



JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2015-03

November 6, 2015

Note: This opinion supersedes Formal Advisory Opinions 2009-04 & 2010-05.

QUESTION:

Can the Commission clarify its guidance regarding potential conflicts of interest created by family members working in the legal profession, specifically:

- What are the ethical obligations of a judge in a matter where a family member appears as counsel before the judge?
- What are the ethical obligations of a judge in a matter where a law firm or attorney employing a family member appears as counsel before the judge?
- Do these obligations change based upon the degree of relationship between the judge and the family member?

CONCLUSION:

The unique facts and circumstances of a specific situation should always be examined and evaluated under the applicable provisions of the North Carolina Code of Judicial Conduct. However, the following general advice should apply in most instances:

Family Members

A judge has a duty to disclose familial relationships. Disqualification of the judge is required in matters in which a spouse or child living within the judge's household represents a litigant or has contributed to the preparation of the matter for hearing.

A judge has a duty to disclose the familial relationship and should also recuse himself or herself from hearing a matter in which a close relative, other than a spouse or child living within the judge's household, represents a litigant or has contributed to the preparation of the matter for hearing. However, if the close relative has no direct financial benefit from the outcome of the case,

then the recusal may be remitted by the written consent of all counsel and parties involved using the process described in Canon 3D.

A judge has no duty to disclose more distant familial relationships to those who may appear before him or her in court or to tender a recusal based solely upon a distant familial relationship. Such a relationship is not presumed to form a reasonable basis for recusal unless it is shown that the judge has a personal bias or prejudice concerning the distant relative, personal knowledge concerning the matter, or a financial interest that could be substantially affected by the matter. The judge should disclose the relationship and offer his or her recusal if he or she believes the relationship impacts his or her impartiality in the matter.

Co-workers and Employers of Family

When an attorney appears before the judge, who is known by the judge to be a co-worker or employer of a member of a judge's household or of a judge's close relative, the judge has a duty to disclose the attorney's professional relationship to his or her family member and then to make a two-part inquiry, as set out below. There is no obligation to disclose or inquire further into the relationship between an attorney and a judge's more distant family member.

After making a disclosure, the judge should first determine whether the family member stands to benefit directly from a favorable outcome in the matter, and should then determine whether the family member performed any work contributing to the preparation of the matter for hearing. If either part of the inquiry results in a positive response then the judge should offer his or her recusal. However, this recusal may be remitted by the written consent of all counsel and parties involved per the process described in Canon 3D. If both questions are answered in the negative then the family member's relationship to the attorney does not form a reasonable basis for recusal.

Appointment of Family Members

A judge should not make an appointment of a member of the judge's household or a close relative. When a decision upon the appointment or re-appointment of a family member is required by statute, a judge should refer or delegate such questions of appointment of a close relative to other judges if possible.

Please note - this formal advisory opinion supersedes the advice of Formal Advisory Opinion 2009-04 and Formal Advisory Opinion 2010-05.

DISCUSSION & ANALYSIS:

The Judicial Standards Commission determined that the ethical obligations of a judge differ based upon the degree of relationship between the judge and the family member, where a judge's ethical duties to disclose potential conflicts and to recuse from a matter is limited to "close relatives," or those within the third degree of relationship to the judge. However a judge has a heightened ethical obligation to disclose conflicts or recuse from matters involving a spouse or child living within the judge's household.

For purposes of clarity, a close relative, is any family member within the third degree of relationship. This includes a parent, child, grandparent, grandchild, great grandparent, great

grandchild, sibling, uncle, niece, or nephew. A member of a judge's household is a spouse or child living within the judge's domicile.

Canon 1 advises that a judge should uphold the integrity and independence of the judiciary and personally observe appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved. Canon 2A advises that a judge should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. These canons direct a judge to avoid situations where his or her impartiality might reasonably be questioned. The appearance of any family member in a matter before a judge may lead someone to question a judge's impartiality in that matter, and therefore a judge should act with care before proceeding on any such matter, making inquiry into reasonable perceptions of bias and any real conflicts of interest that may exist.

Canon 2A also advises that a judge should not knowingly initiate or consider *ex parte* or "other communications" concerning a pending proceeding. In this context, the canon is referring to improper communications, typically outside of court and off of the record of a hearing, that might be improperly introduced or used to influence the judge's opinion.

Canon 3C(1) of the Code of Judicial Conduct reads, inter alia, "[O]n motion of any party, a judge should disqualify himself/herself in any proceeding in which the judge's impartiality may reasonably be questioned..." Canon 2B of the Code provides, inter alia, that a judge should not allow the judge's family, social, or other relationships to influence the judge's conduct or judgment, nor allow others to convey the impression that they are in a special position to influence the judge.

Canon 3C(1)(c) identifies conflicts of interest created when the judge knows that he or she, or the judge's spouse or minor child residing within the judge's home, has a financial interest in the subject matter in controversy, or is a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding. Canon 3C(1)(d) identifies potential conflicts where a person within the third degree of familial relationship to the judge is a party to a proceeding, or an officer, director, or trustee of a party; is acting as a lawyer in the proceeding; is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or is to the judge's knowledge likely to be a material witness in the proceeding.

Canon 3D reads:

"Nothing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon the judge's own initiative. Also, a judge potentially disqualified by the terms of Canon 3C may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's potential disqualification. If, based on such disclosure, the parties and lawyers, on behalf of their clients and independently of the judge's participation, all agree in writing that the judge's basis for potential disqualification is immaterial or insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all lawyers, shall be incorporated in the record of the proceeding. For purposes of this section, pro se parties shall be considered lawyers."

