

JUL. 29 RECD

**Judicial Ethics Committee
Advisory Opinion 93-2**

ISSUE PRESENTED: The spouse of a judge is a member of a law firm, and an associate of that firm engages in legislative lobbying on behalf of the Maine Sheriffs' Association and the Maine Trial Lawyers Association. Under what circumstances is the judge disqualified from cases involving individual sheriffs or members of the Trial Lawyers Association?

DISCUSSION: The relevant provision in the existing Code of Judicial Conduct is Canon 3(C), which provides that "a judge should disqualify himself in any proceeding in which he has reason to believe that he could not act with complete impartiality or in a proceeding in which his impartiality might reasonably be questioned." We assume throughout this opinion that the judge has no personal bias or prejudice concerning any given case and no reason to believe that he or she cannot act with complete impartiality. We therefore focus on the question of whether the judge's impartiality could reasonably be questioned.

The standard that disqualification is required when a judge's

impartiality might reasonably be questioned is the same as that contained in the revised Maine Code of Judicial Conduct that becomes effective on September 1, 1993 except that the latter, which is based on the 1990 ABA Model Code, goes on to provide a list of specific examples where disqualification is called for. See revised Code, Canon 3(E) (promulgated May 21, 1993).¹ The standard for disqualification

¹Specifically, under the new Code that becomes effective on September 1, 1993, Canon 3(E)(2) provides as follows:

A judge may disqualify himself or herself on the judge's own initiative without stating the grounds of disqualification, and shall disqualify himself or herself on a motion for recusal made by a party, in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or the judge's 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 a more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Canon 3(E)(2) (effective September 1, 1993).

under the Maine Code is also similar in most respects to the statutory provisions governing disqualification of federal judges in 28 U.S.C. § 455.

We have been advised that the judge whose spouse's law firm represents the Sheriffs' Association and the Trial Lawyers Association has a policy of not sitting in any cases involving the judge's spouse, the law firm of the judge's spouse, or any current clients of that law firm. Accordingly, the judge would not sit in cases where either the Sheriffs' Association or the Trial Lawyers' Association was a party (even if they were not represented by the spouse or the spouse's firm in the particular case). The question posed by the judge is whether any further disqualification is necessary. For example, should the judge sit in a case brought against a sheriff's office or an individual sheriff or deputy by a prisoner at the county jail? Should the judge sit in a case involving a sheriff's divorce? Should the judge sit in a criminal case that was investigated by a sheriff's office or where a sheriff or deputy sheriff will be called as witnesses?

We are aware of no Maine authority that speaks directly to these issues. Moreover, a review of cases from other jurisdictions suggests that the question of disqualification involves a highly particular inquiry

into the specific circumstances of a given case.

For example, although this particular judge in question has adopted a policy of disqualification in all cases involving current clients of the spouse's law firm, such disqualification has not uniformly been required. See, e.g., Diversifoods, Inc. v. Diversifoods, Inc., 595 F.Supp. 133 (N.D.Ill. 1984) (disqualification not required where a party in a case before a judge is represented on other matters by a law firm in which the judge's spouse is a partner so long as the spouse does not personally represent the party in question and so long as the party is not a major client of the spouse's firm). See also Matter of National Union Fire Ins. Co., 839 F.2d 1226 (7th Cir. 1988) (disqualification not required where a bank that was a party in a proceeding before the judge was represented by the judge's son on a relatively small loan transaction unrelated to the case before the judge). In both the Diversifoods and National Union Fire Insurance Co. cases, the courts suggested that disqualification might be required if the party before the judge were a major client of the judge's spouse's firm.

Given the highly specific factual inquiry that is necessary under Canon 3(C), we conclude that without specific additional facts,

definitive responses to the questions presented cannot be provided.²

Nevertheless, the Committee believes that it is appropriate to provide as much guidance as possible in order to assist the judge in question.

At the outset, the Committee is inclined to the view (consistent with the judge's existing policy) that disqualification would generally be appropriate from all cases in which the Sheriffs Association or the Trial Lawyers Association are actually parties. This is true regardless of whether these entities would qualify as important clients of the spouse's firm. Their retention of the judge's spouse's law firm for general lobbying matters gives rise to the appearance that the spouse's law firm will be generally allied with the interests of these organizations. Moreover, these entities are not like large banks or companies that routinely use a number of different lawyers for specialized tasks.³

That brings us to the question of whether disqualification would be

²To give a definitive answer, it would be necessary to evaluate various additional factors, including but not limited to the following: (1) the relative importance of the Sheriffs' and Trial Lawyers Associations as clients of the spouse's firm, (2) the nature of the lobbying work performed and whether that work was related in any way to the issues before the Judge, and (3) the specific circumstances of any given case before the judge.

