

ADVISORY COMMITTEE
ON STANDARDS OF JUDICIAL CONDUCT

OPINION NO. 13 - 2022

RE: The propriety of a probate judge presiding over contested and uncontested matters in which the judge's uncles and/or cousin are attorneys of record.

FACTS

A recently appointed Probate Judge inquires as to presiding over matters involving certain family members. The judge's uncle and cousin practice together in the same county in which the judge presides. Currently, there are multiple cases pending before the Probate Court in which either the uncle or the cousin is counsel of record. One-third of the cases are contested. Additionally, the judge has another uncle (not in the same firm) that is counsel of record on a contested matter.

CONCLUSION

A Probate Judge should disqualify himself/herself in proceedings in which the judge's uncles or cousin appear as counsel of record, regardless of whether the matter is uncontested or not, but may allow the parties a chance to waive disqualification by following the remittal procedure in Canon 3F.

OPINION

A judge should disqualify himself or herself in a proceeding where the judge's impartiality might be questioned, including, but not limited to, circumstances where a person with the third degree of relationship to the judge is a lawyer in the proceedings. Canon 3E(1)(d)(ii). The third degree of relationship includes uncles. Rule 501, Terminology. While a cousin is not considered a third degree of relationship, the appearance of a cousin as an attorney in a matter could still lead

to a question of the judge's impartiality.¹ The Code of Judicial Conduct does not differentiate between contested and uncontested matters with regard to disqualification.

In Opinion No. 3-1995, we addressed a similar situation. In that case, the Probate Judge inquired into the propriety of presiding over uncontested matters where the judge's son was an attorney of record. We determined that the probate judge could not preside over matters where his son was acting as a lawyer in a proceeding, regardless of whether it was contested or uncontested. However, we found that instead of withdrawing from a proceeding, the judge could disclose the basis of his disqualification on the record. If the parties agreed in writing to waive the disqualification, the judge could preside.

Opinion No. 3-1995 was decided under a previous version of the rules, though the logic of the opinion still applies. In cases in which the Probate Judge's uncles or cousin appear as counsel of record, the judge should disqualify himself or herself. However, the judge can disclose the reasons for disqualification and the parties can choose to waive disqualification. In doing so, the judge must adhere to the remittal of disqualification procedures in in Canon 3F. As the South Carolina Supreme Court recently explained:

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

¹ In addition, because one of the Judge's uncles and the Judge's cousin are in the same law firm, a person within the third degree of relationship (the uncle) would have more than a *de minimis* interest that could be substantially affected by a proceeding in which the cousin was the attorney of record. See, Canon 3E(1)(d)(iii). This provides another basis for the judge to disqualify himself/herself.

disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule.”

In re Barker, Op. No. 28098, filed June 15, 2022 (Howard Adv. Sheet No. 21 at p. 16) (internal citation omitted). Thus, regardless of whether the matter is uncontested or contested, the judge should either disqualify himself from cases in which the uncles or cousin appear as attorneys or follow the remittal procedure in Canon 3F.

s/ Usha Jeffries Bridges
USHA JEFFRIES BRIDGES, CHAIR

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

s/ Keith M. Babcock
KEITH M. BABCOCK

August 3, 2022