Family Members

The Commission finds that Canon 3 provides basic guidance on the matters of disqualification regarding the involvement of family members before the judge. However, the language of Canons 1 and 2 are also significant and should also be applied in this situation.

When a judge's relative lives within the judge's household, there is a reasonable presumption that the judge and relative are in regular contact and communication. It may also be presumed that there is some financial dependence or financial interdependence between them, or at least that the economic gain of one may have a meaningful impact on the other.

Such presumptions may not necessarily be made where a relative does not live with the judge, is financially independent of the judge, and may not even be in regular communication with the judge. Thus, this greater potential for conflicts when a judge lives with the close relative means that a judge should always disqualify from these matters; however where a judge's close relative lives independently, the potential for these conflicts is reduced and the presumed conflicts may be waived pursuant to the remittal process.

The Code of Judicial Conduct identifies a blood relationship within the third degree as a reasonable basis for presuming a conflict. A judge's personal relationship with more distant relatives may be so close as to create a potential bias, but in such a situation the conflict will not be presumed and requires a showing of more evidence of bias than simply blood and biology.

Employers and Co-workers of Family Members

The Judicial Standards Commission previously issued two Formal Advisory Opinions (2009-04 & 2010-05) addressing the obligations of a judge regarding conflicts of interest arising from the employment of a family member. However, because the facts of these two previous opinions are notably distinguishable, the opinions provide advice that can be viewed as contradictory.

The Commission previously advised, in Formal Advisory Opinion 2009-04 that “[c]learly one could reasonably question the impartiality of a judge when a member of the judge’s family is in an employer/employee relationship with an attorney and said attorney appears in a contested matter before the judge.” However, the Commission also advised in Formal Advisory Opinion 2010-05 that when a judge’s relative is employed as an assistant district attorney, the judge is not required to disqualify himself/herself from matters involving the District Attorney or other attorneys from the District Attorney’s staff, so long as the judge’s relative had no involvement in the matter and does not appear before the judge, specifically stating that “[u]pon confirmation that the judge's son/daughter has not been involved in the matter, the judge's impartiality [to hear matters involving other attorney co-workers of the judge’s child] could not reasonably be questioned.”

Significant in distinguishing one scenario from the other is that in the first opinion, the family member was the judge’s spouse and shared a household and bank account with the judge, and the identified conflict was imputed to the spouse’s direct supervisor, with hiring and firing authority of the judge’s spouse. In the second scenario, the family member was an adult child living independently of the judge, and the question of disqualification seemed to concern numerous co-workers of the child, rather than a direct supervisor. Without such distinctions articulated in the earlier opinions, however, the Commission’s advice requires additional clarity.

The Commission identifies the important distinction between family members who are part of a judge's household from other family members considered to be "close relatives" but who are otherwise living independently of the judge. The Commission further relies upon the conditions for disqualification provided for in Canon 3C.

Thus, in the context of conflicts of interest that may be created when an attorney employing the family member of a judge appears before that judge, the Commission reconsiders its previously stated position that "[c]learly one could reasonably question the impartiality of a judge when a member of the judge's family is in an employer/employee relationship with an attorney and said attorney appears in a contested matter before the judge" as overbroad. Instead, it would refocus the inquiry beyond whether a family member is simply employed by such an attorney, onto questions of whether the family member contributed to the preparation of the matter before the judge or whether the family member has a financial interest in the matter.

The Commission reiterates that the facts and circumstances of each specific situation should always be examined before evaluating whether or not conduct is proper under the North Carolina Code of Judicial Conduct. To that end, the Commission recognizes that there may be potential misconduct aggravated by clear conflicts or mitigated by necessity. Other factors to weigh in evaluating whether any action is reasonable or poses a potential conflict of interest when a co-worker or employer of a family member appears before the judge may include the size of the firm employing the family member, any direct supervisory relationship between an attorney and the family member, any financial or ownership interest that the family member might have in work done by other attorneys in the firm, and perhaps, the size of the legal community within the judicial district.

APPOINTMENT OF FAMILY MEMBERS

Regarding questions of the appointment of family members, or those connected to family, the Commission turns to Canon 3B(4) and Canon 2A. Canon 3B(4) states that a judge should exercise the power of appointment only on the basis of merit, avoiding nepotism and favoritism. While acknowledging that, in reality, most appointments and assignments of counsel are made by other courtroom officials, many simply moving down a list of qualified applicants, who then present the appointment to the judge for ratification or approval, there is nonetheless the potential for damaging accusations of nepotism where a judge's signature is applied to an order appointing a relative to work that would profit a family member. As Canon 2A advises, in relevant part, that a judge should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary we have advised that judges avoid signing such orders and that such appointments should be reviewed and approved by another judge.

As this formal opinion supersedes any previous formal or informal opinion adopted by the Commission on this subject, any judge who has acted in conformity with a previous formal or informal opinion inconsistent with this formal opinion will be deemed to have acted in good faith and any conduct by a judge undertaken in reliance upon any previous informal advice by the Commission on this subject shall not be held to be misconduct.

References:

North Carolina Code of Judicial Conduct

Canon 1

Canon 2A

Canon 2B

Canon 3C

Canon 3D

Formal Advisory Opinion 2009-04 (Now superseded)

Formal Advisory Opinion 2010-05 (Now superseded)

NC Rules of Professional Conduct 1.7

NC 2005 Formal Ethics Opinion 1 (North Carolina State Bar)

Rules of the North Carolina Judicial Standards Commission, Rule 8 (2014)

In re: Pedestrian Walkway Failure, 173 N.C. App. 237 (2005)