³For instance, authority from other jurisdictions suggests that a judge might not be disqualified from a commercial loan dispute involving a large bank if the judge's spouse was a member of a law firm that represented the bank on a relatively small real estate matter if the matter was unrelated to the case before the judge and the judge's spouse was not personally involved in representing the bank. In each case, the specific facts must be weighed.

required in a case that did not involve the Sheriffs' Association per se but instead involved claims against a sheriff's office, a sheriff or a deputy sheriff based on official acts or omissions. In such a case, although the law firm of the judge's spouse represents only the Sheriffs' Association and not individual sheriff's offices or individual sheriffs, the Association cannot necessarily be separated from the members who collectively comprise the Association. In such a case, therefore, there must be some inquiry as to whether the lawsuit in question is a lawsuit that might affect the interests of sheriffs as a group. A routine automobile accident case involving a sheriff's vehicle would not necessarily raise any concerns.⁴ However, a more significant case that might set a precedent applicable to sheriffs as a group (such as a major case brought by prisoners at a county jail) would be a different story. In such a case, since the nature of the lobbying work performed by the spouse's firm suggests that the firm represents the interests of sheriffs as a group, it is more likely that the judge's

⁴There might, however, be additional factors that could reasonably cause the judge's impartiality to be questioned. For instance, if the sheriffs' Association was a major client of the spouse's firm and the particular sheriff involved was known by the judge to be a key decisionmaker in the Association, disqualification might be called for. Obviously, disqualification would also be required if a judge had reason to believe that he or she could not act with complete impartiality, as when the judge had a personal bias or prejudice concerning a party or a material witness. Finally, as discussed at the end of this opinion, even in instances where disqualification is not required, disclosure of the relationship of the judge's spouse's firm to the Sheriffs' Association may still be called for.

impartiality could reasonably be questioned if the judge were to sit on such a case.⁵

Thus, for purposes of a prisoner suit against a sheriff, we would not automatically draw a distinction between the Sheriff's Association and the sheriffs who make up that Association for purposes of disqualification. In our view, a somewhat different case is presented by a divorce action involving a sheriff. Here, the sheriff is a party to the case in a purely private capacity. As a result, the Sheriffs' Association will not have any interest at stake in the divorce proceeding nor will the outcome of the case conceivably affect sheriffs as a group. Finally, the spouse's law firm will not be seen as allied to any party in the proceeding by virtue of its representation of the Association. As a result, the judge's impartiality cannot reasonably be questioned in such a proceeding solely as a result of the spouse's law firm's representation of the Association. Once again, this does not rule out the possibility that some additional circumstances might exist that

⁵We arrive at this view based on the language of existing Canon 3(C) and not because we find that the spouse would have any economic or other interest "that could be affected by the proceeding" within the meaning of Canon 3(E)(2)(c) of the new Code of Judicial Conduct that becomes effective on September 1, 1993. If the spouse did have such an interest (for instance, if the case involved a specific issue on which the spouse's firm had actually engaged in lobbying), disqualification would be required under Canon 3(E)(2)(c).

could reasonably cause the judge's impartiality to be questioned.⁶

A final example posed by the judge's question concerning the Sheriffs' Association involves a criminal case that was investigated by a sheriff's office or in which sheriffs or their deputies will testify. Sheriffs and deputy sheriffs are not parties to criminal cases and do not stand to gain or lose financially by the outcome of such cases. Their interest as law enforcement officers is to see that the criminal laws are enforced and that justice is done in specific cases. As a group, however, sheriffs would not be likely to be affected by the result of any particular criminal case. The mere fact that the law firm of the judge's spouse represents the interests of sheriffs before the Legislature, therefore, does not mean the judge's impartiality could reasonably be questioned in every criminal case involving a sheriff. Once again, however, this does not rule out the possibility that there could be specific additional circumstances in a given case that would require disqualification. See n.3 above.

In our view, the representation of the Maine Trial Lawyers Association by the law firm in which the judge's spouse is a member raises somewhat different issues. Members of the Trial Lawyers

⁶See n.3 above.

Association are far more likely to be appearing before the judge as lawyers rather than parties. This means they will be pursuing the interests of specific clients in specific cases rather than the interests of the Association. Thus, there is no reason to assume that a position taken by the Trial Lawyers Association before the Legislature will necessarily be consistent with that of a particular member of the Association in a given case. In Maine, the Trial Lawyers Association includes both plaintiffs' lawyers and defense lawyers. The Association does not take positions on every issue, and the positions that it does take will not necessarily be relevant to the issues in a given case.

For this reason, we conclude that in general the representation of the Trial Lawyers Association by the spouse's law firm would not be likely to reasonably cause the judge's impartiality to be questioned in cases where members of the Association are lawyers or parties. Once again, however, there could be specific additional facts that might alter this conclusion.

We would add that under the new Code of Judicial Conduct that becomes effective on September 1, 1993, judges are instructed to disclose

to the parties in any proceeding any fact known to

the judge that is relevant to the question of impartiality and that the judge knows or reasonably ought to know could connect the judge, the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household to any of the parties, counsel, witnesses, or issues in the proceeding.

Canon 3(E)(3) (promulgated May 21, 1993).

Under this provision, the threshold for disclosure is lower than the standard for disqualification. Thus, a fact that may be "relevant to the question of impartiality" for purposes of disclosure will not necessarily be sufficient to cause the judge's impartiality to be questioned. While we do not believe that the relationship of the law firm of the judge's spouse to the Sheriffs' Association need be disclosed in every case that involves a sheriff, no matter how tangentially, disclosure would be called for whenever the representation of the Sheriffs Association by the spouse's firm would be relevant to the issue of impartiality. If, after such disclosure, the parties do not request disqualification, the judge may sit (unless the judge has reason to believe that he or she could not act with complete impartiality or concludes that despite the lack of any objection from the parties his or her impartiality might reasonably be questioned). If

disclosure is made and a party thereafter requests that the judge disqualify himself or herself, disqualification is not automatic. The ultimate issue is still whether the judge's impartiality might reasonably be questioned, and this is a decision that must be made by the judge.