magistrate is married to secretary in sheriff's department); 3-1998 (no violation of canons where judge is married to sheriff's records clerk); 17-2002 (magistrate dating police officer who might appear before the judge required judge to recuse himself/herself in any matters in which significant other appeared); 6-2005 (no violation where candidate for magistrate is married to clerk for civil department of magistrate's office); 1-2017 (magistrate could continue to preside over tickets/matters involving the state highway department, even though the judge is married to a member of the state highway patrol, provided that the judge did not preside in any matter in which the judge's spouse is a witness or the case agent).

However, other opinions found that a judge should not preside in such cases. See Opinions 12-2005 (finding a part-time bond magistrate judge could not hear matters in which the employees of the judge's spouse--- the captain of the detective unit-- would regularly appear); 8-2007 (improper for spouse of full-time magistrate to accept position with sheriff's department where spouse would have to testify in magistrate's court as to authenticity of 911 tapes); 1-2009 (candidate for municipal judge should not be appointed because candidate's uncle is the chief of police, and repeated disqualification due to relationship renders candidate unable to perform the job); and 2-2018 (judge shall disqualify himself/herself in handling any matters in which employees of sheriff, whom judge was dating, appear as witnesses). In those opinions, it appears that the common factor is that a spouse/relative or employees of the spouse/relative would frequently appear before the court as a material witness.

However, our analysis in Opinion 2-2018 omitted discussion of several other opinions. In Opinion 5-2009, we found no impropriety with a full-time magistrate being married to the Chief Deputy Sheriff in the same county where the magistrate served. We found that the spouse's job duties

before the magistrate due to the marital relationship with the Sheriff's Deputy and thus, recusal would be frequent and disruptive.

were administrative and managerial, and thus the spouse would not appear as a material witness before the judge, contrary to the factual situations of 12-2005, 8-2007, and 1-2009 (which found that the judge should not preside). Opinion 5-2009 did not discuss the fact that employees of the Sheriff would frequently appear before the magistrate--an important factor in Opinion 2-2018, which led the Committee to find that a judge should disqualify himself/herself in matters in which employees of the Sheriff (whom the judge was dating) appeared as witnesses. In 25-1995, we found that where a magistrate was married to a secretary in in the Sheriff's Department in the same county, the magistrate was permitted to preside over cases involving the Sheriff's office, provided that the judge disclosed the marital relationship and recused himself upon request.

With regard to other opinions finding there was a conflict, Opinion 2-2018 omitted mention of Opinions 9-1988 and 2-2003. In 9-1988, the Committee found that a conflict existed when an assistant municipal judge was married to a police officer for the same municipality in which the municipal judge served. The conflict arose because the jurisdictions in which the judge and her husband served were the same, which created the appearance of impropriety. Opinion 02-2003 addressed the propriety of an associate municipal court judge presiding where the judge's son-in-law was the Chief of Police. In 2-2003, we found that disqualification was required because the police prosecute cases in municipal court and that Canon 3E(1)(d) states that a judge must disqualify himself or herself if a person within the third degree of relationship **or the spouse of such person** is a party to the proceedings, acts as a lawyer to the proceeding, **or is a material witness in the proceeding**. (emphasis added).⁴ Thus, Opinion 2-2003, like some other opinions discussed herein,

⁴ In Opinion 1-1991, we found no ethical violation with the magistrate presiding over cases prosecuted by the Sheriff's Department when the magistrate's son was the sheriff. That opinion stated that the sheriff was not actually a "party" so as to trigger the Canon that prohibits a judge from presiding where a person within the third degree of relationship is a party to the proceeding. It is unclear whether the version of the Canons in effect at that time also required disqualification

placed importance on the fact that the judge's relative or his/her employees would be material witnesses to the proceedings.

Obviously, a judge's familial or other relationship with persons in law enforcement creates a thorny issue. In this case, the judge is married to a lieutenant for the university's DPS. The City and the County have concurrent jurisdiction over charges arising from the DPS. Because the judge's spouse is not the Chief or Director of the DPS, persons that appear on behalf of the DPS in magistrate court proceedings would not be the spouse's employees. However, the employees may have been trained by the judge's spouse as the spouse serves as Field Training Manager for the university's DPS. Clearly, the judge should not preside if the judge's spouse appears as a material witness in a proceeding. In other proceedings arising from the university DPS, the judge should disclose on the record the spouse's role with DPS, thereby providing a chance for the parties to request recusal.

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s/ Usha Jeffries Bridges
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if a person within the third degree of relationship (or his employees) was a material witness. Regardless, we have previously overruled Opinion 1-1991.