

JUL. 29 REC'D

Judicial Ethics Committee

Advisory Opinion 93-3

ISSUE: The spouse of a Superior Court judge is the brother of a District Attorney. Is the judge disqualified from hearing criminal cases prosecuted by that District Attorney's office?

DISCUSSION: Canon 3(C) of the current Code of Judicial Conduct 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." That standard is similar to the standard contained in the new Code of Judicial Conduct, that becomes effective on September 1, 1993, except that the latter goes on to provide a list of specific examples in which disqualification is called for. It is our view that most or all of these examples are currently covered -- albeit implicitly -- in the general standard that disqualification is required in a proceeding where the judge's impartiality might reasonably be questioned.

One of the new Code's examples of a situation where a judge's

impartiality might reasonably be questioned is where "the judge's spouse or a person within the third degree of relationship to [the judge or the judge's spouse] . . . is acting as a lawyer in the proceeding."

Another example is where the judge's spouse or a person within the third degree of relationship to the judge or the judge's spouse "is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding." See Canons 3(E)(2)(d)(ii), (iii) of the Code of Judicial Conduct that becomes effective on September 1, 1993..

Where a judge's spouse is the brother of a District Attorney, there is no doubt that the relationship between the two falls within the third degree of relationship for purposes of Canon 3(E)(2)(d) of the Code.¹ However, since the District Attorney does not personally prosecute all of the criminal cases that are handled by a District Attorney's office, it is unclear whether the District Attorney would be found to be "acting as a lawyer" within the meaning of Canon 3(E)(2)(d)(ii) of the new Code in any proceeding in which the District Attorney did not personally appear. See Commentary to ABA Model Code Canon 3(E)(1)(d) (1990), upon which

¹The "Definitions" section of the new Code indicates that the following are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, or niece. Code of Judicial Conduct promulgated May 21, 1993, Part II, § 3 (P).

Canon 3(E)(2)(d) of the new Maine Code is based.

However, all the cases handled by a particular District Attorney's office are prosecuted under the District Attorney's ultimate direction and control, and it may be assumed that the District Attorney is personally involved in prosecutorial decisions in most if not all of the Superior Court cases handled by the District Attorney's office. Under these circumstances, it is our conclusion that the District Attorney would have "a more than de minimis interest that could be substantially affected by the proceeding" within the meaning of Canon 3(E)(2)(d)(iii) of the new Maine Code. Accordingly, a judge whose spouse is a District Attorney would be disqualified from any case prosecuted by the office of that particular District Attorney.

We reach this conclusion even though we recognize that government law offices are not identical to private law firms. Rules of vicarious disqualification that would apply to lawyers in a private law firm do not apply to lawyers in the Attorney General's office or a District Attorney's office. See Superintendent of Insurance v. Attorney General, 558 A.2d 1197 (Me. 1989); Opinion No. 130 of the Professional Ethics Commission (February 3, 1993). Thus, if the spouse of a judge were the brother of an Assistant District Attorney, the judge would not

automatically be disqualified from cases handled by other members of the District Attorney's office. This is true even though the judge might be disqualified from a case in which a party was represented by a private law firm that included the brother of the judge's spouse. See SCA Services Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977) (construing analogous provisions of 28 U.S.C. § 455).

However, because of the District Attorney's authority to direct and control all prosecutions handled by the District Attorney's office, and because the District Attorney has an interest in the outcome of all such prosecutions, disqualification is required of a judge whose spouse is within the third degree of relationship to the District Attorney himself or herself.